No. 18-726	
Title:	Linda H. Lamone, et al., Appellants v. O. John Benisek, et al.
Docketed:	December 6, 2018
Lower Ct:	United States District Court for the District of Maryland
Case Numbers:	(1:13-cv-03233-JKB)
Decision Date:	November 7, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Dec 03 2018	Statement as to jurisdiction filed. (Response due January 7, 2019) **Jurisdictional Statement** **Appendix** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Motion to affirm filed by appellees John Benisek, et al. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 18 2018	Opposition to motion of appellants Linda Lamone, et al. filed. (Distributed) **Main Document** **Proof of Service** **Other** **Other**
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.
Dec 19 2018	Motion for leave to file amicus brief filed by David Trone. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 04 2019	Motion for leave to file amicus brief filed by David Trone GRANTED.
Jan 04 2019	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. The case will be set for argument in the March argument session.
Jan 08 2019	Appellants' briefs on the merits are to be filed on or before Friday, February 8, 2019. Appellees' briefs on the merits are to be filed on or before Monday, March 4, 2019. Reply briefs on the merits are to be filed in accordance with Rule 25.3 of the Rules of this Court. Amicus curiae briefs in support of appellants or in support of neither party are to be filed on or before Tuesday, February 12, 2019. Amicus curiae briefs in support of appellees are to be filed on or before Friday, March 8, 2019.
Jan 25 2019	SET FOR ARGUMENT on Tuesday, March 26, 2019

Jan 25 2019	Blanket Consent filed by Petitioners, Linda Lamone, et al.. **Blanket Consent**
Feb 07 2019	Blanket Consent filed by Respondents, John Benisek, et al.. **Blanket Consent**
Feb 08 2019	Joint appendix (5 volumes) filed. (Statement of costs filed) **Main Document** **Main Document** **Main Document** **Main Document** **Main Document**
Feb 08 2019	Brief of appellants Linda Lamone, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 11 2019	Brief amicus curiae of David Orentlicher filed (also in 18-422). **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amicus curiae of Representative David Trone filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of Bernard Grofman and Ronald Keith Gaddie in support of neither party filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2019	Brief amici curiae of The Wisconsin State Senate and Wisconsin State Assembly filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	CIRCULATED
Mar 04 2019	Brief of appellees John Benisek, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 06 2019	Amicus brief of Robert Lee Stone, Jr., and John Harvard Lomax, Jr. not accepted for filing. (Corrected version submitted)
Mar 06 2019	Brief amici curiae of Robert Lee Stone, Jr., and John Harvard Lomax, Jr. filed. (March 8, 2018). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 06 2019	Brief amicus curiae of Stephen M. Shapiro filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of First Amendment and Election Law Scholars filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Amicus brief of Floyd Abrams Institute for Freedom of Expression not accepted for filing. (March 11, 2019)

Mar 08 2019	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Bipartisan Group of Current and Former Members of the House of Representatives filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Constitutional Accountability Center filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Senator Sheldon Whitehouse filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Political Science Professors filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of the American Jewish Committee filed (also in 18-422). (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 08 2019	Brief amici curiae of Constitutional Law Scholars Michael C. Dorf, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Governors Arnold Schwarzenegger and Lawrence Joseph Hogan, Jr. filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of the American Civil Liberties Union, et al. filed (also in 18-422). (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 08 2019	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Historians filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of International Municipal Lawyers Association, et al. filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 08 2019	Brief amici curiae of Anti-Defamation League, et al. filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amicus curiae of Professor Michael Kang filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 08 2019	Brief amici curiae of Mathematicians, Law Professors, and Students filed (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 11 2019	Amicus brief of Floyd Abrams Institute for Freedom of Expression not accepted for filing. (Corrected brief submitted).
Mar 11 2019	Brief amicus curiae of Floyd Abrams Institute for Freedom of Expression filed (March 18, 2019) (also in 18-422). (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 15 2019	Reply of appellants Linda Lamone, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
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No. 18-_____

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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DECEMBER 2018

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QUESTIONS PRESENTED

1. Are the various legal claims articulated by the three-judge district court unmanageable?

2. Did the three-judge district court err when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections?

3. Did the three-judge district court abuse its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs: O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine;

Defendants: Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chairman of the Maryland State Board of Elections.

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OTHER AUTHORITIES

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JURISDICTIONAL STATEMENT

In this case, a fractured three-judge district court adopted unprecedented and unworkable theories of First Amendment retaliation in striking down Maryland's 2011 congressional districting plan on the basis of partisan gerrymandering. Not only do the court's three separate opinions suffer from significant errors, the court's injunction imposes "traditional criteria for redistricting" not found in the Constitution nor any statute, and places unprecedented restrictions on what information legislators may consider in redrawing district lines. Given the multiple and substantially contradictory opinions and theories generated by the three-judge district court, this Court's plenary review is needed to supply Maryland's officials and legislators with essential guidance on what they are permitted to consider in crafting a congressional districting plan.

Last term, on appeal in this same case, this Court undertook plenary review of the three-judge court's denial of plaintiffs' request for preliminary injunctive relief. The lower court had denied relief because it could not conclude that plaintiffs were likely to succeed on the merits and because then-pending *Gill v. Whitford*, 138 S. Ct. 1916 (2018), might "set forth a 'framework' by which plaintiffs' claims could be decided[.]" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). This Court affirmed the order denying preliminary relief on grounds that included plaintiffs' "years-long delay" in pursuing injunctive relief, their failure to plead their First Amendment claim until 2016, and the reasonableness of withholding relief "to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs'

claims" and thereby avoid "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1944, 1945 (citation omitted). As it turned out, however, this Court's decision in *Gill* did not articulate the correct standard to apply in evaluating a partisan-gerrymandering claim.

On remand from this Court, the three-judge court decided already-pending cross-motions for summary judgment. By that time, this Court had been asked to review a partisan-gerrymandering decision of a North Carolina three-judge court, which had recognized and adjudicated four distinct varieties of a partisan-gerrymandering claim. *Rucho v. Common Cause*, No. 18-422. Nevertheless, the court below forged ahead, granted summary judgment to plaintiffs, and entered a permanent injunction against Maryland's 2011 plan. The court produced two incompatible majority opinions, and a third opinion concurring in both. In the process, the court recognized a new, additional type of injury for the retaliation claim it had earlier recognized: denial of First Amendment associational rights.

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. App. 1a-77a. Previous opinions are reported at 266 F. Supp. 3d 799 (D. Md. 2017), and 203 F. Supp. 3d 579 (D. Md. 2016). App. 82a-171a, 172a-225a.

JURISDICTION

The district court issued its decision on November 7, 2018. Appellants filed their notice of appeal on November 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. This case is the last of several challenging Maryland's 2011 congressional districting plan, enacted in light of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701–8-709 (2017 Repl. Vol.). In June 2012, in an earlier case, this Court summarily affirmed a three-judge court's decision rejecting both racial-gerrymandering and partisan-gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). Although the 2011 plan made "it more likely rather than less likely that a Democrat . . . is able to prevail in the general election," Dkt.

186-2, 43:7-10, in *Fletcher*, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 903.

Now, more than six years after *Fletcher*, a separate three-judge district court has reached the opposite conclusion and found that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." App. 51a. In reaching that conclusion, the district court rejected evidence that the redrawn map met nonpartisan legislative goals and priorities, responded to concerns expressed by Sixth District voters and candidates, and returned that district to a more traditional configuration. Rejecting that evidence as "post-hoc rationalization," App. 55a, the district court found more believable plaintiffs' preferred narrative that Democrats designed the map with "a narrow focus" to "ensure the election" of an additional Democratic representative in the State's congressional delegation. App. 48a. That intent, the court believed, established that plaintiff Republican voters in the Sixth District had met their burden of proving a First Amendment retaliation claim of harm to their representational and associational interests. App. 56a, 64a.

2. It is undisputed that Maryland's 2011 congressional districting plan was the culmination of a months-long process of drafting work by State legislative staffers, followed by public hearings. Dkt. 104 ¶¶ 18-23, 26; Dkt. 186-2, 53:12-54:7. The final map met

significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

a. First, the 2011 plan eliminated a geographic anomaly, first introduced in Maryland's 1991 congressional districting plan and continued in the 2002 plan. That is, beginning in 1991, Maryland's First District had contained portions of both the eastern and western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This configuration protected an incumbent Republican representative, who had sought "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting). The 2011 plan eliminated the Bay Bridge crossing by extending the northern portion of the First District westward into precincts formerly contained within the Sixth District.

Second, the 2011 plan accommodated the request of the Maryland Legislative Black Caucus to reduce from three to two the number of districts having territory in Prince George's County. *Fletcher*, 831 F. Supp. 2d at 902. This required shifts in population in the Fourth and Eighth Districts, as well as the Sixth District, which borders the Eighth.

Third, the 2011 plan retained as majority-minority districts both of Maryland's Section 2 Voting Rights Act districts (the Seventh and Fourth Districts),

which necessitated shifts elsewhere to accommodate population changes in those districts.

Fourth, the map developed through this process connected Frederick and Montgomery Counties via I-270 and made the I-270 corridor a major feature of the Sixth District. Dkt. 186-11 ¶ 9.

Finally, in addition to meeting these significant legislative goals, Governor O'Malley expressed that "part of [his] intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less. Dkt. 186-2, 47:2-5.

b. The final map also responded to concerns expressed during public hearings. Sixth District voters had "advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County." App. 19a. The residents explained that these changes were needed to "mak[e] it viable for someone to reach the voters, and in terms of better representing the population." App. 20a. A former plaintiff in this action, Stephen Shapiro, described the associational harms caused by the then-existing map and lamented the "decreased turnout and interest" in the general election caused by packing in the Eighth District, which yielded results he characterized as "usually a foregone conclusion." Dkt. 186-3, 66. Other Sixth District Democrats felt "shut out of the process" because "their politics weren't represented at all at the national level." *Id.* at

27. One Democratic candidate explained that the then-existing map made it difficult to campaign because the former Sixth District encompassed a huge swath of geographic territory centered on two different metropolitan areas. *Id.* at 21-24; *see id.* at 12, 16-17.

3. The congressional redistricting statute was enacted in substantially the same form as proposed, and it was then petitioned to statewide referendum, with a sizable majority of voters approving the legislation in the November 2012 election. App. 22a-23a. The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth District.[1] Dkt. 104 ¶ 39.

4. The subsequent elections reflected a more invigorated electorate, with the new Sixth District's voters favoring Republicans in some races and Democrats in others. *See* Dkt. 186-19, 11. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, Dkt. 186-50, and turnout among Republicans increased between the 2008 and 2012 presidential elections, Dkt. 186-51. Although turnout in the 2014 gubernatorial primary was down statewide, from

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[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

25.35% in 2010 to 21.81% in 2014,[2] Republican turnout in Garrett, Allegany, and Washington Counties outpaced Democratic turnout in the 2014 gubernatorial primary. *Id.* And, notwithstanding small variations in contributions to local Republican central committees, contributions to then-incumbent Republican Congressman Roscoe Bartlett's campaign committee in 2012 were more than *twenty-five times* those received in 2010.[3]

Post-redistricting, plaintiffs maintained or increased their own associational activities. All the plaintiffs voted regularly after the 2011 redistricting. Dkt. 186-20, 11:19-12:10; Dkt. 186-43, 10:21-11:1; Dkt. 186-44, 13:15-17; Dkt. 186-25, 14:17-15:16; Dkt. 186-24, 11:6-12; Dkt. 186-45, 18:12-18; Dkt. 186-36, 12:10-17. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and subsequently became a member of the Washington County Republican Central Committee and the Washington County Republican Club. Dkt. 186-43, at 13:15-14:14; 24:2-5. Plaintiffs Ropp and Strine were also active in local Republican

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[2] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

[3] *Compare* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ (Post-General 2010, reporting $46,091.96 in total contributions for reporting period and election cycle-to-date) *with* http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (Post-General 2012, reporting $1,185,434.87 in same).

political campaigns both before and after the redistricting. App. 26a-27a.

5.a. The plaintiffs filed this action in November 2013. On December 8, 2015, this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

b. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. App. 84a. They asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. App. 172a-225a. The majority held that a judicially manageable standard existed to adjudicate the plaintiffs' vote-dilution (or "representational-rights") claim. Under that standard, plaintiffs must show that (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree

that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months after the court's decision, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. Dkt. 177. After oral argument, the district court denied the request for preliminary injunction, declined to dispose of the parties' fully briefed cross-motions for summary judgment, and entered a "stay pending further guidance" from this Court's disposition of *Gill v. Whitford*, No. 16-1161. App. 83a & n.1.

In denying preliminary injunctive relief, the court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. App. 83a. The court deemed plaintiffs unlikely to succeed in carrying their burden of proving it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." App. 100a.

On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. Dkt. 205. After hearing argument, this Court issued its June 18, 2018 *per curiam* opinion noting its jurisdiction and affirming the district court's denial of the preliminary injunction. *Benisek*, 138 S. Ct. 1942. This Court concluded that, even assuming that plaintiffs were able to show a likelihood of success on the merits, their delay in seeking injunctive relief and the public's interest in orderly elections supported the district court's denial of injunctive relief and stay of proceedings pending this Court's decision in *Gill*. *Id.* at 1944-45.[4]

6.a. On remand, the parties requested leave to brief the district court on how this Court's *Benisek* and *Gill* rulings affected the pending summary judgment motions. The plaintiffs also informed the district court that no further discovery would be necessary. Dkt. 209, 1. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. Dkt. 210, 7-19. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which the evidentiary record was less developed. *Id.* at 19-22.

Attempting to buttress their new associational-rights claim, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections'

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[4] On that same day, this Court also issued its ruling in *Gill*, 138 S. Ct. 1916, vacating and remanding to allow plaintiffs to demonstrate "concrete and particularized injuries" to establish standing to assert their partisan-gerrymandering claims. *Id.* at 1934.

website, together with lay opinion testimony from one of their attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. Dkt. 210-3; Dkt. 210, at 16-17. Plaintiffs also submitted campaign-finance reports retrieved from the Maryland State Board of Elections, which they claimed showed declines in contributions to local Republican Party committees in relevant areas before and after the implementation of the 2011 map. Dkt. 210-3, at 7-8; Dkt. 210, at 17-18. Defendants moved to exclude this evidence because the data was hearsay, outside the affiant's personal knowledge, not part of the discovery record, and not otherwise subject to judicial notice, and because the attorney's lay analysis of election-return data constituted inadmissible lay opinion testimony. Dkt. 215, at 1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections, on the grounds that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. Dkt. 219, 2.

b. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018. *See* App. 1a-77a; 78a-81a. Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both of their First Amendment retaliation theories of vote dilution and impairment of associational rights. App. 4a. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational rights theory alone,

App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, App. 69a-70a.

With regard to the representational-rights claim, Judge Niemeyer applied the standard the district court developed at the motion-to-dismiss stage and concluded that plaintiffs had established each element of their claim. App. 48a. As to intent, he found that Maryland Democratic officials worked with "precise purpose" to "flip the Sixth District from safely Republican to likely Democratic." App. 48a, 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," App. 52a, even if the district had become more electorally competitive, because "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting." App. 53a. He added that, although not essential to the conclusion, "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence" of injury. *Id.*

Finally, as to causation, Judge Niemeyer found that only retaliatory intent explained the Sixth District's boundaries. App. 54a-56a. In so ruling, he rejected as "utter[ly] implausib[le]," the State's evidence of alternative motivations, described above, for the redrawing of the district, including the western extension of the First District into territory previously

occupied by the Sixth District "to prevent the new First District from crossing the Chesapeake Bay," and "grouping residents along the Interstate 270 corridor," who previously resided in separate districts, into the Sixth District. App. 55a. He deemed the State's evidence of alternative motivation irrelevant in light of "the undisputed fact" that "the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic Control." *Id.*

Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the one the district court established for evaluating plaintiffs' representational-rights claim, except that "in lieu of the harm involving a burden on representational rights, [plaintiffs] must prove a harm involving a burden on their associational rights," namely, "that the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims." App. 59a. Plaintiffs satisfied that burden, he explained, because several indicators of "voter engagement in support of the Republican Party" in the Sixth District "dropped significantly." App. 62a. These indicators included voter turnout data and fundraising data—including data that was the subject of the State's motion to strike in advance of the summary judgment hearing, *see* Dkt. 215-1; App. 28a, 63a (citing fundraising data submitted with supplemental briefing); App. 74a-75a (concurring opinion of Judge Bredar citing the same).

Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for

injunctive relief. App. 64a-65a. He opined that plaintiffs' delay in pursuing relief need not be considered in determining whether to enter a permanent injunction, and, contrary to this Court's conclusion, *Benisek*, 138 U.S. at 1944, found that the case's "protraction cannot be attributed to the plaintiffs[.]" App. 66a. According to Judge Niemeyer, an election in 2020 with the current map—even if only for one election cycle—would irreparably harm plaintiffs, whereas ordering a new map for the 2020 election would not unduly disrupt the election process, despite the inevitable need to redraw that map yet again to reflect results of the 2020 census. App. 65a-67a.

In awarding judgment to plaintiffs, the district court enjoined the State from conducting any further elections under the 2011 map, and directed the State to submit for the district court's approval a new congressional districting plan that redraws the boundaries of the Sixth District "applying traditional criteria for redistricting . . . and without considering how citizens are registered to vote or have voted in the past or to what political party they belong." App. 78a-79a. If the State fails to submit a map, or if the district court declines to approve the map, a court-appointed commission will assume the responsibility of drawing and submitting a map to the three-judge court for approval. App. 79a-80a.

c. On November 15, 2018, the defendants filed a notice of appeal, App. 226a, and filed a consent motion to stay the district court's judgment during the pendency of the appeal, Dkt. 226. On November 16, 2018,

the district court granted in part the stay motion, and stayed the proceedings until the earlier of this Court's disposition of the appeal or July 1, 2019. Dkt. 230.

ARGUMENT

I. The Three-Judge District Court Did Not Set Forth a "Limited and Precise" Test for Adjudicating Partisan-Gerrymandering Claims.

The First Amendment retaliation formula adopted here has one principal disqualifying flaw: it does not resolve the "central problem" for a court attempting to address a claim of partisan gerrymandering. *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). As the plurality emphasized in *Vieth*, and all justices there acknowledged in one way or another, that central problem is determining when the redistricting process, which is "root-and-branch a matter of politics," *id.* at 285, nonetheless "has gone too far," *id.* at 296.

A. The Three-Judge Court's Standards Would Preclude Districting for Proportional Representation, Which This Court Has Long Approved.

The standards employed in the three-judge court's two majority opinions do not amount to a "limited and precise test" for adjudicating partisan-gerrymandering claims, primarily because, however one parses their contradictory analyses, they insist on proscribing

activity that this Court has repeatedly held to be permissible.

In *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the Court rejected a challenge to a Connecticut proportional districting plan that drew "virtually every" line with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." In upholding the plan, the Court refused to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752; *see Gill*, 138 S. Ct. at 1927. But the three-judge court's standard would condemn the maps that this Court upheld in *Gaffney*, which were drawn with express reference to voters' political affiliations so as to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752.

With regard to representational injury, Judge Niemeyer's opinion likened political vote-dilution to the numerical dilution caused by an overpopulated district and reasoned that citizens "have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." App. 42a. Accordingly, his opinion reaffirmed the intent, effect, and causation standard he first articulated in *Shapiro*, 203 F. Supp. 3d at 596-97. App. 43a. In articulating this standard, the opinion did not define what constitutes a "tangible and concrete adverse

effect" in this context. Instead, it merely referenced similarly indeterminate language—"*the plaintiffs must show only that their electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened*," App. 52a—before simply announcing that the element was satisfied in this case, App. 53a. This standard allows for no consideration of party affiliation and thus, it is inconsistent with the decision in *Gaffney*, which allowed consideration of party affiliation to achieve proportional representation.

The three-judge court's associational rights claim suffers from the same defects. In addition to the same "intent" and "causation" elements required for a vote-dilution claim, the associational-rights standard looks to whether "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a, 72a. Specifically, the court concluded[8] that the "atmosphere of general confusion and apathy" that resulted from the redistricting caused (unmeasured and unspecified) decreases in "fundraising, attracting volunteers, campaigning, and generating interest in voting." App. 63a.

But any redistricting, for any reason, risks generating an "atmosphere of general confusion and apathy," *id.*, among those residents who are reassigned to different districts and must therefore shift their associational activities, at least with regard to congressional campaigns, to the new geographic alignment. Thus,

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[8] As discussed below in part II, these conclusions were based on improper resolution of factual and evidentiary disputes.

evaluating associational harm rather than representational harm does not free the court of the significant line-drawing problems posed by the vote-dilution injury, because any redistricting impacts some individuals' associational rights. This problem of line-drawing cannot be averted merely by resorting to the three-judge court's element of partisan intent, which contains no means of distinguishing between permissible and impermissible political considerations.

Finally, as if to underscore the standard's incongruity with this Court's precedent, the three-judge court directed the State "to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections," App. 67a, and *expressly prohibited* the State from "considering how citizens are registered to vote or have voted in the past or to what political party they belong" in doing so, App. 79a. The State is thus precluded from, for example, adopting a map that seeks to approximate the strengths of Democrats and Republicans statewide (as this Court permitted in *Gaffney*). The three-judge court's opinions and injunction fail to set forth workable standards for adjudicating partisan-gerrymandering claims, because they foreclose considerations that this Court has long held to be permissible.

B. The Three-Judge Court Impermissibly Assumes That Preexisting District Configurations Are the Constitutional Benchmark.

The intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map. The three-judge court has stated that legislators may not intend "to flip" a challenged district "from safely Republican to likely Democratic." App. 49a. Judge Niemeyer's opinion reduces the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." App. 50a-51a. It is no less impossible to evaluate whether something was or was not intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," App. 52a, without consideration of the electoral advantages enjoyed under the prior map. So, too, does the associational harm require comparison to associational activity under the prior map to determine whether the new map "burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a; App. 75a (party members harmed if "severed from their preferred associates" in the prior district); *see* App. 61a-63a (comparing pre- versus post-redistricting data).

In all these respects, the three-judge court's opinions test the constitutionality of a redistricting plan by comparing the current districting plan to the status

quo ante. But there is no *constitutional* reason to believe a prior district "has any special claim to fairness," particularly where the old district "was formed for partisan reasons." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 446-47 (2006) (Kennedy, J.). On the contrary, any standard that invests the prior district with the power to invalidate subsequent legislative acts altering its borders will almost inevitably yield absurd results. Among them are the impairment of a legislature's ability to remedy a past partisan gerrymander. Under the three-judge court's test, claims from those voters whose districts did not change, and are therefore still affected by the prior gerrymander, would be barred, because they could not show that their vote was diluted or their associational opportunities diminished compared to the prior districting map. But claims from voters who were newly in a political minority as the result of legislation *curing* a prior partisan gerrymander would be actionable because claimants would be able to demonstrate that the legislature could and did "flip" the makeup of their district intentionally. *See* App. 50a.

If that is so, the State would be unable to "avoid liability," because its interest in remedying past gerrymandering would be, in the three-judge court's estimation, not a "compelling government interest." App. 43a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders, and remedy for those past ills would be available, if at all, only from the courts. Such a result directly conflicts with "'what has been said on many

occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

If the goal of recognizing a partisan-gerrymandering claim is to remedy excessive or unfair partisanship, then prior districts are more likely part of the problem rather than the solution. Enshrining pre-existing maps as the constitutional touchstone for future redistricting may perpetuate the nationwide political dominance of one party. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 Electoral Studies 329, 336, 337 fig. 4 (2016) (discussing the two major parties' relative control over states' redistricting processes).

The three-judge court's premise, that the constitutionality of a redistricting plan under consideration depends entirely on the configuration of the prior map, will not provide a judicially manageable test for determining partisan gerrymanders.

C. Neither of the Three-Judge Court's Dueling Standards Provides the Requisite Guidance to Legislators on How to Redistrict Within Constitutional Limits.

In adopting a standard based in First Amendment retaliation with no definition of what would constitute

impermissible effects, the three-judge court fell short of establishing a "limited and precise rationale" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Judge Niemeyer's opinion identified two types of potential injury: (1) a "meaningful[ ] burden" on the plaintiffs' "representational rights," which the court also described as "a concrete electoral disadvantage," App. 52a; and (2) a "burden[on] the targeted citizens' ability to associate in furtherance of their political beliefs and aims," App. 59a. The opinion further explained that there no longer need be any showing "that the linedrawing altered the outcome of an election," App. 52a, and thus abandoned a requirement imposed in both of the three-judge court's prior decisions, App. 108a-109a, 202a. As for the newly identified associational harm, the court relied only on (1) a drop in turnout in a single primary election in which the statewide turnout was also depressed, and in which Democratic turnout was lower than Republican turnout, App. 62a; (2) hearsay statements that non-plaintiffs experienced "a lack of enthusiasm," App. 62a; and (3) a singular statement from a singular plaintiff that he felt " 'disoriented' by and 'disconnected' from his new congressional district," App. 63a; *see* App. 74a-75a.

Judge Bredar's separate majority opinion does not illuminate. He asserts that adopting a test based in associational harm "poses no line-drawing problem," App. 71a, but requires only a showing that the District "deprives the disfavored group of voters of its 'natural political strength,' " App. 73a (quoting *Gill*, 138 S. Ct.

at 1938 (Kagan, J., concurring). Just as Judge Niemeyer's vote-dilution injury lacks any method to measure how much is too much, Judge Bredar provides no method for determining the "natural political strength" of any political association that would aid courts in determining whether that strength has been diminished, particularly where the decade preceding redistricting has seen considerable shifts in migration, commuting patterns, or demographics within a district. Both alternative paths provided below attempt to identify "a burden," but neither defines that burden "as measured by a reliable standard," something "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do." *LULAC*, 548 U.S. at 418 (Kennedy, J.).

For legislators interested in avoiding "an election-impeding lawsuit contending that partisan advantage was the predominant motivation," *Vieth*, 541 U.S. at 286 (plurality op.), a standard for measuring burden is indispensable. This need is acute because the identified burdens will be present, in some amount, in every redistricting. As explained more thoroughly in Brief for Appellees at 28-30, *Benisek*, 138 S. Ct. 1942 (No. 17-333), defining "vote dilution" as an injury without specifying any means to evaluate the quantity or impact of the asserted dilution does not present a judicially manageable standard. Moreover, here, the court's standard provides no practical limit on potential claims—a political group could bring suit alleging a "concrete electoral disadvantage," even if they consistently win

elections but must expend additional effort in order to do so.

The identified associational harms particular to the facts of this case are similarly unlimited. It will not be hard, after any redistricting, to identify a few members of any political party or association who find themselves newly in a congressional district different from that of their neighbors. Anyone whose residence is reassigned to a new district could feel "disoriented" by redistricting, and disenchantment with the political process is common enough to be found on either side of a district line. The court required no evidence that associations suffered an adverse impact to their membership, or evidence showing exactly how their members' activities were curtailed or limited. To the contrary, ample evidence shows that the newly competitive Sixth District increased participation in political associations and activities among the plaintiffs and in the general electorate. *E.g.*, *supra*, 7-9. If the evidence in this case meets the test for associational harm, then those harms will be present in each redistricting.

A legislature will face difficulty in demonstrating it has *not* acted with the intent the three-judge court prohibited. This Court has long recognized that direct inquiries into legislative "motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Broad and frequent inquiries into legislative motive "'undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (citation omitted). A search for

retaliatory intent is especially fraught because it raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The three-judge court's standard endorsed a wide-ranging inquiry into legislative intent, relying on such varied sources as statements from legislators who did not hold leadership positions and were not involved in the map drafting, App. 20a-24a; legislators who opposed the proposed plan,[6] App. 24a; deposition testimony of a former Governor, App. 49a-50a; deposition testimony of a consultant who prepared a map *rejected* by Maryland decisionmakers, App. 48a; and Congressional aides' inadmissible e-mails that had no obvious relation to the Sixth District, App. 22a. These evidentiary sources are more problematic than even the legislative testimony admissible in an "extraordinary instance[]." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

The three-judge court describes their requisite intent standard as "retaliatory." Their expansive definition, which would encompass any intent to take an

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[6] *See Bryan v. United States*, 524 U.S. 184, 196 (1998) ("'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' . . . 'In their zeal to defeat a bill, they understandably tend to overstate its reach.'" (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964))).

action "based on the persons' political affiliation and voting" if such an action "burden[s] their representational rights," does not derive from "well developed and familiar" First Amendment retaliation standards. *Baker v. Carr*, 369 U.S. 186, 226 (1962). Under those standards, a government official must act with "vengeful" intent to punish or fail to reward an individual "for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But here, no government official examined individually the expressive activity of any plaintiffs or any association to which they belong. *See, e.g., Moss v. Harris County Constable Precinct One*, 851 F.3d 413, 421 (5th Cir. 2017) (no retaliation claim where government had no knowledge of the individual's expressive conduct). Moreover, there is no government official to whose intent the map may be attributed. Instead, the 2011 Congressional map was approved directly by the people of Maryland, including majorities in three majority-Republican counties within the Sixth Congressional District.[7]

II. The Three-Judge Court Erred by Departing from the Summary Judgment Standard When It Resolved Disputes of Material Fact and Made Credibility Findings.

In addition to the theoretical flaws in the three-judge court's adopted standards, reversal is necessary because the court committed a more extreme version

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[7] *See* https://elections.maryland.gov/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

of the error for which this Court reversed a three-judge court's entry of summary judgment in *Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999). That is, the court below resolved issues of "disputed fact," "credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due," and otherwise engaged in "'[c]redibility determinations'" and "'the weighing of the evidence,'" which are functions for the trier-of-fact and "not suited for summary disposition." *Id.* at 552, 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). But unlike *Hunt*, where the court resolved disputed facts as to only one element of a racial-gerrymandering claim, *i.e.*, the legislature's "impermissible racial motivation," 526 U.S. at 552, the three-judge court here resolved disputed facts pertaining to multiple elements of plaintiffs' claims, and did so by crediting and relying on evidence that is the subject of still-unresolved hearsay and other timely objections to admissibility. The court selectively highlighted facts and drew inferences in plaintiffs' favor, in the face of contradictory evidence favorable to the State, which the court either discounted or chose not to mention.

Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the requirement that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Id.* at 552 (quoting *Anderson*, 477 at 255). As *Hunt* suggests, this has added significance in a redistricting challenge, because of "'the sensitive nature of

redistricting,'" "'the presumption of good faith that must be accorded legislative enactments,'" and "'the intrusive potential of judicial intervention into the legislative realm'"—considerations that tend to "tip the balance in favor of" the need for a trial before "making findings of fact" adverse to defendants. 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995)). Indeed, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9; precedent suggests no reason summary judgment should be more lightly granted to plaintiffs bringing partisan-gerrymandering claims. Thus, even if plaintiffs' evidence "might *allow* the District Court to find" in their favor after a trial, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Id.* at 552-53 (emphasis in original). Rather than heed these concerns and accord defendants the requisite belief and benefit of inferences, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See, e.g.*, App. 50a (stating that "[t]he State's argument . . . rings hollow"). This error infects the three-judge court's conclusions as to all elements of plaintiffs' claims, including injury, intent, and causation.

For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own deposition testimony, that plaintiffs themselves had not suffered chilling or associational injury, but had, instead, become more politically active

post-redistricting. *See* Statement *supra* at 8-9. As the record also showed, the only evidence purporting to indicate chilling of political activity constituted inadmissible hearsay: plaintiffs' descriptions of what some unidentified persons said or felt about voting.[8] Dkt. 201, 16. Those descriptions convey statements by unidentified out-of-court declarants, offered for "the truth of the matter asserted," and thus are hearsay, Fed. R. Evid. 801(c), "inadmissible at trial" and "cannot be considered on a motion for summary judgment," *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998); *see* Fed. R. Civ. P. 56(c)(1)(B), (2), (4). Rather than disregard these hearsay statements, or even venture to address defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," App. 61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible." *Vazquez*, 134 F.3d at 34. *See* App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); App. 62a (same); App. 63a ("she frequently met potential Republican voters who 'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); App. 27a (same); App. 74a (crediting same hearsay statements). The court employed the

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[8] The only non-hearsay evidence plaintiffs presented on this subject was deposition testimony of plaintiff Ned Cueman, who described himself as "disoriented" or "disconnected," Dkt. 177-1, 24, but conceded that post-redistricting he continued his political engagement by voting regularly, Dkt. 186-25, 14:17-15:16.

statements for "the truth of the matter asserted." *See* App. 62a (crediting these statements by unidentified declarants as "clear evidence" of "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters"). The court never addressed defendants' hearsay objections to these statements nor identified any applicable exception to the hearsay rule. Instead, the court most inaccurately characterized these hearsay statements as among "undisputed facts of record." App. 61a.

Similarly, to demonstrate that Republican political participation in the Sixth District remained comparatively undeterred after the 2011 redistricting, defendants presented evidence showing increases in the district's Republican voter registration and Republican voter turnout in general elections. *See* Dkt. 186-50; 186-51. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: (1) by looking only at Sixth District Republican voters' low turnout in the 2014 primary, App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[9] and (2) by crediting hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel submitted with supplemental

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[9] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

briefing filed more than 13 months after the close of discovery, approximately a year after cross-motions for summary judgment were briefed, and two weeks after plaintiffs declined the court's invitation to reopen discovery.

Far from being undisputed, the referenced campaign-finance information was the subject of defendants' motion to exclude on grounds of hearsay, the affiant's lack of personal knowledge, and the information's widely recognized inaccuracy, and because campaign-finance reports are unsuitable for judicial notice. Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. Dkt. 219. Instead, it merely cited cases referring to relaxation of standards governing the court's gatekeeper role for expert testimony in a bench trial (a concept inapplicable to the hearsay objections raised in the motion), before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." *Id.* at 2. None of the court's cited cases suggest any relaxation of the need to exclude hearsay in a bench trial. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial" under Rule 802 and "neither this rule nor any other rule or statute creates an exception for bench trials."). Moreover, because the campaign-finance evidence was submitted in the final round of briefing permitted by the court, long after the close of discovery, defendants had no opportunity to probe the information's veracity through discovery or submit rebuttal evidence. In any

case, the selective campaign-finance information cited by plaintiffs' counsel is unrepresentative of overall campaign contributions since redistricting. For example, other campaign-finance reports on file show that contributions to Roscoe Bartlett's campaign committee *increased* by 2,500% between 2010 and the post-redistricting 2012 election.[10]

Similar departures from the summary judgment standard plague the court's intent analysis. For example, the court repeated the error that necessitated reversal in *Hunt* by impermissibly giving greater weight to plaintiffs' evidence of the "legislature's motivation"—"a factual question"—while failing to accept defendants' alternative "motivation explanation as true, as the District Court was required to do in ruling on [plaintiffs'] motion for summary judgment." 526 U.S. at 549, 551. The court embraced plaintiffs' characterization of "the mapmakers' intent," App. 48a, and refused to accept as true, App. 50a-51a, defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions, including the rejection of a Chesapeake Bay crossing; deference to Prince George's County residents' desire for their county to have two districts, neither of them shared by Montgomery County; and heeding constituents' public testimony expressing the importance of having a district to serve the I-270 corridor economic region, *e.g.*, Dkt. 186-11 ¶ 9; *see* Dkt. 201, 3-6 (discussing evidence of varied legislative motives). In so doing,

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[10] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/.

the court weighed evidence. *See, e.g.*, App. 14a-16a, 48a-49a (relying heavily on deposition testimony of Congressional staffer Eric Hawkins, Dkt. 177-4, while failing to acknowledge material contradictory testimony in the affidavit of State legislative staffer Yaakov Weissmann, Dkt. 186-11, and elsewhere in the record); App. 13a, 55a (selectively crediting and disbelieving the former Governor's deposition testimony). Once again, the court credited inadmissible hearsay to which defendants had objected, Dkt. 201, 5-6, and did so without addressing the hearsay objection, *see* App. 22a (quoting foundationless hearsay email, Dkt. 177-58).

Perhaps the decision's most conspicuous failure to acknowledge a genuine dispute of material fact appears in its finding that plaintiffs have satisfied the causation element. App. 54a-56a. This conclusion directly contradicts the court's previous determination, based on the same evidentiary record, that it "is not persuaded" that plaintiffs "have met their burden of proof with respect to causation." App. 100a. If, as it previously acknowledged, "the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*," *id.*, then, at a minimum, "the evidence is susceptible of different interpretations or inferences by the trier of fact," and, consequently, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate[.]" *Hunt*, 526 U.S. at 553.

III. Plaintiffs' Unreasonable Delay in Earlier Phases of this Case Precludes Injunctive Relief.

The Court should also note jurisdiction and reverse because the three-judge court abused its discretion both in (1) erroneously concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction, and (2) directly contradicting this Court's finding that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. App. 66a. Entry of an injunction is "a matter of equitable discretion," and success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek*, 138 S. Ct. at 1943. This principle applies equally to requests for preliminary and permanent injunctions. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). This Court has long recognized that these principles apply to election law cases, including redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("equitable considerations" may justify withholding ultimate relief in redistricting case, even where plan violates constitution); *accord Benisek*, 138 S. Ct. at 1944 (principle that diligence is

a requirement for injunctive relief is "as true in election law cases as elsewhere").

Contrary to the three-judge court's assumption that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," App. 66a, other courts have applied equitable principles, including laches, in withholding injunctive relief for constitutional violations when, as in this case, the relief would apply "for only the last election in the decade" prior to completion of the next decennial census. *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 695 (N.D. Ill. 1969) (three-judge court); *Maryland Citizens for Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (same). In the face of "inexcusable and unreasonable" delay, "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290 (11th Cir. 2001) ("over six years" delay justified denying injunction of districting plan); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (three-judge court), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

Proximity to an upcoming census creates a presumption against ordering a map redrawn, because "two reapportionments within a short period of two years would greatly prejudice the [jurisdiction] and its citizens by creating instability and dislocation in the electoral system," "imposing great financial and logistical burdens," and jeopardizing "fair and accurate representation for the citizens" through the use of stale

census data. *White*, 909 F.2d at 104. Courts have recognized the public interest in avoiding injunctions that would necessitate resort to such data, even after a finding in plaintiffs' favor on a claim as well-established as one-person, one-vote. *Skolnick*, 307 F. Supp. at 695 (three-judge court finding plan unconstitutional for lack of population equality but declining to impose injunction); *see Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (Even where prior district boundaries were racially motivated, the "passage of six years" "does caution against wholesale alteration" of district lines "based on out-of-date census figures when the process will in any case have to be done in the immediate future" because of a new census.).

Since the June remand, no circumstance has arisen to alter this Court's evaluation of the balance of equities and weighing of the public interest in light of plaintiffs' dilatoriness. *Benisek*, 138 S. Ct. at 1944. This Court concluded that plaintiffs did not "show reasonable diligence," not only in belatedly requesting a preliminary injunction, but more significantly, in "fail[ing] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id.*

The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs'

own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, it has been seven years, and four general elections, after the 2011 map was adopted, and nearly five years since the original complaint was filed. The loss of the additional election cycle was the direct consequence of plaintiffs' late-filed request for preliminary injunction, an optional litigation strategy that plaintiffs opted to pursue instead of pressing their claim for permanent injunction.

The three-judge court sought to justify its entry of injunctive relief, notwithstanding plaintiffs' delay, by declaring that this case's protracted procedural history "cannot be attributed to the plaintiffs, but to process." App. 66a. That finding directly contradicts this Court's assessment that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. The three-judge court's observation that plaintiffs presented a claim for permanent injunction in their 2013 complaint, App. 66a, does not absolve plaintiffs, because that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944. And, though there remained time to

implement a new plan for the 2020 election when the three-judge court entered its injunction, the court ignored this Court's caution to consider "the legal uncertainty surrounding any potential remedy" when evaluating the impact to the state election system. *Id.* When the three-judge court entered its judgment, App. 78a, a jurisdictional statement had already been filed by defendants in a North Carolina redistricting case, where a three-judge court recognized four separate theories of a partisan-gerrymandering claim, and defendants seek review on grounds including nonjusticiability and lack of standing, among others. Even as those four different standards were poised for review by this Court, the court below added a fifth, and enjoined the State, while the exact contours of these plaintiffs' novel cause of action remained undefined. Under these circumstances, the injunction ordered was an abuse of discretion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*, Plaintiffs,	*	
v.	*	Case No. 1:13-cv-03233-JKB
LINDA H. LAMONE, *et al.*, Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

MEMORANDUM OPINION

Argued: October 4, 2018 Decided: November 7, 2018

Michael B. Kimberly, Paul W. Hughes, Stephen M. Medlock, E. Brantley Webb, and Micah D. Stein, MAYER BROWN LLP, Washington, D.C., for Plaintiffs.

Sarah W. Rice, Jennifer L. Katz, and Andrea W. Trento, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Defendants.

Benjamin W. Thorpe, Emmet J. Bondurant, BONDURANT MIXSON AND ELMORE LLP, Atlanta, Georgia, Gregory L. Diskant, PATTERSON BELKNAP WEBB AND TYLER LLP, New York, New York, and Michael A. Pretl, Riverton, Maryland, for Amicus Common Cause. Charles E. Davidow, Washington, D.C., Pietro Signoracci, Robert A. Atkins, New York, New York, PAUL WEISS RIFKIND WHARTON AND GARRISON

LLP, and Michael Li, Thomas P. Wolf, New York, New York, for Amicus The Brennan Center for Justice at N.Y.U. School of Law. Paul March Smith, Washington, D.C., for Amicus The Campaign Legal Center, Inc.

Before NIEMEYER, Circuit Judge; BREDAR, Chief District Judge; and RUSSELL, District Judge.

Judge Niemeyer wrote the opinion, in which Judge Russell joined. Chief Judge Bredar wrote a separate opinion, in which Judge Russell joined, concurring in the judgment. Judge Russell wrote a separate opinion, concurring.

NIEMEYER, Circuit Judge:

The plaintiffs in this action — seven registered Republican voters who lived in Maryland's Sixth Congressional District prior to the State's enactment of its 2011 congressional redistricting law — challenge the constitutionality of that law and, specifically, the way the State redrew the boundaries of the Sixth District. *See* Md. Code Ann., Elec. Law § 8-701 *et seq.* They contend that in enacting the law, State officials specifically intended to burden Republicans with the overarching goal of achieving a state delegation to the U.S. House of Representatives of seven Democrats and one Republican, as distinct from the previous six Democrats and two Republicans. To do so, the officials targeted Republican voters in the Sixth District by, on net, removing roughly 66,000 of them from the district and adding some 24,000 Democratic voters, thereby effecting a swing of about 90,000 voters and bringing about the single greatest alteration of voter makeup in any district in the Nation following the 2010 census. The

plaintiffs point out that before the redistricting, experts regarded the Sixth District as "Solid Republican" and after redistricting, as "Likely Democratic." Based on these factual allegations, the plaintiffs argue that in enacting the 2011 law, the State deliberately diluted their votes and burdened their associational interests based on their party affiliation and voting history, in violation of their First Amendment rights.

The parties have conducted and completed extensive discovery, and neither the plaintiffs nor the State has requested any more. Moreover, no party disputes the material facts in the record, although the parties do dispute the legal consequences that flow from them. Following discovery, the plaintiffs filed a motion for summary judgment, and the State filed a cross-motion for summary judgment.

This court conducted a lengthy hearing on the cross-motions for summary judgment on October 4, 2018, and now, for the reasons given herein, the court grants the plaintiffs' motion and denies the State's motion. The record shows that:

- The State specifically targeted voters in the Sixth Congressional District who were registered as Republicans and who had historically voted for Republican candidates.
- The State specifically intended to diminish the value of those targeted citizens' votes by removing a substantial number of them from the Sixth District and replacing them with Democratic voters for the purpose of denying, as a practical matter, the targeted voters the

opportunity to elect the candidate of their choice.

- The State gave effect to its intent by, on net, removing about 66,000 Republican voters from the Sixth District and adding 24,000 Democratic voters in their place.
- The State meaningfully burdened the targeted Republican voters' representational rights by substantially diminishing their ability to elect their candidate of choice.
- The State also burdened the Republican voters' right of association, as demonstrated by voter confusion, diminished participation in Republican organizational efforts in the Sixth District, and diminished Republican participation in voting, as well as decreased Republican fundraising.
- These injuries were the direct result of the State's purpose to convert the Sixth District from a solid Republican district to a Democratic district.

We thus conclude that the plaintiffs have sufficiently demonstrated that Maryland's 2011 redistricting law violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history. Because the plaintiffs also satisfy the requirements for injunctive relief, we enter a judgment permanently enjoining the State from using the 2011 congressional redistricting plan after the 2018 congressional election and requiring it promptly to adopt

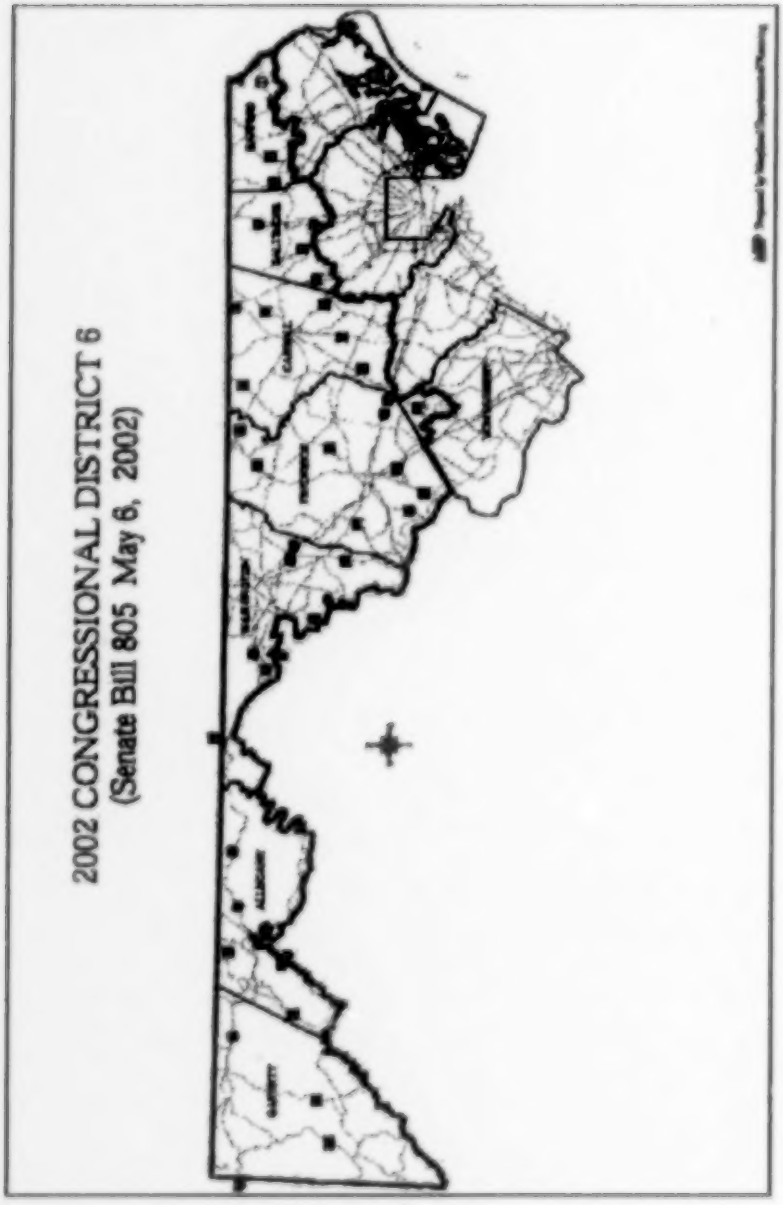
a new plan in conformance with this Memorandum Opinion for use in the 2020 congressional elections.

I. Facts of Record

A

The facts of record are not disputed. Following the 2010 decennial census, the State of Maryland redrew the lines of its 8 congressional districts and its 47 state legislative districts, as required to equalize the population in each district. In particular, the census showed that the Sixth Congressional District had grown somewhat since the prior census, having 10,186 more residents than the ideal adjusted population of 721,529 for a Maryland congressional district, a variation of 1.4%. Joint Stipulations ¶¶ 9, 52 (ECF No. 104). Thus, Maryland was required to remove a net of 10,186 residents from the Sixth District to achieve the required equal population for the District. With such a modest adjustment, however, the Sixth District would have remained a solid Republican district, which, together with the First District on the Eastern Shore of Maryland, would have given Maryland two reliably Republican districts.

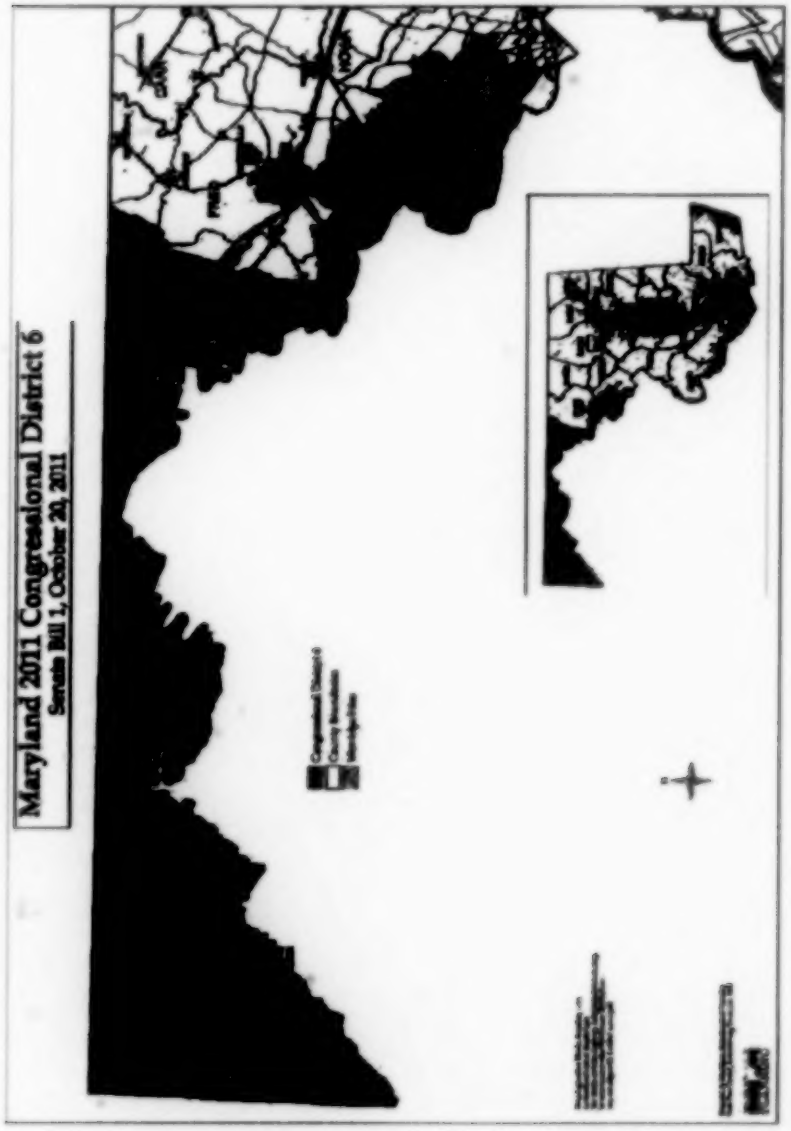
Since 1966, the Sixth District had always been configured to include all of Maryland's five most northwestern counties — Garrett, Allegany, Washington, Frederick, and Carroll Counties. *See* Expert Report of John T. Willis at 9 & app. A, maps 11–15 (ECF No. 186-17). After the 2002 redistricting, the District included this identifiable core of five counties, as well as a small pocket of northern Montgomery County and larger portions of Baltimore and Harford Counties, shown as follows:


2002 CONGRESSIONAL DISTRICT 6
(Senate Bill 805 May 6, 2002)

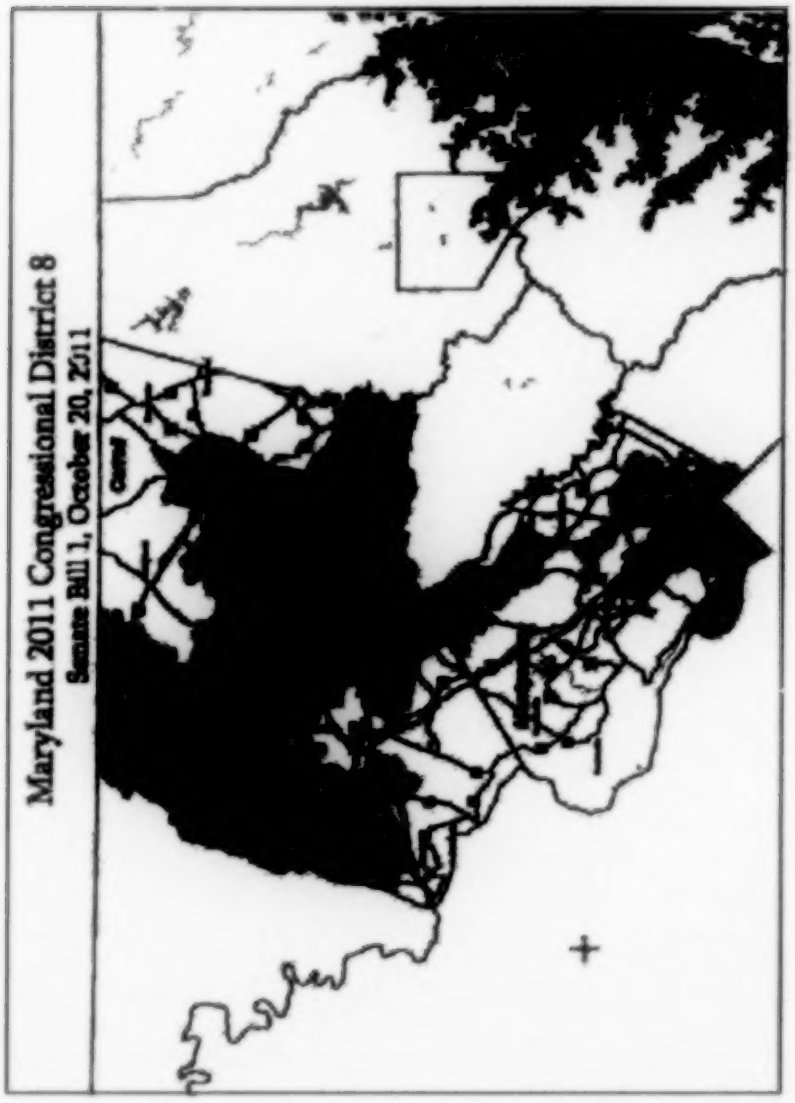
At the time of the 2010 congressional election — the last held prior to the 2011 redistricting — 47% of the Sixth District's approximately 446,000 registered voters were registered as Republicans, 36% were registered as Democrats, and 16% were registered as Unaffiliated, making the District the most Republican in the State. Joint Stipulations ¶ 10 & Ex. 2 at 2. Representative Roscoe Bartlett, a Republican, had continuously represented the District since 1993, and he won reelection in 2010 by a margin of 28%. *Id.* ¶ 8.

In creating the 2011 redistricting plan, the Democratic officials responsible for the plan redrew the Sixth District's boundaries far more dramatically than was necessary to remove 10,186 residents from the District. Under their plan, the Sixth District retained only one-half of its original population (specifically, the residents of Garrett, Allegany, and Washington Counties, as well as roughly half the population of Frederick County). The other half of the former Sixth District's population — roughly 360,000 residents — was moved to other districts. Approximately 60% of those removed — those from Frederick County and more than half the population of Carroll County — were shifted into the Eighth Congressional District, which had previously been confined almost entirely to Montgomery County. In place of those residents, the plan added to the new Sixth District approximately 350,000 residents from Montgomery County — the majority of whom had previously been assigned to the Eighth District. The exchange thus involved over 700,000 residents.

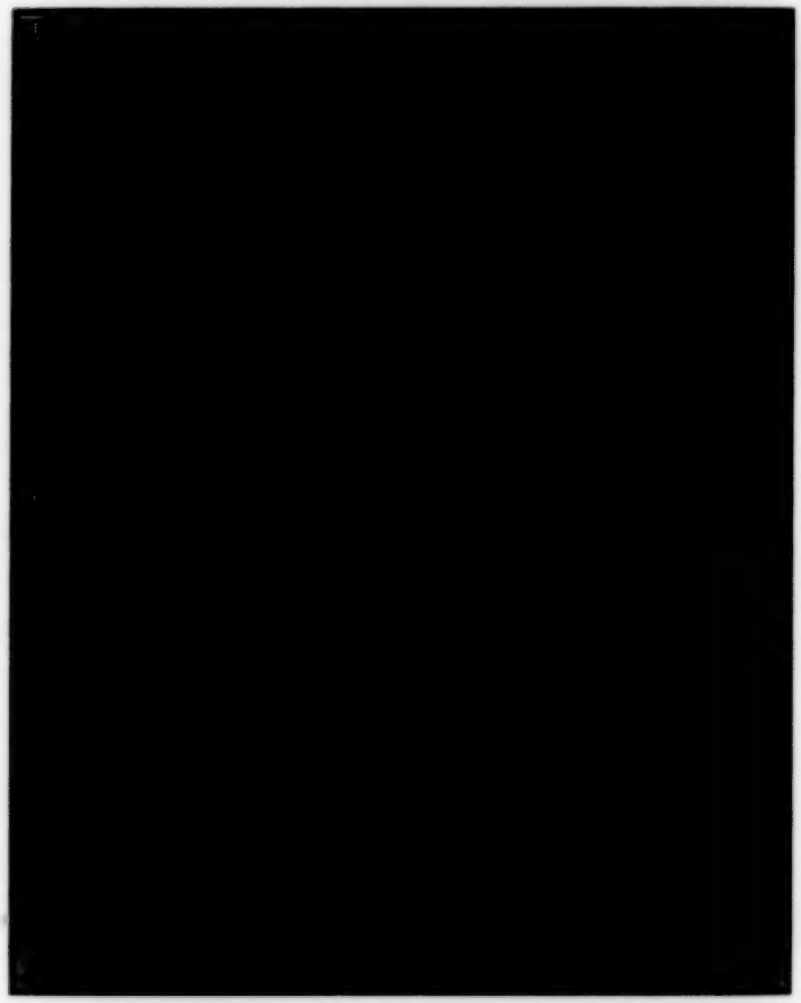
The final 2011 redistricting map for the Sixth District is shown as follows:



The new Eighth District is shown as follows:



Finally, the map as a whole is shown as follows:



The registered voters removed from the former Sixth District were predominately Republican, while those added were predominately Democratic. Specifically, in the precincts removed from the Sixth District,

there were on average approximately 1.5 times as many registered Republicans as Democrats. By contrast, in the precincts added to Sixth District, registered Democrats outnumbered Republicans by more than 2 to 1. In total, the reshuffling of the Sixth District's voters resulted in a net reduction of roughly 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters. *See* Opening Expert Report of Prof. Michael P. McDonald at 5, 11–12 (ECF No. 177-19); Opening Expert Report of Dr. Peter A. Morrison ¶ 134 & tbl. 1 (ECF No. 177-35). Thus, of the new Sixth District's roughly 437,000 registered voters, 33% were registered as Republicans, 44% were registered as Democrats, and 22% were registered as Unaffiliated. Joint Stipulations ¶ 53 & Ex. 19 at 2. And, in the new Sixth District, Democratic candidate John Delaney defeated Republican incumbent Bartlett by a 21% margin in the 2012 election. *Id.* ¶ 54. Delaney was narrowly reelected in 2014 with a margin of 1.5% but then won the 2016 election by a margin of 14%. *Id.* ¶ 55–56.

The Eighth District, to which the State had shifted the bulk of the Sixth District's removed voters, continued to be a reliable seat for Democrats. Prior to redistricting, registered Democratic voters outnumbered registered Republican voters in the Eighth District by almost 3 to 1 — 58% were Democrats, 20% were Republicans, and 21% were Unaffiliated. Joint Stipulations Ex. 2 at 2. After the redistricting, 51% of the registered voters were Democrats, 27% were Republicans, and 21% were Unaffiliated. *Id.* Ex. 19 at 2. Thus,

even though the number of registered Republicans in the Eighth District rose significantly after the transfer of Republicans from the Sixth District, registered Democrats still outnumbered registered Republicans by nearly 2 to 1.

The record shows that this readjustment of the voter composition of the Sixth District was specifically intended by Maryland Governor Martin O'Malley, a Democrat; by the Maryland General Assembly, controlled by Democrats; and by the Democratic members of Maryland's congressional delegation to achieve a 7 to 1 Democratic majority in Maryland's delegation to the U.S. House of Representatives.

As was the custom — and indeed the procedure specified by state law for redrawing state legislative districts — Governor O'Malley took responsibility for creating the 2011 congressional redistricting plan and submitting it to the General Assembly as a joint resolution for adoption. *See* O'Malley Dep. 8, 10–11 (ECF No. 177-3). He testified explicitly that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping either the First District on the Eastern Shore of Maryland or the Sixth District in western Maryland. *See, e.g.*, *id.* at 22–28. He confirmed that he "set out to draw the borders in a way that was favorable to the Democratic party." *Id.* at 9–10. As he stated:

> [T]hose of us in leadership positions in our party, the Speaker, the Senate President, the

> Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that, while our — while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also — part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many [goals].

Id. at 81. After brief consideration, Governor O'Malley rejected the notion of flipping the First District because the resulting district would have to jump across the Chesapeake Bay. *Id.* at 24–27. Consequently, "*a decision was made to go for the Sixth.*" *Id.* at 27 (emphasis added).

To carry out the process, Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his effort, directing it to hold public hearings and recommend a redistricting plan. But at the same time, he "asked Congressman [Steny] Hoyer, as the dean of the [U.S.] House delegation," to "lead the effort . . . to inform the [Advisory Committee] about congressional redistricting" and "come up with a map that a majority of the congressional delegation supports." O'Malley Dep. 47–48; *see also* Willis Dep. 185–88 (ECF No. 177-14). And the record shows that the work produced under the direction of the Democratic members of Maryland's congressional delegation — including data reflecting how citizens in discrete areas of the State had voted in the past — played a central role in shaping the new Sixth

District. *See, e.g.*, Miller Dep. 97 (ECF No. 177-15) (testifying that the map "primarily was drawn by the congressional people").

Thus, while the Advisory Committee was holding public hearings across the State — indeed, even before it began — the Democratic members of Maryland's congressional delegation, led by Representative Hoyer, who has described himself as a "serial gerrymanderer," ECF No. 191-3, began their work to redraw the State's congressional map. Hoyer and other members of the delegation retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations. ECF No. 177-17; *see also* Hawkins Dep. 28–36 (ECF No. 177-4); ECF No. 177-18. NCEC was specifically charged with drawing a map that maximized "incumbent protection" for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican. It was given no additional instruction as to how to draw the map. Hawkins Dep. 40–42, 47–49.

The primary NCEC analyst assigned to the task, Eric Hawkins, analyzed various congressional redistricting plans to inform the Democratic members of the Maryland congressional delegation of how different options would change their districts, and he personally prepared between 10 and 20 different draft congressional maps using a GIS computer software program called Maptitude for Redistricting. Hawkins Dep. 36–38. Maptitude allows users to "[c]reate districts using

any level of geography," "[a]dd political data and election results," and "[u]pdate historic election results to new political boundaries." Joint Stipulations ¶ 28. With Maptitude, "data reflecting . . . citizens' political party affiliations and voting histories[] can be used to determine how the outcome of historical elections would have changed . . . if the proposed plan had been in place in prior years," *id.* ¶ 30, thus enabling users to predict accurately the likely outcome of future elections.

Hawkins specifically used a proprietary metric created by NCEC called the Democratic Performance Index ("DPI"), which measures how a generic Democratic candidate would likely perform in a particular district. *See* Hawkins Dep. 24, 110. As Hawkins explained, the DPI considers how "statewide candidates perform over time in competitive elections," is "weighted differently for different election years," and "take[s] into account past voting history in a state or a district." *Id.* at 24. The DPI thus "indicate[s] competitiveness or lack thereof" for Democratic candidates and is based on the principle that "observed party performance correlates with future party performance more strongly than any other single measure." ECF No. 191-7 at 1. It has proven quite predictive in practice. For example, in the 2016 congressional election, U.S. House Democratic candidates almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%. *Id.* at 2. NCEC also calculates separate versions of the DPI specific to federal and state races — with the federal DPI "only

us[ing] federal races" and the state DPI "only us[ing] state races" — to better account for "ticket splitting." Hawkins Dep. 25–26.

Hawkins testified that he used the DPI to meet the dual "goals" given to NCEC — namely, to draw a map that would maximize "incumbent protection" for the Democrats currently representing Maryland districts in Congress and that would "chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican." Hawkins Dep. 40–42; *see also id.* at 47–49. With respect to this 7-1 goal, Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI, *id.* at 102–03, which Hawkins calculated under the preexisting map as standing at 37.4%, indicating low Democratic performance and correspondingly strong Republican performance, *id.* at 88. Over the course of working with Maryland's Democratic congressional representatives and their staff, Hawkins prepared several different maps under which the Sixth District would have had at least a 51% federal DPI. *See, e.g., id.* at 97, 157–61. In preparing these draft maps, Hawkins considered neither "any measure of compactness," *id.* at 126, nor whether "there was a community of interest related to the I-270 corridor," *id.* at 128. Rather, "[t]he intent was to see if there was a way to get another Democratic district in the state." *Id.* at 230.

While maps were also proposed during this period by third-party entities, they resulted in a far lower federal DPI for the Sixth District and were not used

further. For example, a map proposed by the Maryland Legislative Black Caucus would have resulted in a federal DPI of 39% for the Sixth District and DPIs below 50% for 2 other districts, ECF No. 177-34, a proposal a senior congressional staffer worried would be "a recipe for 5–3, not 7–1," ECF No. 177-36.

Ultimately, the Democratic members of Maryland's congressional delegation proposed and forwarded to the state Democratic leadership at least one map prepared by Hawkins. *See, e.g.*, Weissmann Decl. ¶ 8 (ECF No. 186-11). Hawkins also traveled to Annapolis to brief a number of state legislative staffers on the proposal, *see* Hawkins Dep. 170–75, and assisted at least some of these staffers as they continued working on the congressional map, *see, e.g.*, ECF No. 191-6.

The record reflects that a group of staffers to the State's most senior Democratic leaders, including the Governor, was "tasked with developing a plan . . . that would be acceptable to the [Governor's Redistricting Advisory Committee]." Weissmann Decl. ¶ 9; *see also id.* ¶ 7. Significantly, these senior staffers were given a data file containing NCEC's proprietary DPI information for Maryland at the precinct level — the smallest geographic unit in Maryland (averaging around 3,000 people) at which election results are reported. *See id.* ¶¶ 4–5. This data file was loaded onto a laptop used by the staffers to generate maps, and this laptop also contained the Maptitude software and "party registration data and voter turnout data," including data at the census-block level — the smallest geographic unit used by the U.S. Census Bureau. *Id.* ¶¶ 3–5. State

Democratic officials, through their staffers, thus continued to use the DPI — as well as other information about how local groups of citizens had previously voted and the political party with which they were affiliated — to finalize a map for the Advisory Committee and ultimately the Governor.

One of the staffers involved in this process testified that after the group received a draft map that had been proposed by Maryland's congressional delegation, the group made a series of changes to the map — chiefly, keeping Washington County intact in the Sixth District; keeping the City of Frederick, but not its suburbs, intact in the Sixth District; connecting the City of Frederick with a swath of Montgomery County by orienting the Sixth District around the I-270 highway; and making adjustments so that the Eighth District no longer went into Prince George's County and the Fourth District no longer went into Montgomery County. Weissmann Decl. ¶ 9. While the staffer did not give testimony about whether the group aimed to carry out the Governor's goal of creating a 7-1 map, he did acknowledge that the group briefly considered creating a map such that "eight Democratic and zero Republican congressional representatives could be elected" from Maryland. *Id.* ¶ 12.

Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his mapdrawing efforts. He charged the committee with holding public hearings around the State and recommending two redistricting plans for his consideration — one for the State's 8 congressional districts and

the other for its 47 legislative districts. Joint Stipulations ¶ 18. The Governor selected Jeanne D. Hitchcock — a Democrat with no prior redistricting experience, who was then the Appointments Secretary in the Governor's Office, *see* Hitchcock Dep. 45–46 (ECF No. 177-8) — to chair the Committee, and he appointed four other individuals to be members of the Committee: state Senate President Thomas V. Mike Miller, Jr.; state House of Delegates Speaker Michael E. Busch; Richard Stewart, a businessman who had chaired the Governor's reelection campaign in Prince George's County; and James J. King, a businessman from Anne Arundel County who had previously served in the House of Delegates and who was the Committee's sole Republican. Joint Stipulations ¶¶ 19–20.

The Advisory Committee held 12 public hearings across the State from July through September 2011 and received approximately 350 comments from members of the public. Joint Stipulations ¶ 22. At hearings conducted in western Maryland, residents provided suggestions regarding potential changes to the shape of the Sixth District. Several of these residents testified about various connections between Frederick and Montgomery Counties — including Interstate 270 ("I-270"), a 35-mile highway running between the City of Frederick and southern Montgomery County — and advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County. But none of the speakers contemplated a map that would remove from

the Sixth District much of Frederick County *itself*, which had been included in its entirety in the Sixth District since 1872. *See, e.g.*, Public Hearing Testimony (ECF No. 186-3) at MCM 000029–31 ("[T]he start of the Sixth District is pretty easy, with Garrett, Allegany, Washington, and Frederick, you've got a nucleus there. . . . [O]nce you start with those four counties, . . . your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest extent possible, and . . . leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district"); *id.* at MCM000038 ("[B]oth in terms of making it viable for someone to reach the voters, and in terms of better representing the population, it would make more sense to re-orient the district to include more of Montgomery County and less — and none of Harford and Baltimore and less of Carroll, as you put those communities in with the Baltimore County area that they are naturally a part of"); *id.* at MCM 000048 ("Frederick County and the counties west of Frederick have more in common with Montgomery County than they do with Carroll, Baltimore, or Harford").

The Advisory Committee released its proposed congressional redistricting plan to the public on October 4, 2011, with the Committee's lone Republican casting the sole vote against the plan. Joint Stipulations ¶ 32. The Committee's map had a federal DPI of 53% in the Sixth District, which was greeted as "good news" by the man who was widely expected to be the Democratic nominee to represent the newly redrawn District in the upcoming 2012 election. ECF No.

177-25; *see also* Garagiola Dep. 27 (ECF No. 177-24) (agreeing that, in his mind, "one of the purposes[ ] [was] to make the Sixth Congressional District have [a] 53 percent Democratic performance"). As he succinctly explained at the time, the Advisory Committee's proposed Sixth District would include "[a]ll of Washington, Alleg[a]ny, and Garrett [Counties]"; "southern Frederick [County] and the City of Frederick"; and then "about 40% of Montgomery County, including northern and western parts," while "[t]he rest of Frederick would be in [the Eighth] district." ECF No. 177-25.

Members and staff of the Advisory Committee briefed a joint session of the state House and Senate Democratic Caucuses about their recommended congressional plan on October 3, 2011. Joint Stipulations ¶ 35. Talking points prepared for Senate President Miller's introductory remarks encouraged him to emphasize that "[e]ven though the map isn't pretty, it accomplishes a few important goals," including "creat[ing] an opportunity for Montgomery County to control two congressional districts"; "preserv[ing] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% Democratic performance"; and "giv[ing] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. The talking points continued, "In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." *Id.*

Following Senate President Miller's remarks, Chairwoman Jeanne Hitchcock delivered a PowerPoint

presentation that stated that the Sixth and Eighth Districts had been "[c]onfigured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State." Joint Stipulations, Ex. 6. The record suggests that those in attendance were skeptical that the I-270 corridor justified dramatically redrawing both the Sixth and the Eighth Districts. For example, immediately after Hitchcock's presentation, Democratic Delegate Curt Anderson told a reporter, "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Joint Stipulations ¶ 46. And, while listening to Hitchcock give a similar presentation earlier in the day, one senior congressional aide who had been intimately involved in the redistricting process wrote to another, "This is painful to watch. . . . I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it." ECF No. 177-58.

On October 15, 2011, Governor O'Malley announced that he was submitting a map to the General Assembly that was substantially the same as the Advisory Committee's proposal, Joint Stipulations ¶ 33, and two days later, on October 17, Senate President Miller introduced the Governor's proposed redistricting map as Senate Bill 1 at a special legislative session. With only minor technical amendments, Senate Bill 1 was signed into law on October 20, 2011, three days after it had been introduced. *Id.* ¶ 34; *see* Md. Code Ann., Elec. Law §§ 8-701 – 8-709. In the 2012 general

election, Maryland voters were asked whether they were "for" or "against" the law that "[e]stablishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution," and 64% of voters who responded to that question voted in favor of the law. Joint Stipulations ¶ 39.

"No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes." Joint Stipulations ¶ 36. Moreover, while the legislation was progressing rapidly through the General Assembly, numerous legislators made comments reflecting their clear understanding that the massive redrawing of the Sixth District was designed primarily to give the eventual Democratic nominee a distinct electoral advantage over the Republican nominee. For example, one Delegate bluntly stated in a floor speech that he supported the map because it meant "more Democrats in the House of Representatives." *Id.* ¶ 44. Another Delegate stated in an October 17 interview that, "What we're doing is we are trying to get more, in terms of — currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *Id.* ¶ 47. One Democratic Senator who voted for the bill nonetheless lamented in a floor speech that partisan gerrymandering was a problem across America, adding that "it's a process where we dress up partisan and political

ambition on both sides of the aisle in high principle, *but we can all tell what's really going on.*" Joint Stipulations ¶ 43(a) (emphasis added). And the only Democratic Senator to vote against the bill stated in an October 14 interview, "[W]hen you look at the way these districts are drawn, they're absolutely drawn with one thing in mind. . . . *[I]t's certainly drawn so that you can minimize the voice of the Republicans.*" ECF No. 177-41 at 16 (emphasis added).

The result of the wholesale recomposition of the Sixth District was precisely as intended and predicted. In October 2012, the Cook Political Report released an analysis of "all 435 newly redrawn Congressional districts in the country" using its Partisan Voter Index ("Cook PVI"), ECF No. 177-52 at 1, a well-respected "measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole," ECF No. 177-51; *see also* Lichtman Dep. 131 (ECF No. 177-49) (testimony of State's expert witness that the Cook PVI is a "well respected" and "well regarded" metric). Specifically, a Cook PVI of D+2 means that in the last two presidential elections, "that district performed an average of two points more Democratic than the nation did as a whole." ECF No. 177-52 at 9. In addition to calculating PVIs, the Cook Report also assigns each congressional district a label based on its assessment of the political parties' electoral prospects.

Using these metrics, the Cook Report examined "which districts underwent the most dramatic alterations in redistricting" following the 2010 census and

found that Maryland's Sixth District experienced the single largest swing of any district in the Nation. ECF No. 177-52 at 6–8. Specifically, before the 2011 redistricting, the Sixth District had a Cook PVI of "R+13" and a "Solid Republican" label; after redistricting, the District received a Cook PVI of "D+2" and a "Likely Democratic" label. *Id.* at 8. An academic analysis that looked at the accuracy of the Cook Report's forecasting over the course of 11 congressional elections helps unpack the significance of this swing. When the Cook Report has rated a district "Solid Republican" on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; what is more, when a district has been rated as "Likely Democratic," the Democratic candidate has won 94% of the time. *See* James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010) (ECF No. 191-8).

Moreover, the Cook Report's analysis of the effect of redistricting on the Sixth District was consistent with NCEC's own DPI data. According to NCEC, in the 2016 congressional election cycle, "Democrats [nationwide] won only four districts where DPI was below 50 percent"; in none of those districts was the DPI below 40%, as it was in the Sixth District prior to redistricting. ECF No. 191-7 at 1–2. Conversely, among the 160 districts across the country with a DPI above 50%, all but 12 were won by the Democratic candidate. *See id.* Thus, given that the new Sixth District's DPI was 53%, NCEC's data, like Cook's, confirmed that the

Democrats held a clear electoral advantage in the District as a result of its redistricting.

The record demonstrates further that, in addition to the reduced opportunity to elect a candidate of their choice, the plaintiffs and other active members of Maryland's Republican Party faced new difficulties in their organizational efforts as a result of the redistricting. For example, Plaintiff Sharon Strine — a registered Republican voter who had consistently voted for Republican candidates — testified that until the 2011 redistricting plan reassigned her residence to the Eighth District, she had lived and voted in the Sixth District ever since registering to vote on her 18th birthday in the early 1980s. Strine Dep. 9–15 (ECF No. 177-53). Even though she no longer lived in the Sixth District, she nonetheless worked for over a year on Sixth District Republican nominee Dan Bongino's 2014 congressional campaign, eventually serving as the campaign's manager. *Id.* at 8, 59, 61–62. She testified that over the course of the campaign — "between festivals, knocking on doors, parades, anything you can imagine" — she spoke to thousands of people in the Sixth District and that "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time. . . . [T]hey just [felt] disenfranchised that . . . they don't have somebody that represents them anymore . . . [a]fter the redistricting." *Id.* at 61–63.

Similarly, Plaintiff Alonnie L. Ropp — also a registered Republican voter who had consistently voted for Republican candidates and whose residence was

also reassigned to the Eighth District — testified that, at the time of the 2014 congressional election, she served on the Frederick County Republican Central Committee and played a role in "promot[ing] all of our Republican candidates running in our geographic territory." Ropp Dep. 16–23, 33 (ECF No. 177-54). She described how, when she engaged with potential voters in that capacity, she routinely spent a lot of the conversation helping the voter figure out which congressional district the voter lived in, the Sixth or the Eighth. *Id.* at 34–38. As she stated, "[A] large percentage of folks, if they had historically voted, they were confused about the candidates. They didn't know who they should be engaging. It was a very confusing situation for them that year." *Id.* at 37. She added that "we spent most of our time" trying to ascertain the voter's district and that, "by the time [we] [got] through 20 minutes of that conversation," some people "felt as though they didn't want to participate that time because it seemed too confusing." *Id.* at 37–38.

And Plaintiff Edmund Cueman — a longtime resident of Carroll County and registered Republican voter whose residence was reassigned to the Eighth District — described personally feeling "disoriented" by and "disconnected" from his new congressional district: "[M]y feelings were that every time there's a census, yeah, you may have to make some adjustments. You can't freeze it in time but this . . . was a chop job. . . . I have absolutely no connection with what is in this district except the portions of Frederick that were

thrown in." Cueman Dep. 11–16, 36–37 (ECF No. 177-55).

Other record evidence corroborates these plaintiffs' experiences, including evidence showing that Sixth District registered Republican voters' participation declined in primary elections in midterm years — *i.e.*, when congressional candidates topped the federal ticket. For example, in Garrett County, 48% of registered Republican voters participated in the 2010 Republican primary election, but that number fell to 35% in 2014; in Allegany County, there was a 43% turnout for the 2010 Republican primary, a number that fell to 27% in 2014; and in Washington County, the percentage of Republicans participating in the primary fell from 37% in 2010 to 25% in 2014. ECF No. 191-11 at 3, 9–10.

Similarly, the record shows a decline in fundraising by the Republican Central Committees of the three counties that remained entirely within the Sixth District after the 2011 redistricting. Specifically, in the 2014 filing period, the Republican Central Committees for Garrett, Allegany, and Washington Counties received 6.5% less than in the 2010 filing period, the prior midterm election year. ECF No. 210, Ex. C-8 to C-11. Fundraising by these committees during presidential election years has suffered as well — comparing the contributions received in the 2008 filing period with those received in the 2012 filing period reveals a drop of 12%. *Id.*

B

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 redistricting plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d. 516 (D. Md. 2014), and the Fourth Circuit summarily affirmed, 584 F. App'x 140 (4th Cir. 2014). The Supreme Court, however, reversed that judgment in December 2015, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *Shapiro v. McManus*, 136 S. Ct. 450, 455–56 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). In doing so, the Court observed that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy in his concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and was "uncontradicted by the majority in any of [the Court's] cases." *Shapiro*, 136 S. Ct. at 456.

On remand, the plaintiffs, then represented by counsel, promptly filed a second amended complaint in February 2016 — roughly one week after this three-judge court was empaneled. The amended complaint added six additional plaintiffs and refined the theory underlying their constitutional challenge. Two of the original plaintiffs later agreed to their dismissal from

the action, leaving seven plaintiffs, all of whom are registered Republicans who lived in the Sixth District prior to the 2011 redistricting. Three of these plaintiffs still reside in the Sixth District, while four of them now live in the Eighth District as a result of the redistricting.

In an opinion issued August 24, 2016, we denied the State's motion to dismiss, concluding that the plaintiffs had adequately alleged a justiciable claim for relief. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586, 600 (D. Md. 2016). Drawing on First Amendment retaliation principles, we held that to succeed on their claim, the plaintiffs would have to prove three elements: first, *specific intent* — "that those responsible for the map redrew the lines of [their] district with the specific intent to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; second, *injury* — that the plaintiffs had, in fact, experienced a concrete burden on their legally protected interests; and third, *causation* — "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 596–97 (emphasis omitted).

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction in May 2017 to prevent the use of the challenged map during the 2018 elections. The plaintiffs' motion alternatively sought summary judgment, and the State subsequently filed a cross-motion for summary judgment. In August 2017, we denied the plaintiffs'

motion for a preliminary injunction and stayed further proceedings — including resolution of the parties' cross-motions for summary judgment — for the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). *See Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017). The Supreme Court affirmed our denial of the plaintiffs' motion for a preliminary injunction in June 2018, *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–45 (2018), and, on remand, the parties agreed not to reopen discovery. They did, however, file supplemental summary judgment memoranda, and we conducted a lengthy hearing on the parties' cross-motions for summary judgment on October 4, 2018.

II. Legal Principles of the Districting Process

The process of creating districts from which members of the U.S. House of Representatives are elected is rooted in the authority granted by the U.S. Constitution to both state legislatures and Congress — political departments of the respective governments. In establishing the U.S. House of Representatives, the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, and further that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof," *id.* § 4, cl. 1. Article I thus "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993).

While Maryland has enacted no law codifying procedures for discharging the responsibilities conferred on it by Article I, § 4, it has codified procedures for redrawing the lines of state legislative districts following each decennial census. The Maryland Constitution, Article III, § 5, provides:

> Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing the members of the Senate and the House of Delegates.
>
> The Governor shall present the plan to the President of the Senate and the Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly. . . . [The] plan shall conform to Sections 2, 3, and 4 of this Article.

And Section 4, in particular, requires that each legislative district "consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions." *Id.* § 4. The Maryland Constitution provides further that if the General Assembly fails to adopt the Governor's plan, that plan "shall become law." *Id.* § 5. The Maryland General Assembly implemented a state legislative district plan pursuant to these provisions following the 2010 census. *See* Md. Code Ann., State Gov. § 2-201 *et seq.*

With no law codifying the congressional redistricting procedure, Maryland has, by custom, substantially

followed the procedure set forth in the Maryland Constitution for adopting state legislative districts. Thus, following each decennial census, the Maryland Governor takes charge of congressional redistricting by holding advisory hearings and creating a redistricting plan, which he then submits to the General Assembly as a joint resolution for adoption. And that process was followed after the 2010 census. The process, however, did not incorporate the restrictions contained in the Maryland Constitution, Article III, § 4, that provide for contiguity, compactness, regard for natural boundaries, and regard for boundaries of political subdivisions.

While Article I of the U.S. Constitution gives the States primary responsibility for the apportionment of federal congressional districts, it also reserves to Congress the power to override decisions made by the States. Article I, § 4, provides that "the Congress may at any time by Law make or alter such [state] Regulations" pertaining to the election of federal representatives. U.S. Const., art. I, § 4, cl. 1. And over the years Congress has exercised that authority in various ways. In 1842, it required that members of the House of Representatives be elected from single-member districts composed of contiguous territory. Apportionment Act of 1842, ch. 47, 5 Stat. 491. In 1872, it required further that districts contain, "as nearly as practicable[,] an equal number of inhabitants." Apportionment Act of 1872, ch. 11, § 2, 17 Stat. 28. In 1901, it added a compactness requirement. Apportionment Act of 1901, ch. 93, § 3, 31 Stat. 733, 734. In 1911, it again imposed

requirements of contiguity, compactness, and equality of population. Apportionment Act of 1911, ch. 5, § 3, 37 Stat. 13, 14. But as it stands today, Congress only requires that the States create single-member districts. *See* 2 U.S.C. § 2c. The single-member-district requirement "produce[s] a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Thus, while the single-member-district requirement effects a more democratic result, it is this requirement that gives rise to apportionment disputes and gerrymandering.

As the Supreme Court has observed, "[i]t is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Gaffney*, 412 U.S. at 753. And those state officials charged with redistricting will of course "recognize the political consequences of drawing a district line along one street rather than another." *Id.* The practical "reality is that districting inevitably has and is intended to have substantial political consequences." *Id.*; *see also Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities, *see* Art. I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics"). Thus, because the Constitution commits district apportionment to political departments, it is quintessentially a political process, and courts cannot invalidate a redistricting map merely because its drafters took political

considerations into account in some manner. *See Gaffney*, 412 U.S. at 752–53.

Nonetheless, when political considerations are taken into account to an extreme, the public perceives an abuse of the democratic process without fully understanding how it can be resolved within the existing structure. Indeed, partisan gerrymandering, as it is called, is widely considered to be repugnant to representative democracy. As stated earlier in this case:

> The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity. The problem is cancerous, undermining the fundamental tenets of our form of democracy.

Benisek v. Lamone, 266 F. Supp. 3d at 818 (Niemeyer, J., dissenting); *see also Shapiro*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting) (noting that gerrymandering is a "noxious" practice with "no place in a representative democracy"). Moreover, the Supreme Court, with no disagreement from any Justice, has concluded repeatedly that severe partisan gerrymandering is incompatible with democratic principles, *see, e.g.*, *Vieth*, 541 U.S. at 292 (plurality opinion), as it threatens "the core principle of republican government" — "that the voters should choose their representatives, not the other way around," *Ariz. State Legislature v. Ariz.*

Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks and citation omitted).

Consistent with these concerns, in an earlier case addressing alleged racial discrimination with respect to the same 2011 redistricting plan, we noted that the shape of Maryland's Third Congressional District resembled a "broken-winged pterodactyl lying prostrate across the center of the State." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 n.5 (D. Md. 2011) (Niemeyer, J.). And, to be sure, that pterodactyl still lies there, broken-winged. Yet, any effort to address misshapen districts simply based on shape would likely stray beyond the province of the courts. We thus begin with the recognition that reviewing the political activity giving rise to the 2011 redistricting law ordinarily is not a role conferred on the courts.

But, even as we recognize that the districting process is largely political in nature, we also understand that state officials are always limited by specific provisions of the U.S. Constitution. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained" (emphasis added)). And when state officials violate specific provisions of the Constitution in carrying out their districting responsibilities, courts must not hesitate to fulfill their constitutionally assigned role. As the Supreme Court has stated, the political nature of redistricting does not "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the

constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*. . . . The right to vote is too important in our free society to be stripped of judicial protection. . . ." *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964) (citations omitted).

In this vein, the Supreme Court has over the years applied specific constitutional provisions to regulate particular apportionment plans. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held justiciable a claim alleging that a state legislative map establishing districts with unequal populations violated the Equal Protection Clause. Similarly, in *Wesberry*, the Court held that Article I, § 2's provision for the election of representatives "by the People" meant that "one man's vote in a congressional election is to be worth as much as another's," 376 U.S. at 7–8, so that today congressional districts must be drawn "with populations as close to perfect equality as possible," *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

The Court has also held that racial discrimination in the districting process violates the Equal Protection Clause, *see Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993), and has approved remedial redistricting in cases of racial gerrymandering, *see, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam).

And in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court recognized that diluting the votes of one political party's members in the districting process could

violate the Equal Protection Clause. But establishing a standard under the Equal Protection Clause to give effect to *Bandemer*'s conclusion has proven elusive for the Court. *See Gill*, 138 S. Ct. at 1926–29 (describing the Court's efforts over the years in *Gaffney, Bandemer, Vieth*, and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), to articulate a standard). Nonetheless, when a districting plan, even though the product of a political process, is alleged to have injured those before the court in violation of a specific provision of the Constitution, the court must exercise its role by applying the standards attending the constitutional right at issue.

In this case, we have concluded that the plaintiffs' claims state a viable cause of action in alleging that Maryland's 2011 redistricting plan violated the First Amendment by burdening their representational and associational rights based on their party affiliation and voting history. *See Shapiro*, 203 F. Supp. 3d 579. To be sure, the Supreme Court has not directly addressed allegations that a redistricting plan has violated the First Amendment, but it has indicated clearly that such a challenge is not precluded by its decisions or by the Constitution. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State show[ed] some compelling interest"); *id.* ("The First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection

Clause. . . . The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association"); *Shapiro*, 136 S. Ct. at 456 (noting that the plaintiffs' legal theory in this case — which is premised on the First Amendment rather than the Equal Protection Clause — is "uncontradicted by the majority in any of [the Court's] cases"); *see also Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (recognizing that "partisan gerrymanders may infringe the First Amendment rights of association held by parties, political organization, and their members"). As Justice Kennedy explained, "After all, . . . allegations [of unconstitutional partisan gerrymandering] involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Relying on decisions such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000), he stated:

> As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect

> of burdening a group of voters' representational rights.

541 U.S. at 314. The plaintiffs in this case make these very allegations, contending that the partisan gerrymander effected by Maryland's 2011 congressional redistricting plan injured both their representational rights and their associational rights by reason of their political views, in violation of the First Amendment.

III. Representational Rights

It is fundamental that "the Constitution of the United States protects the right of all qualified citizens to vote," *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), and that a citizen's right to vote is "individual and personal in nature," *id.* at 561. Indeed, "the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (emphasis added). Expounding on the significance of this representational right, the Supreme Court has explained:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in th[is] political process[ ]. . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens . . . requires, therefore, that*

> *each citizen have an equally effective voice in the election of [a representative].*

Reynolds, 377 U.S. at 565 (emphasis added).

Based on these foundational principles, the Supreme Court has long recognized that the Constitution prohibits States from drawing legislative districts with unequal populations — for "[i]f districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts." *Bd. of Estimate of N.Y.C. v. Morris*, 489 U.S. 688, 693–94 (1989). Indeed, when a State discharges its constitutionally conferred duty to create congressional districts, it must draw "districts with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124.

While a State can thus literally contract the value of a citizen's vote by placing the citizen in an overpopulated district, it can similarly contract the value of a citizen's vote by placing the citizen in a district where the citizen's political party makes up a smaller share of the electorate, thereby reducing the citizen's chance to help elect a candidate of choice. *Cf. Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government").

To be sure, citizens have no constitutional right to be assigned to a district that is likely to elect a

representative that shares their views. But they do have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history. Put simply, partisan vote dilution, when intentionally imposed, involves the State penalizing voters for expressing a viewpoint while, at the same time, rewarding voters for expressing the opposite viewpoint. This targeting of a citizen's viewpoint is typical of First Amendment violations in other contexts. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books"). As the Supreme Court has explained, "[E]ven though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely," chief among them, a person's political viewpoint, as expressed in his party affiliation and voting history. *Rutan*, 497 U.S. at 72 (internal quotation marks and citation omitted).

Applying traditional First Amendment jurisprudence to government action in redistricting, we previously held in this case that a plaintiff states a claim

under the First Amendment when he demonstrates (1) that "those responsible for [a redistricting] map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) that "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) that "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Shapiro*, 203 F. Supp. 3d at 596–97. When the plaintiff makes a sufficient showing of these requirements, "the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest." *Id.* at 597.

Before turning to address the merits, however, we address the threshold argument raised by the State that the "[p]laintiffs here have failed to produce evidence sufficient to establish that they suffered legally cognizable individual harm," as necessary to satisfy the injury-in-fact component of Article III standing.

A

Consistent with Article III of the Constitution, which limits the jurisdiction of federal courts to "Cases" and "Controversies," courts must "exercise power that is judicial in nature," rather than "serv[ing] as a forum for generalized grievances." *Lance v. Coffman*, 549 U.S. 437, 439, 441 (2007). As such, "a plaintiff may not

invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy,'" *Gill*, 138 S. Ct. at 1929 (quoting *Baker*, 369 U.S. at 204), which he does by "satisfy[ing] the familiar three-part test for Article III standing: that he '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision,'" *id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "Foremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the 'invasion of a legally protected interest' that is 'concrete and particularized,' *i.e.*, which 'affect[s] the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)). The "irreducible constitutional minimum of standing" is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case," which "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . at the successive stages of the litigation." *Lujan*, 504 U.S. at 560–61.

The Supreme Court applied these principles specifically to the context of a partisan gerrymandering claim premised on vote dilution in *Gill v. Whitford*. In *Gill*, a group of Democratic voters from Wisconsin filed a complaint challenging the 2011 redistricting plan for that State's legislature, alleging that the plan constituted an unconstitutional partisan gerrymander that "unfairly favor[ed] Republican voters and candidates" by "cracking" and "packing" Democratic voters

throughout the State. 138 S. Ct. at 1923–24 (internal quotation marks omitted). Several of the *Gill* plaintiffs alleged that they lived in districts where Democrats had been cracked or packed, and all of them alleged that, regardless of whether they personally lived in such a district, they had been harmed because the manipulation of district boundaries across the State affected the legislature's overall composition. *Id.* at 1924. The case proceeded to trial, where the plaintiffs focused on their theory of *statewide* injury rather than offering proof that any of their particular districts had been cracked or packed. *Id.* at 1932.

On appeal, the Supreme Court vacated the district court's judgment in favor of the plaintiffs and remanded for further proceedings, holding that the plaintiffs had failed to show "standing under the theory upon which they based their claims for relief." *Gill*, 138 S. Ct. at 1929. The Court explained that because "a person's right to vote is 'individual and personal in nature,'" *id.* (quoting *Reynolds*, 377 U.S. at 561), "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage," *id.* (quoting *Baker*, 369 U.S. at 206). The *Gill* plaintiffs did allege "that they suffered such injury from partisan gerrymandering, which works through 'packing' and 'cracking' voters of one party to disadvantage those voters." *Id.* at 1930. But the Court explained, "[t]o the extent the plaintiffs' alleged harm [was] the dilution of their votes, *that injury [was] district specific*" because the voter "votes for a single representative." *Id.* (emphasis added). As a

result, it is "the boundaries of the particular district in which [a voter] resides" — "and the composition of its voters" — that determine whether and to what extent that voter has been "'disadvantage[d] . . . as an individual.'" *Id.* (brackets omitted) (quoting *Baker*, 369 U.S. at 206). The Court noted that the remedy for such partisan gerrymandering "lies in the revision of the boundaries of the individual's own district." *Id.* In sum, the voter alleging a dilution violation *in his district* has standing to sue for that violation.

But the Court rejected the plaintiffs' theory of a "*statewide harm* to their interest 'in their collective representation in the legislature,'" reasoning that "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative" and that "the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes," which in turn "arises through a voter's placement in a 'cracked' or 'packed' district." *Gill*, 138 S. Ct. at 1931 (emphasis added). Because the plaintiffs did not seek to show the requisite harm "that he or she live[d] in a cracked or packed district" but proceeded "on their theory of statewide injury," the Court concluded that the plaintiffs had failed to demonstrate Article III standing. *Id.* at 1932. But "in light of the plaintiffs' allegations that [certain of them] live[d] in districts where Democrats like them have been packed or cracked," the Court "decline[d] to direct dismissal" and instead "remand[ed] the case to the District Court so that the plaintiffs [might] have an opportunity to prove concrete and particularized injuries

using evidence . . . that would tend to demonstrate a burden on their individual votes." *Id.* at 1934.

The plaintiffs in this case, unlike the plaintiffs in *Gill*, have brought and pursued the kind of single-district challenge that *Gill* recognized as providing such plaintiffs with standing. Here, all seven plaintiffs are registered Republicans who lived in Maryland's Sixth District prior to the 2011 redistricting plan. Three still live in the Sixth District, while the other four were moved to the neighboring Eighth District. And ever since the filing of their Second Amended Complaint, their theory of the case has been that those responsible for the redistricting plan intentionally and successfully "cracked" the formerly Republican Sixth District by removing many of the precincts that had historically supported Republican candidates and replacing them with overwhelmingly Democratic precincts.

After *Gill*, it is clear that if the plaintiffs show, as they have alleged, that the State deliberately acted to flip the former Sixth District from one very likely to elect the Republican candidate for Congress to one quite likely to elect the Democrat, they will have established that the State made it materially harder for them to play a role in electing a candidate of choice. They would, in short, establish a "disadvantage to themselves" in their capacity as individual voters and their "'standing to sue' to remedy that disadvantage." *Gill*, 138 S. Ct. at 1929 (quoting *Baker*, 369 U.S. at 206).

B

Turning to the merits, we conclude, based on the summary judgment record, that the plaintiffs have sufficiently established each element of their First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history. Relying on undisputed facts, the plaintiffs have shown that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

First, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's congressional delegation. Governor O'Malley, who was responsible for the redistricting process, asked Congressman Hoyer to lead the redistricting effort, and Hoyer retained NCEC to draw up district maps that (1) protected Democratic incumbents and (2) flipped the Sixth District from Republican to Democratic control. Hawkins, an NCEC analyst, followed those two commands and prepared district maps using NCEC's proprietary DPI metric to assess the likelihood that a district would elect a Democratic candidate. He homed in on maps where the data predicted a Democratic victory in the Sixth District, unlike maps submitted by third parties, which had sub-50% DPI values for the Sixth District. Hawkins

submitted maps to the Democratic members of Maryland's congressional delegation, at least one of which the delegation passed on to Maryland Democratic officials who were members of the Governor's Redistricting Advisory Committee. Moreover, the underlying precinct-level DPI data were shared with the officials' staffers, who then used that information, along with State data on party registration and voter turnout, to develop a final map with a 53% DPI for the Sixth District, which the Governor submitted to the General Assembly and the General Assembly promptly adopted. Reliance on the DPI in finalizing a map was essential to achieving the specific intent to flip the Sixth District from safely Republican to likely Democratic.

Moreover, the record is replete with direct evidence of this precise purpose. For example, notes prepared for state Senate President Miller's remarks to the state House and Senate Democratic Caucuses about the redistricting plan emphasized that the map "create[d] an opportunity for Montgomery County to control two congressional districts"; "preserve[d] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% [DPI]"; and "g[ave] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177–23. Governor O'Malley admitted that he intended to "create a district where the people would be more likely to elect a Democrat than a Republican." O'Malley Dep. 82; *see also id.* at 27–28 (describing aim of "put[ting] more Democrats and Independents into the Sixth District" to help ensure "the election of another

Democrat"). Senate Majority Leader Garagiola admitted that "one of the purposes[ ] [was] to make the Sixth Congressional District have 53 percent Democratic performance." Garagiola Dep. 16, 27. These sorts of statements, particularly by delegates and state senators during the General Assembly's abbreviated consideration of the proposed map, are legion. *See, e.g.*, Joint Stipulations ¶¶ 40–51.

The State's argument that its officials intended only "to allow Democrats to have an equally effective voice in the election of a representative" in the Sixth District — an intent that it argues "cannot be equated with an intent to burden [Republicans'] representational rights" — rings hollow. Even if the intent to make one party "more competitive" were constitutionally permissible, the record shows something materially different. Democratic officials, with the help of NCEC, worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat by removing Republicans from the District and adding Democrats in their place.

Moreover, the State's argument fails to appreciate the requirements of the law. If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party. The First Amendment does not — indeed, cannot — distinguish between these intents because they are one and the same when applicable to two-party elections. It is impossible to flip a seat to the Democrats without flipping it away from

the Republicans. Thus, when the government targets a class of persons based on the persons' political affiliation and voting and then acts so as to burden their representational rights, it has run afoul of the First Amendment, no matter how it characterizes its intent.

The State also argues that its officials did not act with impermissible intent because they did not target *specific* voters based on their individual party affiliation or voting history. This argument, too, is based on a misunderstanding of First Amendment jurisprudence. Here, the plaintiffs have shown that they were targeted for disfavored treatment because of a shared marker of political belief — their Republican Party affiliation. The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment. *Cf. Miller*, 515 U.S. at 920 (condemning State's *targeting of areas* with "dense majority-black populations" for inclusion in district).

At bottom, given the overwhelming direct and circumstantial evidence, there can be no doubt that at every stage of the process, the State's Democratic officials who put the 2011 redistricting plan in place specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent. The plaintiffs have amply established the intent element of their claim.

Second, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights. At the threshold, it is important to reiterate that, under the standard set forth in our denial of the State's motion to dismiss, a plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election — though such a showing would certainly be relevant evidence of the extent of the injury. *See Shapiro*, 203 F. Supp. 3d at 598. And, contrary to the State's argument, the plaintiffs need not show that the new Sixth District was *certain* to produce a Democratic congressman to establish injury to their rights as voters. Indeed, it would only be a "perfect" gerrymander where "a voter [who] lives in a cracked district" stands "*no* chance" of having her preferred candidate prevail. *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring) (emphasis added). Rather, *the plaintiffs must show only that their electoral effectiveness — i.e., their opportunity to elect a candidate of choice — was meaningfully burdened*, and, of course, that this burden was intentionally imposed for partisan reasons. That is, the plaintiffs must have experienced a "demonstrable and concrete adverse effect" on their "right to have 'an equally effective voice in the election' of a representative,'" which they can establish by showing that they have been placed at a concrete electoral disadvantage. *Shapiro*, 203 F. Supp. 3d at 598 (quoting *Reynolds*, 377 U.S. at 565).

The plaintiffs here have made that showing. By several measures, the dramatic redrawing of the Sixth District's boundaries disfavored Republican voters. In creating the map, the State, on net, removed roughly 66,000 registered Republicans from the Sixth District and added some 24,000 registered Democrats, such that Republican voters went from outnumbering Democrats 1.3 to 1 (47% of the District's registered eligible voters being Republicans and 36% Democrats) to nearly the exact inverse (44% Democrats, 33% Republicans). Joint Stipulations ¶¶ 10, 53. According to the DPI metric used by the mapmakers themselves, as well as the Cook PVI metric endorsed by the State's expert, Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so. Indeed, the Cook report deemed the district's swing — from R+13 and "Solid Republican" to D+2 and "Likely Democratic" — the largest of any district in the country. ECF No. 177-52 at 6–8. And, historically, "Likely Democratic" districts elect a Democrat 94% of the time. *See* Campbell, *supra*, at 628.

Moreover, while the State's linedrawing need not have changed the outcome of an election to be culpable, the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence that the Republican voters have suffered a cognizable injury. In other words, the Democratic officials who drew the map achieved

exactly what they aimed to do — to make Republican voters in the Sixth District less effective.

Finally, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

The 2010 census required shifting only a small number of residents — 10,186 — from a district consisting of over 720,000 residents. While adjustments to other districts to achieve equal population or other legitimate goals might also have resulted in some additional adjustments to the Sixth District, the record shows no legitimate basis for the wholesale removal of 360,000 residents in the northern, more Republican portion of the Sixth District and their replacement with 350,000 residents from Montgomery County, a heavily Democratic area. To the contrary, the record conclusively shows that an illegitimate basis — the intent to flip party control — dictated the decision to so radically reshape the Sixth District.

All of these facts were consistent with the actual intent expressed by those responsible for the 2011 redistricting plan. Thus, the causal link between the State's intent and the harm to the targeted voters' representational rights could not be clearer. In short, the record refutes the conclusion that the actions were taken for any other reason than to carry out the specific intent expressed.

The State suggests that other causes were involved, but it fails to explain how the other causes gave rise to the massive shifts of population and the specific targeting of Republicans. It notes, for example, that the need to prevent the new First District from crossing the Chesapeake Bay gave rise to extending the First District around the northern part of the State, effectively requiring that the eastern boundary of the Sixth District be moved westward. Even accepting this suggestion — and, indeed, other similar adjustments to accommodate precise populations and other legitimate redistricting goals — none explains the dramatic exchange of populations between the Sixth and Eighth Districts. Moreover, the State's suggestions do not explain the undisputed fact that virtually all the Democratic officials involved stated that the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic control.

The State separately suggests that there was an expressed interest in grouping residents along the Interstate 270 corridor in one district. As for this argument, however, there is no evidence that the presence of an interstate highway running from the City of Frederick to southern Montgomery County was the reason for the reconfiguration of both the Sixth and Eighth Districts, as distinct from a post-hoc rationalization. In fact, there is affirmative evidence that the I-270 corridor was *not* a reason for the reconfigurations, including both the utter implausibility of the rationale and statements from key decisionmakers.

In short, while there may have been other causes that could have marginally altered the Sixth District, the striking actions complained of are not explained by the State's proffers.

Moreover, for these same reasons, the State has certainly not shown that its redistricting law was narrowly tailored to achieve a compelling government interest.

In sum, the record amply demonstrates that the State violated the First Amendment under the standard we previously set forth in this case; indeed, there is no way, based on this record, that we could conclude otherwise.

IV. Associational Rights

It is likewise well settled that the First Amendment protects the independent right to associate. *See NAACP v. Button*, 371 U.S. 415, 430 (1963) (noting that the First Amendment protects "the right 'to engage in association for the advancement of beliefs and ideas'" (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))); *id.* at 431 ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations" (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion))); *Patterson*, 357 U.S. at 460–61 (noting that "[e]ffective advocacy of both public

and private points of view, particularly controversial ones, is undeniably enhanced by group association"). And this right of association specifically includes the right to associate with political parties. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (noting that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views" and that the "First Amendment protects 'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986))). The Court has explained the importance of this right to associate with political parties, noting that "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356; *see also Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (explaining that, while restriction on primary voting did not "deprive [voters] of all opportunities to associate with the political party of their choice," it was nonetheless "a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association"). And the kinds of injury resulting from such associational violations are readily discernable and significant: "Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983).

It is therefore unremarkable that Supreme Court Justices have repeatedly recognized these principles in the context of partisan gerrymandering. Explaining that the First Amendment may be "more relevant" than the Equal Protection Clause for assessing partisan gerrymandering, Justice Kennedy reasoned that the First Amendment protects the interest "of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, *their association with a political party*, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (emphasis added). And focusing on political association in particular, Justice Kagan likewise observed only recently that plaintiffs can prove injury in the form of associational harm, as "distinct from vote dilution," by showing that the State has "burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1938–39 (Kagan, J., concurring). As she explained:

> [T]he associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. . . . Members of the

> "disfavored party" in the State, . . . deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). *See Anderson v. Celebrezze*, 460 U.S. 780, 791–792, and n. 12 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on . . . associational rights"). . . . By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

Id. at 1938 (citation omitted).

Accordingly, plaintiffs can prove a First Amendment partisan gerrymandering claim involving associational harm by demonstrating the elements of such a claim involving representational rights, but in lieu of the harm involving a burden on representational rights, they must prove a harm involving a burden on their associational rights. Thus, they must prove (1) intent, as described in Part III, *supra*; (2) that the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims; and (3) causation, again as described in Part III, *supra*.

Before turning to address the merits of the plaintiffs' claim premised on associational harm, however, we again address in this context the State's threshold argument that the plaintiffs have "failed to produce

evidence sufficient to establish that they suffered legally cognizable individual harm," as necessary to satisfy the injury-in-fact component of Article III standing.

A

The State's argument that the plaintiffs lack standing to bring a partisan gerrymandering claim premised on harm to their associational rights under the First Amendment is governed by the same principles applicable to the plaintiffs' claim for injury to their representational rights. *See* Part III.A, *supra*. Only the nature of the injury is distinct. While vote dilution diminishes the targeted voters' opportunity to elect a candidate of their choice, the associational injury is the burden imposed on the targeted party members' ability to affiliate with their political party to carry out its activities and achieve its aims. As Justice Kagan explained in *Gill*, "if the gerrymander ravaged the party [the plaintiff] works to support, then he indeed suffers harm, as do all other involved members of that party." 138 S. Ct. at 1938 (Kagan, J., concurring).

In this case, the plaintiffs claim that by moving, on net, 66,000 Republican voters — over 30% of the Republican voters — from the Sixth District and replacing them with a net of 24,000 Democratic voters, the Republican Party in the Sixth District was indeed "ravaged." As they showed and as described in more detail below, interest among potential Republican voters in the Sixth District declined, fundraising diminished,

and enthusiasm among members of the Republican Party was damaged. And certain of the plaintiffs specifically described facing this type of waning interest. We conclude that the plaintiffs, as the ones claiming to have personally suffered associational injury by reason of the 2011 redistricting, have standing to challenge its constitutionality.

B

Turning to the merits, we conclude, based on the summary judgment record, that the plaintiffs have sufficiently established their First Amendment partisan gerrymandering claim as premised on harm to their associational rights. The plaintiffs, relying on undisputed facts of record, again have shown that they are entitled to judgment as a matter of law.

First, as explained in Part III.B, *supra*, which is also applicable here, in redrawing the lines of the Sixth District, the State acted with constitutionally impermissible intent to disadvantage certain citizens based on their party affiliation and voting history.

Second, with respect to the injury element, the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights. Before the 2011 redistricting, the Sixth District was safely Republican. The Republican congressional representative in the District had been elected to represent the District since 1993, and he won reelection in 2010 by a margin of 28%. But to break that hold by the Republican Party, State officials moved over 30% of registered

Republican voters from the District based on their voting history and replaced them with Democratic voters. The plaintiffs have shown that thereafter voter engagement in support of the Republican Party dropped significantly.

Specifically, they demonstrated that, in midterm election years, Republican participation in Republican primaries in the counties that remained entirely in the Sixth District fell significantly. In Allegany County, for example, Republican voter participation went from 42.8% in the 2010 primary to 26.7% in the 2014 primary. ECF No. 191-11 at 3, 9–10. And for all counties that remained entirely in the District, Republican voter turnout in the primaries declined by roughly 30% from 2010 to 2014. The plaintiffs provided comparable statistics for other elections.

Further, testimony provided by several of the plaintiffs revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters — clear evidence that the plaintiffs were burdened in their ability to "band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party*, 530 U.S. at 574. Plaintiff Strine described how, after the redistricting, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time." Strine Dep. 61. As she put it, "[T]hey just [felt] disenfranchised that . . . they don't have somebody that represents them anymore." *Id.* at 63. Similarly, Plaintiff Ropp described how, while promoting

Republican candidates, she frequently met potential Republican voters who "didn't want to participate that time because it seemed too confusing." Ropp Dep. 37–38. And Plaintiff Cueman described personally feeling "disoriented" by and "disconnected" from his new congressional district in that he had "absolutely no connection with what is in [the] district except the portions of Frederick that were thrown in." Cueman Dep. 36–37.

The plaintiffs also demonstrated that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections.

We conclude that this undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened. Members of the Republican Party in the Sixth District, "deprived of their natural political strength by a partisan gerrymander," were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (citing *Anderson*, 460 U.S. at 791–92 & n.12).

Third, as to causation, the same evidence we cited in Part III.B, *supra*, also supports causation here. The massive and unnecessary reshuffling of the Sixth District, involving one-half of its population and dictated by party affiliation and voting history, had no other cause than the intended actions of the controlling

Democratic officials to burden Republican voters by converting the District into a Democratic district. And it was this reshuffling that caused the associational harms noted.

In short, the record amply demonstrates that the State burdened the plaintiffs' associational rights, which, when coupled with the plaintiffs' successful showing of causation and constitutionally impermissible intent, establishes that the State violated the First Amendment. Indeed, based on this record, it is hard to conclude otherwise.

V. Remedy

While the plaintiffs thus prevail on the merits, to obtain a permanent injunction, they must also establish (1) that they will suffer irreparable harm absent the injunction; (2) that remedies available at law, such as monetary damages, are inadequate; (3) that the balance of equities tips in their favor; and (4) that such an injunction would serve the public interest. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31–33 (2008).

We conclude that in this case, absent an injunction, the plaintiffs will suffer irreparable harm that cannot be remedied at law. Because the State's enactment of the 2011 redistricting law violated the plaintiffs' First Amendment rights, it is well recognized that the plaintiffs are, and will be, experiencing ongoing constitutional injury in the absence of a new

redistricting map. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury"). And only an injunction mandating a new, lawful map, not money damages, can remedy this injury.

While the State does not really challenge these conclusions, it argues that the plaintiffs' interest in redress is weakened by the fact that any new map will only be in place for the 2020 election cycle. This argument presupposes that because there are five congressional elections after each decennial census, one unconstitutional election somehow lacks sufficient importance to justify a remedy. Unfortunately, this argument overlooks the fact that plaintiffs have ongoing associational injury and will suffer additional representational injury during both the 2020 primary election and the 2020 general election if the injunction is not entered. These are injuries resulting from a serious constitutional violation and do not deserve to be demeaned by an approach that tells the plaintiffs essentially "to bear it because it will be over soon" — "soon" meaning in two years. Every election employing constitutionally deficient districts causes irreparable harm. "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *League of Women Voters of N.C.*, 769 F.3d at 247.

With respect to the balance of the equities, the State relies on the Supreme Court's explanation for

affirming the denial of preliminary injunctive relief in this case based on the plaintiffs' delay in seeking that relief to argue that the balance tips in the State's favor with respect to now granting *vel non* a permanent injunction. *See Benisek*, 138 S. Ct. at 1944. But the difference between the plaintiffs' request for a preliminary injunction and their efforts to obtain a permanent injunction cannot be so quickly overlooked. The plaintiffs asked for a preliminary injunction, which operates only *pendente lite*, some three and a half years after this action was commenced, and the Supreme Court concluded that such delay was significant with respect to the interim relief being sought. But a permanent injunction, which we are now addressing, is the ultimate remedy that was sought in this action, and it was requested when the litigation was first commenced in 2013. While it is true that the case has dragged on, that protraction cannot be attributed to the plaintiffs, but to process. This case traveled to the Supreme Court twice and came back to us twice, and we have not seen any dilatory efforts during the process that was before us — either by the plaintiffs or by the State.

Finally, we conclude that a permanent injunction in this case will serve the public interest. It will redress a serious, ongoing constitutional injury and enable a large number of Maryland voters to more fully participate in congressional elections. While the State argues that a permanent injunction will be unduly disruptive, we note our judgment is being issued two years before the next general election — a time period that will

allow the State to comply in an orderly fashion. The relief sought in this case is discrete and limited, seeking only to remedy the redrawing of the Sixth District's lines in a manner that renders them constitutional. Indeed, the plaintiffs have proposed a map that would require modifying only the border between the Sixth and Eighth Districts. We are confident that the State, if it acts diligently, will have little trouble devising an alternative map in time for the 2020 election. Finally, we believe that redrawing district lines to comply with the Constitution will not sow any additional confusion beyond that caused by the illegal lines themselves.

Accordingly, we will enter an injunction (1) permanently enjoining the State from conducting any further elections for members of the U.S. House of Representatives under the 2011 congressional redistricting plan and (2) directing the State to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections.

BREDAR, Chief District Judge, concurring in the judgment:

Partisan gerrymandering is noxious, a cancer on our democracy. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (concluding that severe partisan gerrymanders are incompatible with democratic principles); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (stating

that to curb partisan gerrymandering is to restore "the core principle of republican government" that "voters should choose their representatives, not the other way around") (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Texas L. Rev. 781, 781 (2005)); *Gill v. Whitford*, 138 S. Ct. 1916, 1940–41 (2018) (Kagan, J., concurring) ("At its most extreme, [partisan gerrymandering] amounts to 'rigging elections.'"). The present danger of partisan gerrymandering is obvious to courts and scholars alike. *See, e.g.*, Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 838 (2015) ("[T]he problem of gerrymandering has never been worse in modern American history."). Yet, setting a standard by which to measure the lawfulness of particular partisan gerrymanders has, to date, proven impossible. Today, this Court addresses partisan gerrymandering against the backdrop of this case's long legal history and the many precedential cases that have come before. While I do not agree with all of Judge Niemeyer's analysis, I wholeheartedly join the conclusion that the current Maryland gerrymander infringes the plaintiffs' valuable associational rights protected by the First Amendment. Accordingly, I concur in the judgment invalidating the 2011 reconfiguration of Maryland's Sixth Congressional District.

As the Supreme Court made clear in *Vieth*, a legal standard employed to measure the lawfulness of partisan gerrymanders "must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at

278. Otherwise, it is not justiciable.[1] From 1986 until today, the Court has rejected standard after standard as not workable and, consequently, nonjusticiable. *See Davis v. Bandemer*, 478 U.S. 109 (1986) (articulating, as a plurality, that a justiciable partisan gerrymandering claim requires a showing of intent to discriminate and a denial of a group's chance to influence the political process); *Vieth*, 541 U.S. at 306 (holding that the *Bandemer* plurality standard failed and concluding that partisan gerrymandering claims are effectively nonjusticiable); *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting) (proposing a standard); *Vieth*, 541 U.S. at 343 (Souter, J., dissenting) (same); *Vieth*, 541 U.S. at 355 (Breyer, J., dissenting) (same); *see also Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 WL 5868225, at *2–3 (N.D. Ill. Nov. 22, 2011) (listing rejected partisan gerrymandering standards). Here, Judge Niemeyer, joined by my colleague Judge Russell, puts forth an insightful majority opinion, one with which I agree in many respects. Compelling as the opinion is, though, my reading of *Vieth* and its progeny prevent me from joining it.

I cannot join because Judge Niemeyer's opinion leans on the results of elections in assessing the

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[1] *See Republican Party of N.C. v. Martin*, 980 F.2d 943, 950 (4th Cir. 1992) ("Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.") (alteration in original); *Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal.").

lawfulness of the Maryland gerrymander. His opinion for the Court considers evidence of electoral outcomes as proof that the gerrymander succeeded — in short, that the map-drawers flipped the Sixth District from red to blue. In considering this evidence, the opinion performs a causation analysis — under both the representational rights and associational rights theories — that would ask future courts to discern whether a given electoral outcome resulted from a legislative manipulation of voters or from the voters themselves changing their minds. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 602, 606 (D. Md. 2016) (Bredar, J., dissenting); *see also id.* at 600 ("[T]he courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus voluntarily changed its tune."). The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging — perhaps impossible — to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did. The Supreme Court's requirements for a standard are exacting in this context, so much so that the Court has cast aside numerous attempted standards. Assessing causation by examining the outcome of any given election will always be problematic. And, such a problematic test probably does not satisfy the requirement of *Vieth* that the tool used to gauge lawfulness be "principled, rational, and based upon reasoned distinction." *Vieth*, 541 U.S. at 278. Because this problematic causation analysis permeates Judge Niemeyer's opinion, I write separately.

I concur on narrower grounds, rejecting the representational rights theory once again, *Shapiro*, 203 F. Supp. 3d at 602 & n.2, but embracing much of the associational rights theory. First, the representational rights analysis appears to line up with the many other valiant — though nonetheless rejected — attempts at crafting a standard for partisan gerrymandering claims because it does not articulate a sufficiently concrete and measurable standard. Beyond the causation problems connected to reliance on electoral outcomes for proof, it also leaves unanswered the line-drawing question: how much political consideration is *de minimis* and how much violates the Constitution? *See, e.g.*, *Vieth*, 541 U.S. at 291 (rejecting as not judicially manageable a standard that weighs factors "with an eye to ascertaining whether the particular gerrymander has gone too far"). By contrast, an associational rights analysis — one that is stripped of evidence of electoral outcomes — is different; it poses no line-drawing problem. This narrowed associational rights analysis yields a workable standard that, when applied in this instance, reveals a constitutional violation. Even without any evidence of electoral outcomes, the plaintiffs have established a retaliation violation of their First Amendment right to associate. I therefore concur in the judgment.

As articulated by Judge Niemeyer, plaintiffs can establish a partisan gerrymandering First Amendment retaliation violation involving associational harm when they prove that: (1) those responsible for the redistricting drew the boundaries with the specific

intent to impose a burden on plaintiffs and similarly situated citizens because of how they voted or the political party with which they were affiliated; (2) "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims"; and (3) the map-drawers' intent to burden was a but-for cause of the adverse impact. Part IV, *ante*, at 52. The plaintiffs presented ample evidence of intent, which Judge Niemeyer lays out in detail. *See* Part III.B, *ante*, at 42–45.[3] His opinion also details how the plaintiffs prove harm and causation, citing sufficient evidence to prove a constitutional violation. I add that no mention of electoral outcomes is necessary to prove such a violation, and, indeed, any mention must be omitted to establish a workable standard under *Vieth*.

Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win the Sixth District, the State certainly caused harm. The State targeted voters because of the political party affiliation they claimed (Republican) and with whom they associated (other Republicans). The State *retaliated* against voters for those associations. This harm differs from a violation of representational rights in that it does not matter if "[a voter's] individual vote carries . . . less weight than it did

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[3] Evidence of a map-drawer's intent to impact the election does not pose the same justiciability problems as proving that the election was impacted in fact. The latter is dependent on how people vote. Courts cannot and should not try to answer the question of whether a partisan gerrymander succeeded in changing the outcome of an election. There are simply too many variables in play — variables that courts are not equipped to measure.

before." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Rather, the gerrymander of Maryland's Sixth Congressional District deprives the disfavored group of voters of its "natural political strength" by building roadblocks to "fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Id.* This harm occurs before Election Day and persists long after. And, it is not measured by the outcome of a given election.

Illustrative examples of associational harm exist in the record before this Court. For one, during the 2011 redistricting process, the State divided Frederick County for the first time since 1840. Willis Dep. at 122 (ECF No. 177-14). Frederick County would constitute a community of interest under almost any definition of the term. The redistricting map shows that the State carved out the county seat, the City of Frederick, and siphoned the City and the County's more competitive precincts away from the more solidly Republican precincts. McDonald Expert Report at 23 & Figure 6 (ECF No. 177-19). Sometimes a state may have to divide communities of interest in order to draw equal districts after a movement in population; however, the division of Frederick County is not such a collateral consequence. Coupled with ample evidence of legislative intent, the scooping out of Frederick's county seat and competitive precincts constitutes a blatant targeting of and retaliation against the Republicans in Frederick County. One Frederick County resident, who was

moved from the Sixth to Eighth District, noted that he felt disoriented and disconnected after the redistricting: "I have absolutely no connection with what is in this district except the portions of Frederick that were thrown in." Cueman Dep. at 36–37 (ECF No. 177-55). This is the essence of associational harm.

Here, the plaintiffs establish associational harm because they present evidence, primarily in the form of voter testimony, that the gerrymander "ravaged the party." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). The map-drawers removed over 66,000 registered Republicans from the Sixth District and added over 24,000 Democrats. Joint Stipulations ¶¶ 10, 53 (ECF. No. 177-5). When the redistricting map arose in committee and, subsequently, on the legislative floor, not a single Republican senator or delegate voted for it. Joint Stipulations ¶ 36. The plaintiffs present testimony, which Judge Niemeyer summarizes, Part I.A, *ante*, at 22–25, showing that numerous Republicans from the Sixth District felt disenfranchised and said that their vote no longer mattered. Strine Dep. 61–63 (ECF No. 177-53); Cueman Dep. at 36. The plaintiffs testified that the 2011 redistricting foiled Republican organizational efforts. Volunteers spent significant time helping voters determine in which district they were voting. Ropp Dep. at 36–38 (ECF No. 177-54). And, Republicans lacked enthusiasm, repeating "there's just no point in voting anymore" because it seemed like "a losing race." Strine Dep. at 63. The plaintiffs cite corroborating evidence that Republican voter turnout dropped, and Republican fundraising dropped too.

Voter Turnout Statistics for 2010 and 2014 Maryland Congressional Primary Elections at 3 (ECF No. 191-11); Stein Decl. at 8 (ECF No. 210-3).

Turning to causation, I note that the definition of associational harm simplifies the analysis and avoids any line-drawing problem. For an associational rights violation, the causation analysis stops when the map-drawers sketch the lines, adopt the plan, and make it law. There is no need to look to Election Day. The harm has already occurred. Members of the disadvantaged party have been severed from their preferred associates. Consequently, they feel that voting is futile. Organizers cannot effectively recruit volunteers or fundraise. Ties to communities of interest are diminished. The gerrymander has "ravaged the party" before its members can even go to the ballot box. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Because map-drawers inevitably move, with each redistricting, some voters into districts in which their votes will carry less weight, any theory that relies on measuring vote dilution depends on drawing a line at which point the dilution is too much. By contrast, under an associational rights theory, any retaliation against a voter based on his or her affiliations is a constitutional violation. For that reason, the theory is more concrete and the violation more measurable.

I conclude that a First Amendment retaliation claim involving associational harm is not only

cognizable,[3] it is capable of measurement and assessment by concrete standards. Such a claim is therefore justiciable in the partisan gerrymandering context. Although I disagree with Judge Niemeyer and Judge Russell's focus on vote dilution and electoral outcomes, I do agree with my colleagues in a principally important respect: the plaintiffs have established as a matter of law that the State retaliated against them in violation of their First Amendment rights. Accordingly, I concur in the judgment docketed with the Court's opinions.

RUSSELL, District Judge, concurring:

I entirely concur in Judge Niemeyer's fine opinion for the Court. There is an illegal, partisan gerrymander in Maryland, and it succeeded in flipping the Sixth District.

I agree with Judge Niemeyer that evidence of impact on election results is relevant and germane to the

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[3] Arguably, as I frame the problem, this is no longer even an issue of "gerrymandering," if that term is understood to be the purposeful drawing of district boundaries to affect the outcome of elections. As I have framed the issue and its resolution, the State here may be guilty of "gerrymandering," but they are also guilty of a separate and different misconduct — the intentional retaliation against certain individuals because of their affiliation with a particular political party. In this sense the case, at least for my purposes, is not about voting or the outcome of particular elections. But it is most certainly about the unjustified and illegal retaliation, by state actors, against individuals in consequence of their having exercised a core constitutional right.

adjudication of associational claims, and that such evidence is non-problematic in that context. However, I also agree with Chief Judge Bredar's separate conclusion that a First Amendment retaliation claim is sufficiently stated and justiciable *without reference to the results of particular elections*. Accordingly, on the record of this case, in addition to joining Judge Niemeyer, I join Chief Judge Bredar's narrower opinion because I agree that the Plaintiffs have proven that they were the victims of First Amendment retaliation wholly apart from the impact on any election. In my view, Plaintiffs prevail on *both* the broad theory articulated by Judge Niemeyer *and* the narrow one expressed by Chief Judge Bredar.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 1:13-cv-03233-JKB
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

JUDGMENT

(Filed Nov. 7, 2018)

For the reasons given in the court's memorandum opinions, the court grants the plaintiffs' motion for summary judgment and denies the defendants' cross-motion for summary judgment.

After the conclusion of the 2018 congressional election, the defendants (referred to as the State) are permanently enjoined from conducting any further election for members of the U.S. House of Representatives from Maryland under the 2011 congressional redistricting plan and are directed forthwith to submit to the court a new congressional redistricting plan that redraws the boundaries of the Sixth Congressional District to address the constitutional violations found

with respect to that District. The State shall do so applying traditional criteria for redistricting — such as geographic contiguity, compactness, regard for natural boundaries and boundaries of political subdivisions, and regard for geographic and other communities of interest — and without considering how citizens are registered to vote or have voted in the past or to what political party they belong. In the circumstances of this case, the State might be well advised to establish a neutral commission to develop a conforming plan. Any new congressional redistricting plan must be approved by this court before it is actually employed.

As time is of the essence to have a new plan in place for conducting the 2020 congressional election, this judgment requires the State to submit its new plan for this court's review before March 7, 2019, at 5:00 p.m. Plaintiffs are required to submit any objections to the plan, along with their reasons, within 30 days after the State submits its plan. The court may deny plaintiffs' objections and accept the State's proposed redistricting plan, sustain the objections and modify the proposed plan, or reject the proposed plan entirely for failing to remedy the constitutional violation. If the court does so reject the proposed plan, the court will refer the redistricting process to the Commission detailed herein.

In the event that the State does not submit a plan by the specified deadline or proposes a plan that is rejected, the court will give the redistricting task to a Congressional District Commission appointed by the court to produce and submit an appropriate plan by

July 8, 2019, for approval by the court. The Commission shall consist of (1) United States Magistrate Judge J. Mark Coulson, as chair, (2) a person designated by the plaintiffs, and (3) a person designated by the State. The parties shall disclose the identity of their designees, none of whom may be employees of the State or the federal government, to each other and the court by January 7, 2019.* The Commission shall then retain a professional map-drawer to assist it. The State shall bear the costs of the Commission, including those of the map-drawer, as part of the costs in this action. The activities of the court-established Congressional District Commission will cease, and the Commission will be dissolved, upon approval by this court of a new congressional redistricting plan regardless of whether the approved plan was first submitted by the State or by the Commission.

Should any party fail to identify a designee to the Commission by January 7, 2019, the court will appoint one.

The State shall use the congressional redistricting plan developed in accordance with this judgment for all elections relating to the 2020 election of members of the U.S. House of Representatives from Maryland.

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* It is by design that the court seeks to establish the Commission two months before the State's deadline for its proposed redistricting plan. Time is of the essence, and the Commission must be ready to act promptly should the State fail to propose a conforming redistricting plan by March 7, 2019.

The Clerk shall assess the costs of this action against the State.

Entered this 7th day of November, 2018.

Circuit Judge Paul V. Niemeyer

Chief District Judge James K. Bredar

District Judge George L. Russell III

/s/ Paul Niemeyer
Paul V. Niemeyer, for the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
THREE-JUDGE COURT

O. John BENISEK, *et al.*,	*	
Plaintiffs	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
Linda H. LAMONE, *et al.*,	*	
	*	
Defendants	*	

* * * * * * * * * * * * * * * * * * *

MEMORANDUM

(Filed Aug. 24, 2017)

Before NIEMEYER, *Circuit Judge*, and BREDAR and RUSSEL, *District Judges*.

BREDAR, *District Judge*. On May 31, 2017, Plaintiffs O. John Benisek, *et al.* ("Plaintiffs") filed a Rule 65(a) Motion for a Preliminary Injunction and to Advance and Consolidate the Trial on the Merits or, in the Alternative, for Summary Judgment. (ECF No. 177.) The State responded on June 30, 2017, with a Cross-Motion for Summary Judgment. (ECF No. 186.) Both motions have been briefed. On June 28, 2017, this three-judge Court set in a hearing on Plaintiffs' preliminary injunction motion. On its own motion, the Court directed the parties to also address whether further proceedings in this case should be stayed pending the Supreme Court's decision in *Gill v. Whitford*, No. 16-1161, a political gerrymandering case set to be

argued in the forthcoming Term. A hearing on both matters was held on July 14, 2017.[1]

For the reasons explained below, the Court now DENIES Plaintiffs' preliminary injunction motion and STAYS this case pending the outcome of *Whitford*. As set forth in Part II.B, Judge Bredar concludes that such action is necessary because the justiciability of political gerrymandering claims remains in doubt, but the Supreme Court will likely resolve or clarify this threshold jurisdictional matter in its *Whitford* decision. As set forth in Part II.C, Judges Bredar and Russell conclude that Plaintiffs have not made an adequate preliminary showing that they will *likely* prevail on the causation element of their First Amendment retaliation claim. While the Court by no means excludes the possibility that Plaintiffs may ultimately prevail, Plaintiffs have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief. A stay pending further guidance in *Whitford* is appropriate at this juncture.

As set forth in his dissenting opinion, Judge Niemeyer would grant Plaintiffs' motion for preliminary injunctive relief.

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[1] In a pre-hearing scheduling order, the Court made clear that the *only* matters it would take up at the July 14 hearing were Plaintiffs' motion for preliminary injunctive relief and the Court's *sua sponte* request for argument on the propriety of a stay. (ECF No. 190.) The Court did not then, and does not now, rule on the pending cross-motions for summary judgment. Nor has the Court advanced the trial on the merits under Rule 65(a)(2).

I. Procedural History

A review of the recent history of this redistricting case may prove helpful. Following a remand from the Supreme Court on a procedural issue, *see Shapiro v. McManus* (*Shapiro I*), 136 S. Ct. 450 (2015), the case was assigned to a three-judge panel composed of Circuit Judge Niemeyer and District Judges Bredar and Russell. (ECF No. 42.) On March 3, 2016, Plaintiffs filed a Second Amended Complaint challenging Maryland's 2011 congressional districting map as an unconstitutional political gerrymander. (ECF No. 44.) The State moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 51.)

On August 24, 2016, the Court denied the State's motion to dismiss in a 2-1 decision, with Judge Bredar dissenting. *See Shapiro v. McManus* (*Shapiro II*), 203 F. Supp. 3d 579 (D. Md. 2016). In its ruling, the panel majority held that Plaintiffs' Second Amended Complaint stated a justiciable claim for relief. The majority went on to endorse a standard for assessing political gerrymandering claims under the First Amendment:

> When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote*

> *dilution*. . . . [T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. . . . Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.
>
> When a plaintiff adequately alleges the three elements of intent, injury, and causation . . . he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course . . . the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest.

Id. at 596–97.[2]

Following the Court's decision at the pleading stage, the parties entered a contentious period of

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[2] Judge Bredar disagreed that Plaintiffs had identified a workable standard because (1) "the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems"; and (2) courts are ill-equipped to "ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights," yet that is "precisely what the Supreme Court has required." *Shapiro II*, 203 F. Supp. 3d at 601 (Bredar, J., dissenting). Ultimately, Judge Bredar concluded, there is no reliable, administrable standard for "distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics." *Id.* at 606.

discovery, which resulted in voluminous procedural rulings that need not be reviewed here. At the conclusion of this discovery period, the parties filed their pending motions. (ECF Nos. 177, 186.)

As explained more fully in Part II, the Court concludes that preliminary injunctive relief is inappropriate at this stage because Plaintiffs have not shown that they can likely prevail on each of the three elements of their First Amendment claim. Moreover, any further proceedings—whether in relation to the pending cross-motions for summary judgment or at a bench trial—would be premature because the Supreme Court is poised to consider issues that go to the heart of Plaintiffs' gerrymandering case. Until the Supreme Court speaks, prudence compels this Court to stay further proceedings.

II. Analysis

A. Standard of Decision

1. Preliminary Injunction

Plaintiffs seek preliminary injunctive relief in the form of an order barring the State from enforcing the 2011 redistricting plan and requiring the State to implement a new map in advance of the 2018 midterm elections. To prevail on their motion for such relief, Plaintiffs must show (1) that they are likely to succeed on the merits of their political gerrymandering claim, (2) that they will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction

would serve the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). "A preliminary injunction is an 'extraordinary remed[y] involving the exercise of very far-reaching power' and is 'to be granted only sparingly and in limited circumstances.'" *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 588 (4th Cir. 2017) (alteration in original) (quoting *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)), *cert. granted*, 137 S. Ct. 2080 (2017).

Rule 52(a)(2) of the Federal Rules of Civil Procedure provides that in "granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action." *See Greenhill v. Clarke*, 672 F. App'x 259, 260 (4th Cir. 2016) (per curiam) ("Rule 52(a)(2) . . . requires that the district court make particularized findings of fact supporting its decision to grant or deny a preliminary injunction; such findings are necessary in order for an appellate court to conduct meaningful appellate review."); *accord Booker v. Timmons*, 644 F. App'x 219 (4th Cir. 2016) (mem.). Because Judge Bredar's discussion in Part II.B, concerning justiciability, involves a pure question of law, no findings are enumerated in that Part. However, the opinion of the Court in Part II.C, concerning the causation element of Plaintiffs' First Amendment theory, includes findings germane to that issue as well as separately stated conclusions of law. Such findings and conclusions are, given the procedural posture of this case, preliminary, and they will not bind the Court

in any future proceedings. *See Blake v. Balt. Cty.*, 662 F. Supp. 2d 417, 421 (D. Md. 2009) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

2. Stay of Proceedings

The Supreme Court has long recognized that the "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (recognizing that courts enjoy the inherent authority to grant a stay "under their general equity powers and in the efficient management of their dockets"). The decision to stay an action "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254–55; *see also Rogler v. Fotos*, Civ. No. WDQ-14-228, 2015 WL 7253688, at *13 (D. Md. Nov. 17, 2015), *aff'd*, 668 F. App'x 462 (4th Cir. 2016) (mem.); *Cutonilli v. Maryland*, Civ. No. JKB-15-629, 2015 WL 5719572, at *4 (D. Md. Sept. 28, 2015), *appeal dismissed*, 633 F. App'x 839 (4th Cir. 2016) (mem.).

In deciding whether to stay proceedings, a court should consider the likely impact of a stay on each party as well as the "judicial resources that would be saved by avoiding duplicative litigation if the case is in fact stayed." *Mitchell v. Lonza Walkersville, Inc.*, Civ. No. RDB-12-3787, 2013 WL 3776951, at *2 (D. Md. July

17, 2013) (citing *Yearwood v. Johnson & Johnson, Inc.*, Civ. No. RDB-12-1374, 2012 WL 2520865, at *3 (D. Md. June 27, 2012)).

B. Justiciability

At the pleading stage in *Shapiro II*, the panel majority recognized "the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation." 203 F. Supp. 3d at 598. Judge Bredar disagreed, writing that because (1) Plaintiffs had "not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened" and (2) no "acceptable alternative framework" had been identified, Plaintiffs' claim must be treated as nonjusticiable. *Id.* at 601–02 (Bredar, J., dissenting). Despite the disagreement among the members of the panel on this threshold issue, the majority opinion remains the law of the case absent reconsideration by at least two judges or intervention by the Supreme Court. This Memorandum does nothing to unsettle that prior decision.

However, this case has long since passed the pleading stage. Plaintiffs now seek preliminary injunctive relief in the form of an order that, if entered, would cause an unprecedented disruption in Maryland's legislative and districting process. In granting such relief, the Court would enjoin enforcement of a map that was duly enacted by the General Assembly of Maryland, *see* Md. Code Ann., Elec. Law §§ 8-701 *et seq.*, and that

survived a voter referendum by a wide margin. The remedy would require emergency action by the legislature. The time and resources necessary to implement a new map would surely have the effect of scuttling other legislative priorities in advance of the 2018 session. The remedy would be highly consequential.

In the arena of legislative and congressional districting, unelected federal judges should exercise great caution before declaring unconstitutional the work product of the people's elected representatives. *Cf. Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term.").

The preliminary injunction mechanism under Rule 65(a) of the Federal Rules of Civil Procedure does not authorize a federal court to grant such an extraordinary remedy haphazardly. Rather, the court must be confident, among other things, that the plaintiff has shown it is likely to prevail on the merits of its claim. *Winter*, 555 U.S. at 20. That assessment is quite different from the plaintiff-friendly evaluation of the pleadings under Rule 12(b)(6) and the Supreme Court's

decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A court that has made a preliminary legal determination in the plaintiff's favor must decide at the Rule 65(a) stage whether the plaintiff has carried its burden to show it will likely succeed on the merits. Intervening developments in the law and, in particular, signals from appellate courts, must inform this analysis.

In this case, an intervening development casts a cloud over the panel majority's prior ruling as to the justiciability of Plaintiffs' political gerrymandering claim. On June 19, 2017, the Supreme Court agreed to hear argument in *Gill v. Whitford*, No. 16-1161, a direct appeal from a decision by a three-judge panel that enjoined a Wisconsin legislative map as an unconstitutional political gerrymander. Argument is calendared for October 3, 2017. The decision below in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), is fairly remarkable in that it is the first district court opinion since the Supreme Court's splintered ruling in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to (1) endorse a standard for adjudicating political gerrymandering claims, (2) apply that standard to rule in the plaintiff's favor, and then (3) order the state to draw a new map.[3]

In a 5–4 order, the Supreme Court stayed the district court's judgment pending disposition of the appeal. The Court declined to note probable jurisdiction,

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[3] The *Whitford* panel addressed the remedy separately in an unpublished opinion, *see Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360 (W.D. Wis. Jan. 27, 2017).

ordering instead that "[f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." Plaintiffs in this case brush aside the justiciability question in *Whitford* as the "last of the five questions presented" in that appeal (ECF No. 193 at 2), and the dissent makes no mention of *Whitford*. Yet the Supreme Court's decision to hold over the jurisdictional question for argument is a strong signal that the question remains unsettled in the minds of the Justices.

That should come as no surprise. The justiciability of political gerrymandering claims has plagued the Court for decades. As the panel majority observed in *Shapiro II*, six Justices acknowledged in *Bandemer* that such claims are theoretically justiciable, 478 U.S. at 125, but the Court fractured on the standard for adjudicating these claims. Conversely, Chief Justice Burger and Justices O'Connor and Rehnquist would have held that political gerrymandering claims "raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Id.* at 144 (O'Connor, J., concurring in the judgment).

Eighteen years later, the Court revisited the question in *Vieth*, where four Justices (Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas) would have held "that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." 541 U.S. at 281. Justice Kennedy, the swing vote, declined to sign on to the plurality opinion that would have overruled *Bandemer*, but he sounded sharp

notes of caution, writing that there are "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run." *Id.* at 309 (Kennedy, J., concurring in the judgment); *see also id.* at 317 ("The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.").

While the dissent in the instant case states that "five Justices in *Vieth* concluded that the [political gerrymandering] issue remained justiciable," *post*, at 828, Justice Kennedy's opinion was more guarded than that: it was so guarded, in fact, that the plurality characterized it as a "reluctant fifth vote *against* justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable." *Id.* at 305 (plurality opinion) (emphasis added); *see also* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 Ohio St. L.J. 1097, 1111 (2007) ("Justice Kennedy's ambivalence leaves it bizarrely unclear where the law of partisan gerrymandering stands. The plurality in *Vieth*, as a result, argued that Justice Kennedy's vote ought to be understood effectively, if not expressly, as 'a reluctant fifth vote against justiciability.'" (footnotes omitted)). Hardly a resounding triumph for those who would ask federal courts to adjudicate

political gerrymandering disputes, *Vieth* was the last case in which the Court squarely confronted the question.[4]

The Supreme Court's willingness to consider and reconsider the justiciability question is understandable, given how fundamental that question is to the exercise (and even the legitimacy) of federal judicial power. Justiciability is a threshold matter that courts are required to evaluate, *sua sponte* if necessary, before reaching the merits of a case. "Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 950 (4th Cir. 1992) (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *see also Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal."); *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 824 (D. Md. 1998) ("It is appropriate for a district court to raise issues of justiciability *sua sponte*.").

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[4] In *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 414 (2006), a majority of Justices declined to address the question of justiciability. Chief Justice Roberts and Justice Alito stressed in a separate opinion that they took "no position on that question, which has divided the Court." *Id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Scalia and Thomas reiterated their view that political gerrymandering claims are nonjusticiable. *Id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

Merely because the Supreme Court has agreed to hear argument in *Whitford* and has deferred the jurisdictional question, it does not necessarily follow that the Court will clear up the ambiguity next Term. The composition of the Court has changed dramatically since *Vieth*, as that case was decided before Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, and Gorsuch took their seats. Nonetheless, it is conceivable that the Justices could again divide as the Court did in *Vieth*, with a majority declining to agree on a standard but with at least five votes for the proposition that some standard might yet exist. Or perhaps the Justices will endorse the standard recognized by the three-judge court in *Whitford*, or some other standard; or perhaps they will rule finally that federal courts may not adjudicate these types of political questions. It would be idle to speculate as to the outcome of a case that has yet to be heard.

But with due respect to the other members of this panel, it would be irresponsible to grant a drastic remedy on the basis of a claim that the Supreme Court may invalidate in a matter of months. We know now that the Court is poised to consider the justiciability question. Guidance of some sort (maybe dispositive guidance) is forthcoming. Accordingly, to suggest that Plaintiffs are likely to prevail on the merits of their claim and to award injunctive relief on that basis would place the cart far ahead of the horse.

This is particularly so in light of a case to which neither party has devoted much attention and which, once again, the dissent does not mention. That case is

Cooper v. Harris, 137 S. Ct. 1455 (2017), a racial gerrymandering case decided late last Term. In a separate opinion, Justice Alito—joined by Chief Justice Roberts and, strikingly, Justice Kennedy—took a dim view on the justiciability of political gerrymandering:

> We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. . . . As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. Partisan gerrymandering dates back to the founding, and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering. . . ."

Id. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (citations omitted). Justice Alito stressed that the Court's cases require "extraordinary caution" any time the state has "articulated a legitimate political explanation for its districting decision." *Id.* at 1504 (internal quotation marks and citation omitted). He added that "if a court mistakes a political gerrymander for a racial gerrymander, it *illegitimately invades* a traditional domain of state authority, usurping the role of a State's elected representatives." *Id.* at 1490 (emphasis added).

Justice Alito's remarks are non-majority dicta in a case involving a different (though analogous) claim. These remarks should not be treated as proof that any member of the Supreme Court has prejudged the issues on appeal in *Whitford*. *But see Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004) ("[C]arefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative." (citation omitted)); *Jordon v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the Court's dicta is of persuasive precedential value."); *Fouts v. Md. Cas. Co.*, 30 F.2d 357, 359 (4th Cir. 1929) ("[C]ertainly dicta of the United States Supreme Court should be very persuasive."). However, these remarks are further evidence that the justiciability question is far from settled and will likely be a focal point at the October 2017 argument.

Nothing about this discussion should be taken to suggest that Judge Bredar has decided, as a matter of law, that political gerrymandering claims are nonjusticiable. Indeed, two members of this panel have already decided that such claims *are* justiciable pursuant to the First Amendment framework that Justice Kennedy contemplated in *Vieth*, and the Supreme Court has not—to date—overruled *Bandemer* or held that partisan gerrymandering presents a nonjusticiable political question. Nor has the Court rejected Justice Kennedy's First Amendment theory, though that theory remains nothing more (or less) than a "theory put forward by a Justice of th[e] Court and uncontradicted

by the majority in any . . . cases," *Shapiro I*, 136 S. Ct. at 456.[5]

The dissent simply is incorrect when it states that Judge Bredar advocates "judicial abdication from partisan gerrymandering cases," *post*, at 830. Far from it. A final decision by a majority of Justices instructing lower courts to apply a particular standard to resolve partisan gerrymandering claims would be a welcome development in the law. *See Shapiro II*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting) ("This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such conduct is noxious and has no place in a representative democracy."). The point of this discussion is

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[5] The dissent seems to suggest that political gerrymandering claims *must* be justiciable lest "unacceptable results" obtain, such as a "pointillistic" map that assigns voters to various districts "regardless of their geographical location." *Post*, at 818 (emphasis omitted). This case, of course, does not involve any such extreme practices. Whatever else might be said, Maryland's congressional districts generally adhere to traditional districting principles such as contiguity and the preservation of communities of interest. Should a state legislature ever attempt to implement a pointillistic map, a reviewing court could simply establish a bright line rule requiring *some* degree of contiguity on the theory that pointillism subverts the framers' intentions as expressed in Article I, § 2. A rule barring pointillism would be easy to administer, would not require courts to predict voter behavior, and would not present the thorny line-drawing problems at issue in the typical political gerrymandering case. Pointillism would be the proverbial "easy case" in this context, and the Court would be fortunate indeed to be confronted with such a simple challenge. It is not, though, and we should not oversimplify the challenge of adjudicating the claim that is actually before us on the basis of a hypothetical that has little to do with that claim.

not to suggest that political gerrymandering claims *are not* or *should not* be justiciable; rather, it is to call attention to the uncertainty in the law, an uncertainty that was amplified two months ago when the Court granted argument in *Whitford*. Pausing these proceedings to await further guidance from the Supreme Court is not abdication: it is an expression of prudence, judicial restraint, and respect for the role of a district court that must scrupulously adhere to the instructions of appellate authorities.

Because Plaintiffs are unable at this time to demonstrate that they will likely prevail on the threshold question of justiciability, and because the Supreme Court is poised to act and in so doing may change the legal landscape, Plaintiffs' preliminary injunction motion should be denied and their case stayed pending the Supreme Court's decision in *Whitford*.

C. Causation

1. Preliminary Injunction

Apart from any doubts as to justiciability, and assuming without deciding that Plaintiffs have adduced sufficient evidence to show that the State crafted the 2011 redistricting plan (and the Sixth District in particular) with the "specific intent to impose a burden" on Plaintiffs and similarly situated citizens through vote dilution, *Shapiro II*, 203 F. Supp. 3d at 596, it is unclear whether any such nefarious plan was and remains effective. This Court is not now persuaded that

Plaintiffs will likely prove that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 597. Put more simply, the Court is not yet persuaded that it was the gerrymander (versus a host of forces present in every election) that flipped the Sixth District and, more importantly, that will continue to control the electoral outcomes in that district. Voter decisions are mutable and subject to change, despite voting history and party affiliation. As discussed below, the razor's-edge Sixth District race in 2014 is evidence that suggests significant party-crossover voting and calls into doubt whether the State engineered an *effective* gerrymander.

Trial testimony and other evidence, including thorough cross-examination, may yet establish that Plaintiffs have met their burden of proof with respect to causation, but the Court is not persuaded that they have done so now, at least not to the high standard set for the granting of preliminary injunctions. Since but-for causation is an element of Plaintiffs' First Amendment claim, it follows that if Plaintiffs are unable to prove this element, their claim will collapse on its merits. At this stage, the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*. For that reason, the Court must deny Plaintiffs' request for the extraordinary remedy of preliminary injunctive relief.

a. Findings of Fact

Strictly for purposes of deciding whether to enter a preliminary injunction, the Court makes the following findings of fact, *see* Fed. R. Civ. P. 52(a)(2), corresponding to the causation element of Plaintiffs' First Amendment claim:

1. Maryland's 2011 redistricting process involved two parallel procedures: a public-facing procedure led by the Governor's Redistricting Advisory Committee and an internal procedure involving Maryland's congressional delegation and a consulting firm called NCEC Services, Inc. (ECF No. 177–4 at 36:4–13; ECF No. 177–5 ¶ 18.)

2. NCEC in turn designated analyst Eric Hawkins to review the State's redistricting plan and prepare sample maps using voter demographic data (including party affiliation and voting history) and a computer program called "Maptitude for Redistricting." (ECF No. 177–4 at 36:18–37:17.)

3. In performing his analysis, Hawkins relied on a proprietary metric called the Democratic Performance Index (DPI), a weighted average of candidate performance that takes account of voting history. (*Id.* at 24:5–19.) A higher DPI signals a greater statistical likelihood of Democratic candidate success based on past performance.

4. Hawkins created between ten and twenty draft maps. He analyzed six maps alongside proposals submitted by third parties. Each of the six maps would have produced a federal DPI of 52% or greater for the Sixth District, while the third-party submissions would have produced much lower DPIs. (*Id.* at 38:2–9; ECF No. 177–34; ECF No. 177–35 at 31–32.)

5. There is no evidence that Hawkins personally created the final map that was enacted into law. (ECF No. 177–1 at 13 n.9; ECF No. 186–1 at 11.) Former governor Martin O'Malley testified that legislative director Joe Bryce and staff from the Maryland Department of Planning likely created the final document. (ECF No. 177–3 at 53:12–54:7.)

6. The map as enacted had the effect of transferring 360,368 Marylanders *out of* the Sixth District and 350,179 Marylanders *into* the Sixth District. (ECF No. 177–19 at 12.) In the process, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district. (*Id.* at 6.)

7. After the 2011 plan was implemented, a plurality (44.8%) of voters in the Sixth District were registered Democrats, while 34.4% of voters were registered Republicans. 20.8% of voters were registered with neither major political party. (ECF No. 186–19 at 5–6.)

8. The "Cook Partisan Voting Index" promulgated by the *Cook Political Report* formerly rated the Sixth District as a safe Republican seat. As a consequence of the 2011 redistricting, the Sixth District is now rated as a "likely" Democratic seat. (ECF No. 177–52 at 8.)

9. In the 2012 congressional election (the first held in the new Sixth District), Democrat John Delaney defeated incumbent Republican congressman Roscoe Bartlett by a 20.9% margin. (ECF No. 177–5 ¶ 54.) However, in the U.S. Senate election conducted that same cycle, Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide. (ECF No. 186–19 at 10; ECF No. 186–42 PDF at 2.)

10. Congressman Delaney won reelection in 2014 and 2016 by margins of 1.5% and 14.4%, respectively. (ECF No. 177–5 ¶¶ 55–56.)

11. While Plaintiffs have produced expert reports predicting, based on party affiliation and other demographic data, that Democratic candidates will likely fare better under the 2011 plan than under the former plan, Plaintiffs have conducted no statistical sampling and have adduced no individual voter data showing how displaced and current residents of the Sixth District actually voted in 2012, 2014, and 2016.

12. Plaintiffs have not surveyed voters to determine (1) whether former supporters of Congressman Bartlett who remained in the Sixth District after the 2011 redistricting voted for Congressman Delaney instead, (2) whether such voters switched party affiliation or simply selected a different candidate on an *ad hoc* basis, and (3) the reasons underlying these voters' decisions. Nor have Plaintiffs amassed data concerning the voting behavior and preferences of former Sixth District residents who now reside in other congressional districts.

13. Congressman Bartlett underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election. (ECF No. 104–13 at 2/2.)

14. In 2014, Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District (ECF No. 186–20 at 18:15–20) and operated at a financial disadvantage vis-à-vis Delaney (*id.* at 36:21–37:10). Also in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points. (ECF No. 186–19 at 10.)

b. Conclusions of Law

In denying Plaintiffs' preliminary injunction motion, the Court reaches the following conclusions of law:

1. Under *Winter v. NRDC*, a plaintiff seeking preliminary injunctive relief must demonstrate that plaintiff is likely to prevail on the merits of its claim. 555 U.S. at 20.

2. In *Shapiro II*, this Court held that, to state a claim for First Amendment retaliation via gerrymandering, Plaintiffs must allege not only that the gerrymander diluted votes of targeted citizens "to such a degree that it resulted in a tangible and concrete adverse effect" but also that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." 203 F. Supp. 3d at 597.

3. In other words, the First Amendment framework that the *Shapiro II* majority endorsed requires proof that *but for* the gerrymander, the challenged effect (here, the switch in political power in the Sixth District) would not have happened.

4. The dissent complains that "the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters." *Post*, at 837. In the dissent's view,

"the adverse effect is *the dilution* of votes—and the corresponding burdening of expression by voters—regardless of how the election turned out." *Post*, at 837. However, the *Shapiro II* majority recognized that "vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury." 203 F. Supp. 3d at 596–97. The dissent offers no yardstick to measure vote dilution that exceeds a "*de minimis* amount" yet falls short of altering electoral outcomes. Nor have Plaintiffs shown that they suffered any tangible First Amendment burden other than, perhaps, their inability to elect their preferred candidate. A political gerrymander that imposes nothing more than an abstract "burden" without actually affecting tangible voter rights or interests surely is not justiciable, even pursuant to the framework two judges endorsed in *Shapiro II*.

5. The dissent frets that "under the majority's new standard, no redistricting map could be challenged *before* an election." *Post*, at 837. To whatever extent this critique is accurate, it is a consequence of adjudicating political gerrymandering claims according to the standard adopted in *Shapiro II*. There may be some other, as-yet unidentified standard that would enable courts to enjoin implementation of

a map prior to the first election conducted thereunder, but neither Plaintiffs nor the dissent have proffered any such workable standard here. Strictly prospective relief is relatively uncommon in the law, and courts are far more likely to be tasked with curing or vindicating a prior harm than with anticipating and forestalling a potential one.

6. Citing a handful of First Amendment cases that do not deal with election law, the dissent proposes to import into the political gerrymandering context the burden-shifting framework of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Post*, at 834–36. The Court declines to do so, at least at this preliminary stage. As the dissent explains, *Mt. Healthy* stands for the proposition that "where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway." *Post*, at 835–36. *Mt. Healthy* assumes an injury has occurred and focuses on questions of motive and intent. The problem is that in the redistricting context, the government's "action" is only "injurious" if it actually alters the outcome of an election (or otherwise works some tangible, measurable harm on the electorate). In other words, the question of but-for causation is closely linked to the very existence of an injury: if an election result is not engineered through a

gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred.

7. For this reason, the dissent's poisoning hypothetical, *post*, at 837–38, is beside the point. If a victim sips poison, or trains collide, or an employee is fired, or a homeowner's request for a zoning variance is denied, there is no question that an injury of one sort or another has occurred. The question for courts to resolve in such cases is whether that injury was caused by some illicit action (or inaction) of the defendant and whether the defendant has an adequate defense to the charge. But if Roscoe Bartlett loses to John Delaney, voters are thereby injured if but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*.

8. But-for causation—not some metaphysical, could-be burden—is the standard that controls in this case, and Plaintiffs bear the burden to prove this element is satisfied. Assuming that Maryland's former congressional map provides an acceptable benchmark for assessing the 2011 map, this but-for causation requirement would be satisfied *only* if Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact (with minor adjustments to account for

demographic changes reflected by the 2010 Census). Plaintiffs admit as much: "[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016." (ECF No. 191 at 13.)[6]

9. The fact that John Delaney defeated Roscoe Bartlett by an impressive 20.9% margin in 2012 may shed some light on the effectiveness of the alleged gerrymander. However, even a much smaller victory by Delaney would have shifted the Sixth District seat from Republican to Democratic control. The dispositive question is whether the shift would have occurred absent the alleged gerrymander—that is, whether Delaney would have prevailed (even if by a much smaller margin)

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[6] *But see Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting) ("Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic."); *LULAC*, 548 U.S. at 446 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").

absent the State's reliance on NCEC's DPI and demographic data.

10. Upon the record, the briefs, and the hearing, the Court cannot now conclude that the *likely* outcome of this litigation is a finding that, but for the alleged gerrymander, the Republican Party would have retained control of the Sixth District congressional seat. Plaintiffs have not produced voter sampling or statistical data, affidavits, or other evidence of a sufficient quantity to demonstrate *how* and *why* voters who would have been included in a neutrally drafted Sixth District voted in the 2012, 2014, and 2016 elections. Without such data, the Court cannot reverse-engineer those elections and is unprepared to assume, at this preliminary stage, that enough such voters would have voted for the Republican candidate so as to preserve Republican control.

11. While Plaintiffs have adduced some persuasive predictive evidence through the Cook Partisan Voting Index and expert reports and testimony, the Court is unconvinced, certainly by the standard governing the issuance of a preliminary injunction, that such evidence is determinative of but-for causation. In particular, the Court is not convinced that such predictive evidence accurately accounts for subjective factors such as evolving political temperament and the personal strengths or weaknesses of individual

candidates. The surprising results of various elections in 2016 illustrate the limitations of even the most sophisticated predictive measures. Experience teaches that voter preferences are mutable and that American democracy is characterized by a degree of volatility and unpredictability. *See Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment) ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence.").

12. The Court is especially reluctant at this preliminary stage, absent more concrete voter data, to find an effective gerrymander given that Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations.

13. Indeed, this recent near defeat raises serious doubts about whether Plaintiffs' alleged injury is likely to recur. The most relevant question in a case involving a claim for solely injunctive relief is not whether a harm may have occurred in the past but whether the harm is presently occurring or very likely to recur. If the injury, if any, has long since concluded, there is nothing to enjoin. *See Bloodgood*

v. Garraghty, 783 F.2d 470, 475 (4th Cir. 1986) ("An injunction is a drastic remedy and will not issue unless there is an imminent threat of illegal action. '[An i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future.'" (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931))); *cf. Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) ("'[A]bsent a sufficient likelihood that [Plaintiffs] will again be wronged in a similar way' . . . past events, disconcerting as they may be, are not sufficient to confer standing to seek injunctive relief." (alteration in original) (citations omitted)); *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) ("The courts should be especially mindful of th[e] limited role [prescribed by Article III] when they are asked to award prospective equitable relief . . . for a concrete past harm, and a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries.").

14. Despite the Court's present doubt as to Plaintiffs' proof on the causation prong of their First Amendment claim, the Court does not hold that Plaintiffs *cannot* prevail on their claim. Any such holding would be every bit as premature as the extraordinary relief that Plaintiffs have requested and that the dissent urges. The

> Court simply concludes that Plaintiffs have not carried their burden to show they are *likely* to prevail on the merits, and so preliminary injunctive relief is not proper.
>
> 15. The Court remains open to the possibility that the evidence Plaintiffs have adduced, when subject to robust cross-examination and the development that only a trial can bring, may satisfy Plaintiffs' burden of proof. The Court also is willing to entertain requests by either party to reopen discovery (subject to the stay discussed immediately below) to address the evidentiary gaps and deficits or potential deficits flagged in this Memorandum. Regardless whether either party seeks additional discovery, the parties may find it helpful to take account of the Court's discussion here in any future briefs or oral presentations.

2. Stay of Proceedings

The Court's concerns about Plaintiffs' proof with respect to the causation element of their First Amendment claim compel the Court not only to deny preliminary injunctive relief but also to stay proceedings pending the Supreme Court's further guidance in *Whitford*.

While Plaintiffs argue vociferously that "[t]his case and the Wisconsin case are fundamentally different" (ECF No. 193 at 4), this Court disagrees.

Fundamentally, these cases are two sides of the same coin: both propose a standard by which federal courts might adjudicate claims of unlawful political gerrymandering. Both cases invoke the First Amendment as a source of constitutional authority. And the standard that the Western District of Wisconsin has endorsed is remarkably similar to the standard endorsed by the majority in *Shapiro II*: "We conclude," the Wisconsin court wrote, "that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Whitford*, 218 F. Supp. 3d at 884.

True, the cases differ in their particulars. The Wisconsin case is a statewide challenge to state legislative districts, based in part on partisan asymmetry (the so-called "efficiency gap"); the Maryland case is a single-district challenge to a congressional district, grounded in a retaliation theory. For plaintiffs in either case to prevail, however, they would have to show that the gerrymander about which they complain actually inflicted a constitutional injury on them, one that is sufficiently personal so as to satisfy the threshold requirements of Article III and sufficiently definite and clear so as to justify the drastic remedy of an injunction against enforcement of an otherwise lawfully enacted map. In determining whether a constitutional injury has occurred, the court invariably must reach the question of causation, for if election outcomes (whether in a

single district or across the state) arise not from political machinations at the statehouse but instead from neutral forces or the "natural ebb and flow of politics," *Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting), no injury has occurred and no remedy may issue. While the Supreme Court's decision in *Whitford* may not prove dispositive of *Benisek*, the Court's analysis undoubtedly will shed light on critical questions in this case, and the parties and the panel will be best served by awaiting that guidance.

D. Additional Practical Considerations Supporting the Decision to Stay Proceedings

Two practical considerations bolster the Court's conclusion that a stay is appropriate at this time.

First: this Court is in no position to award Plaintiffs the remedy they have requested on the timetable they have demanded. For the reasons explained in Part II.C, two members of this panel are unconvinced that Plaintiffs will *likely* prevail on the causation element of their First Amendment claim. Plaintiffs therefore are not entitled to preliminary injunctive relief. This case will likely require a full trial on the merits, where witnesses for both parties will be subject to cross-examination and where the Court will be equipped to make detailed findings and credibility determinations. But a trial—particularly one requiring the coordination of three judges and their respective chambers staff—is a substantial undertaking.

Plaintiffs have indicated that a revised districting plan must be enacted no later than December 19, 2017, to allow orderly implementation in advance of the 2018 midterms. (ECF No. 177-1 at 31.) Plaintiffs also have suggested that an injunction should issue no later than August 18, 2017, to accommodate legislative mapmaking or, if necessary, a judicially imposed map. (*Id.* at 32.) Despite the Court's diligence in ruling on the pending preliminary injunction motion (which has been a priority for each member of this panel), that August date has already come and gone. Since the Court cannot deliver the remedy Plaintiffs have requested, Plaintiffs' opposition to a stay pending *Whitford* loses considerable force. It is unclear what hardship Plaintiffs will suffer by waiting a few months if, as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even had it scheduled a trial at the earliest opportunity.[7]

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[7] Plaintiffs alternatively propose that the Court should enter a permanent injunction and then stay enforcement of that injunction so that the parties may expeditiously take their appeal. (ECF No. 193 at 3.) The Court declines to do so. The Court will not abandon its duty to conscientiously resolve this years-long dispute so that the parties may squeeze their case onto the Supreme Court's fall calendar. Nor will the Court make the findings that would support a permanent injunction—including that Plaintiffs have suffered an irreparable injury and that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)—only to then stay that equitable remedy. Rather, the Court will enjoin the State to implement a new map if *but only if* it becomes persuaded that Plaintiffs have proved each element

Second: while the Supreme Court no doubt benefits from the efforts of lower courts in resolving difficult legal issues, it is not clear how additional proceedings in this case would aid the Court's resolution of *Whitford*. The threshold justiciability question that the Court must again confront in *Whitford* is hardly a novel one, and this panel has rigorously analyzed that threshold question in the separate opinions in *Shapiro II*. The *Whitford* litigants and the Justices will have access to those opinions during the forthcoming proceedings. Further, as the divergent opinions in *Vieth* illustrate, the Justices are not bound to decide *Whitford* along the lines that the Western District of Wisconsin found persuasive. If the First Amendment theory that Plaintiffs here have proposed and that two members of this panel have recognized as justiciable strikes one or more of the Justices as workable, the Justices certainly may adopt, co-opt, modify, or otherwise incorporate elements of that theory into a framework for decision or a possible framework for future cases.

Here is the bottom line: a stay in these proceedings will not preclude the Supreme Court from taking advantage of the important legal work that has been done in this case, and the marginal gains—if any—that further fact-finding might offer the Justices would be greatly outweighed by the efficiency costs of charging ahead only to later learn that Plaintiffs must return to

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of their First Amendment claim to the requisite degree of certainty.

square one (or, perhaps, that their action is no longer viable).

III. Conclusion

Though the members of this panel differ in their views concerning the implications of Supreme Court precedent, the evidence Plaintiffs have thus far adduced, and the efficient management of this complicated and important case, all agree that political gerrymandering is a noxious and destructive practice. The segregation of voters by political affiliation so as to achieve purely partisan ends is repugnant to representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). This Court will not shrink from its responsibility to adjudicate any viable claim that such segregation has occurred in Maryland. But in order to *correctly* adjudicate such a claim, the Court must first insure that it is proceeding on the correct legal foundation—that in measuring the legality and constitutionality of any redistricting plan in Maryland it is measuring that plan according to the proper legal standard. Following the Supreme Court's decision in *Whitford*, this panel will be better equipped to make that legal determination and to chart a wise course for further proceedings.

For the foregoing reasons, an Order shall enter DENYING Plaintiffs' preliminary injunction motion, and a separate Order shall enter HOLDING IN ABEYANCE the pending cross-motions for summary

judgment and STAYING further proceedings pending the Supreme Court's decision in *Whitford*.

Judge Russell joins all but Part II.B of this Memorandum and joins the accompanying Orders. Judge Niemeyer joins neither the Memorandum nor the Orders.

NIEMEYER, Circuit Judge, dissenting:

In denying the plaintiffs' motion for a preliminary injunction, the majority overlooks the obvious and relies on abstract notions of the causal relationship between intent and effect that bear no relationship to the real world evidence regarding the conduct at issue or to the First Amendment standard adopted in this case. Its entire reason for denying the injunction rests on a bizarre notion of causation that requires the exclusion of all possible alternative explanations, however remote and speculative. When that effort inevitably fails, it concludes that causation has not been established, despite extraordinarily strong evidence of the connection between intent and effect. I believe that the record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they accomplished was caused by their intent. Accordingly, the motion should be granted.

The record demonstrates, without any serious contrary evidence, that the Maryland Democrats who

were responsible for redrawing congressional districts in 2011 *specifically* intended to dilute the votes of Republicans in the Sixth District and in fact did so. They identified likely Republican voters and moved them in large numbers into the Eighth District, which had a safe margin of Democratic voters. They simultaneously replaced these Republican voters with Democratic voters from the Eighth District. More specifically, they moved 360,000 persons (roughly one-half of the District's population) out of the former Sixth District — when only 10,000 had to be moved in response to the 2010 census — and simultaneously moved 350,000 into the "new" Sixth District. And critically, in making those moves, they focused on voting histories and party registration to move 66,400 registered Republicans out of the Sixth District and replace them with 24,400 registered Democrats, creating a Democratic voter majority in the new Sixth District of 192,820 Democrats to 145,620 Republicans. Prior to the massive shuffle, the Sixth District had 208,024 Republicans and 159,715 Democrats. This 2011 shuffle accomplished the single largest redistricting swing of one party to another of any congressional district in the Nation.

Consistent with this evidence, the State's Democratic leadership stated that their reshuffling of voters by voting history was specifically intended to flip the Sixth District from Republican to Democratic so as to create a 7 to 1 Democratic congressional delegation. For example, Maryland Governor Martin O'Malley, who led the effort to develop a new congressional map after the 2010 census, stated that he wanted to redraw

the lines of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat." He added, "Yes, this was clearly my intent." And other Democrats involved in the process similarly revealed their intent with statements indicating, for example, that the Sixth District was redrawn to "minimize the voice of the Republicans" and to "hit[]" Republican Congressman Roscoe Bartlett from the Sixth District "pretty hard." Moreover, the firm hired to draw the map was given only two instructions — to come up with a map (1) that protected the six incumbent Democrats and (2) that would produce a 7 to 1 congressional delegation.

Republican voters affected by the redrawing of the Sixth District commenced this action, contending that they were targeted, based on the way they voted in the past, with the intent to dilute their vote and diminish their representational rights, in violation of the First Amendment. On the State's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), we held that the plaintiffs stated a cause of action and would succeed in their challenge of the Sixth District's gerrymander if they were to demonstrate (1) that the mapdrawers redrew the district lines with the specific intent to impose a burden on voters because of how they voted in the past or because of the political party with which they were affiliated; (2) that the targeted voters suffered a tangible, concrete burden on their representational rights; and (3) that the mapdrawers' intent to burden a particular group of voters by reason of their views was the but-for cause of the concrete

effect. Simply, the standard requires a showing of (1) specific intent, (2) concrete effect, and (3) causation between the first two requirements. *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016).

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction with a request to advance the trial on the merits under Rule 65(a)(2) so as to obtain a final injunction ordering a redrawing of the lines defining the Sixth District without the use of data that reveal how voters registered or voted in the past.

* * *

The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity. The problem is cancerous, undermining the fundamental tenets of our form of democracy. Indeed, as Judge Bredar has observed in this case, gerrymandering is a "noxious" practice with "no place in a representative democracy." *Shapiro*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting).

The Supreme Court has joined the chorus of voices recognizing the potential ills inflicted on our democracy by gerrymandering. Accepting the general proposition that partisan gerrymandering, when sufficiently extreme, violates the Constitution, the Justices have nonetheless yet to agree on a standard for determining

when the practice crosses the line. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 308 (Kennedy, J., concurring in the judgment). For this reason, a minority of the Justices have indicated that the issue of whether partisan gerrymandering violates the Equal Protection Clause is not justiciable. *See id.* at 305.

But a categorical rule that would abandon efforts at judicial review surely cannot be accepted lest it lead to unacceptable results. For instance, in Maryland, which has a voting population that historically votes roughly 60% for Democrats and 40% for Republicans, the Democrats, as the controlling party, could theoretically create eight safe Democratic congressional districts by assigning to each district six Democrats for every four Republicans, *regardless of their geographical location.* Citizens residing in Baltimore City, others residing in Garrett County in the western portion of the state, and yet others residing in the suburbs of Washington, D.C., could all be assigned to a single district so that the Democrats would outnumber Republicans by a margin of 60% to 40%. Under such a map, no district would have a single boundary, nor indeed any relationship to geography or to the communities that constitute the State, and neighbors would have different Representatives. Such a pointillistic map would, of course, be an absurd warping of the concept of representation, resulting in the very "tyranny of the majority" feared by the Founders. Yet, such an extreme possibility would be open to the most politically

ambitious were courts categorically to abandon all judicial review of political gerrymandering.

I believe that the First Amendment standard previously adopted by us in this case does not allow for such a possibility. Building on the Supreme Court's previous holdings that ensure "one person, one vote" and that prevent racially motivated gerrymanders, we held earlier in this case that when district mapdrawers target voters based on their prior, constitutionally protected expression in voting and dilute their votes, the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. *See Shapiro*, 203 F. Supp. 3d at 595–96. This First Amendment test focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not on the result* of the vote. It is therefore sufficient in proving a violation under this standard to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right. Recent comments of Supreme Court Justices made both in this case and in *Vieth* have suggested that this standard is available for assessing the constitutionality of a gerrymander. And under this standard, I respectfully conclude, the plaintiffs have succeeded in carrying their burden.

The majority instead expresses doubts as to whether the earthquake upheaval in the political

landscape of the Sixth District was attributable to the fulfillment of the Democrats' gerrymandering plan, positing that the flip of the Sixth District might have been attributable to changes in voting preferences or other demographics. But this view reflects nothing more than an effort to skirt around the obvious — that the Democrats set out to flip the Sixth District; that they made massive shifts in voter population based on registration and voting records to accomplish their goal; and that they succeeded.

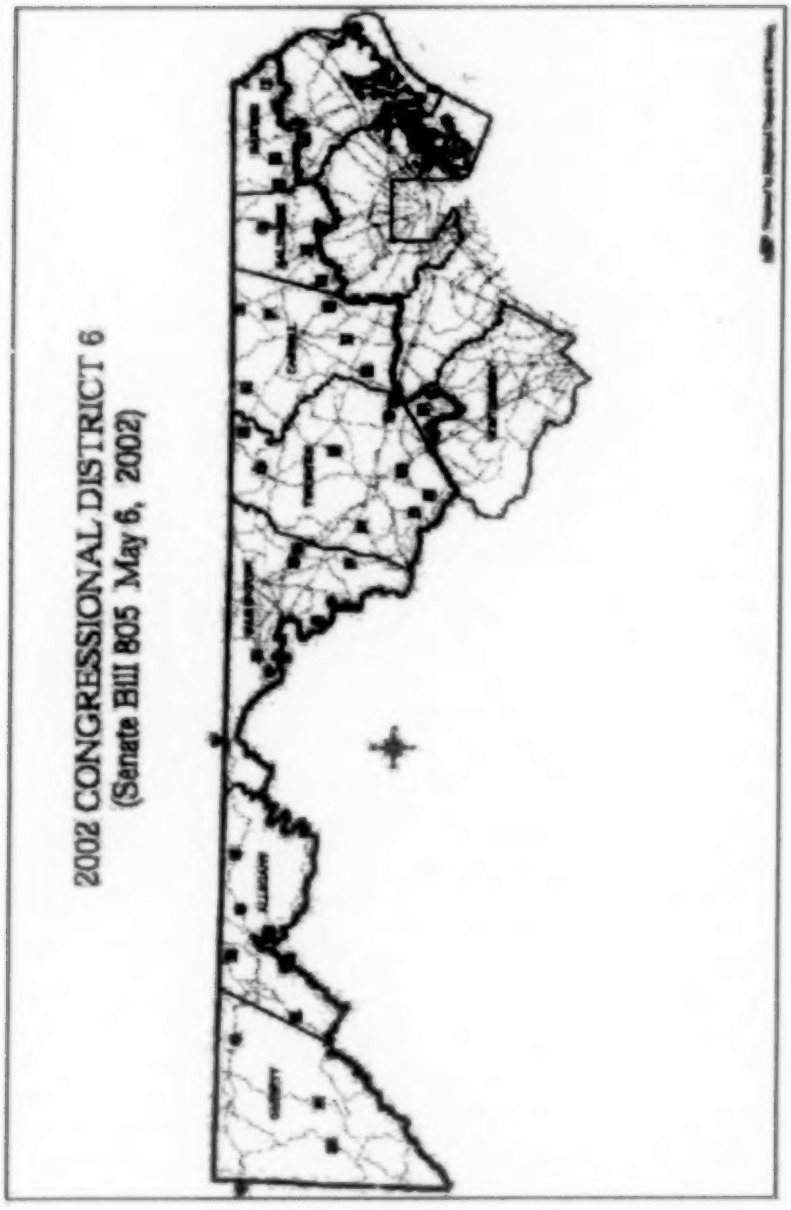
The plaintiffs have not only made the requisite showing that they are likely to succeed on the merits, they have actually succeeded well in demonstrating that the State's gerrymandering violated their First Amendment rights. I would accordingly issue the injunction requested and require the redrawing of the Sixth District's boundaries without the use of information about how citizens voted in the past.

I

A. Facts of Record

The historical facts of record are not disputed. Following the 2010 census, the State of Maryland was required to redraw the lines of its eight congressional districts to ensure that each district had an equal share of the State's population. This action focuses on the boundaries that the State chose to draw for the Sixth District.

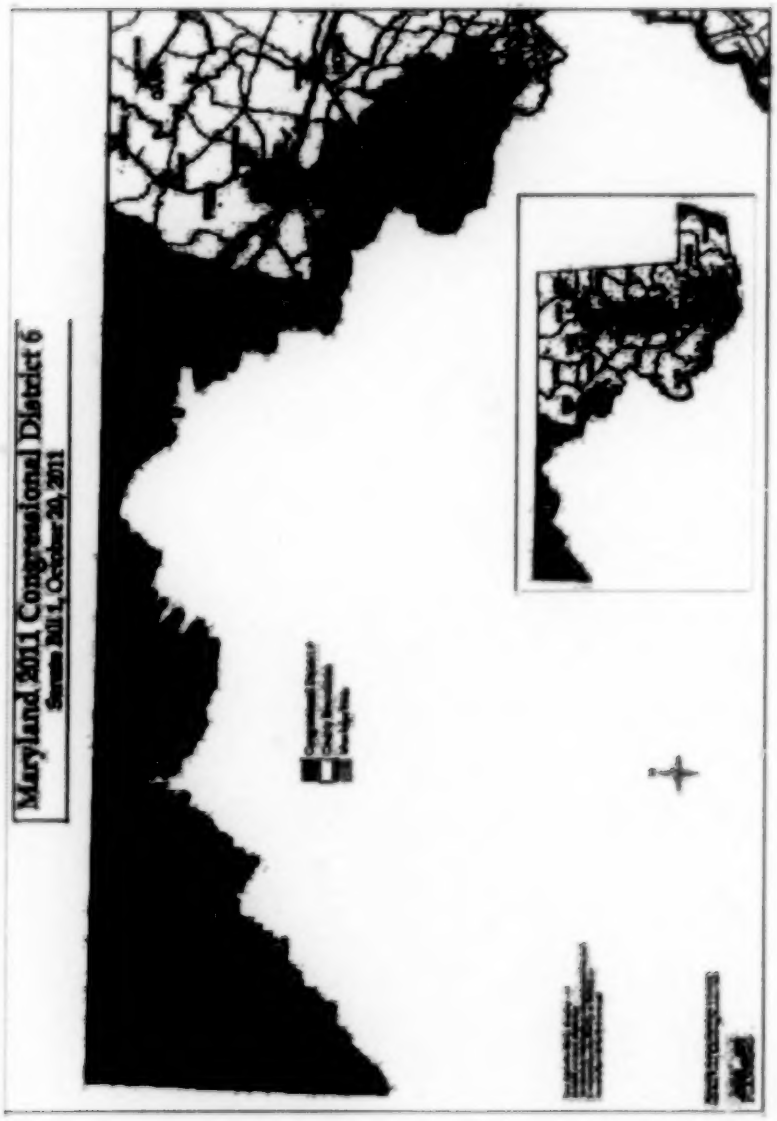
Historically, the Sixth District included western Maryland and much of north-central Maryland, and after the Supreme Court's announcement of the "one person, one vote" rule in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Sixth District had always included all of the State's five most northwestern counties — Garrett, Allegany, Washington, Frederick, and Carroll Counties. After the 2002 redistricting, the District also included a small northern portion of Montgomery County and larger portions of Baltimore and Harford Counties, as shown.


2002 CONGRESSIONAL DISTRICT 6
(Senate Bill 805 May 6, 2002)

At the time of the 2010 congressional election — the last held prior to the 2011 redistricting — 47% of the District's 446,000 eligible voters were registered Republicans, 36% were registered Democrats, and 16% were registered Unaffiliated, making the District the most Republican in the State. Joint Stipulations ¶ 10 & Ex. 2 at 2 (ECF No. 104). Representative Roscoe Bartlett, a Republican, had continuously represented the District since 1993, and he won reelection in 2010 by a margin of 28%. *Id.* ¶ 8.

The 2010 census showed that the Sixth District had grown somewhat, having 10,186 residents more than the ideal adjusted population of 721,529 for a Maryland congressional district, a variation of only 1.4%. Joint Stipulations ¶¶ 9, 52. Nonetheless, the Democratic mapdrawers responsible for the 2011 redistricting plan redrew the District's boundaries far more dramatically than was necessary to move 10,186 voters from the District. Indeed, the new Sixth District retained only 51% of its original population, retaining the residents of Garrett, Allegany, Washington Counties, and a portion of the residents of Frederick County and moved the other half — roughly 360,000 residents — to other districts. Approximately 60% of these residents — those from Frederick County and more than half the population of Carroll County — were shifted into the Eighth District, which had previously been confined almost entirely to the heavily Democratic Montgomery County. In the place of the removed residents, the plan added to the new Sixth District approximately 350,000 residents from Montgomery County,

most of whom had previously been assigned to the Eighth District. The final 2011 map for the Sixth District was as follows:


Maryland 2011 Congressional District 6
Senate Bill 1, October 20, 2011

The area removed from the former Sixth District was predominately Republican, while the area added was predominately Democratic. Specifically, in the precincts removed from the Sixth District, there were on average approximately 1.5 times as many registered Republicans as Democrats. By contrast, in the precincts added to Sixth District, registered Democrats outnumbered Republicans by more than 2 to 1. In total, the reshuffling of the Sixth District's boundaries resulted in a net reduction of more than 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters. *See* Opening Expert Report of Dr. Peter A. Morrison ¶ 134 & tbl. 1 (ECF No. 177-35); Opening Expert Report of Prof. Michael P. McDonald at 12 (ECF No. 177-19).

Not surprisingly, this major reshuffling of the Sixth District's population directly affected the District's political complexion. At the time of the 2012 congressional election (the first held under the new map), the major parties' respective shares of the District's registered voters roughly reversed compared to just two years before. Of the new District's roughly 437,000 eligible voters, 33% were registered Republicans, 44% were registered Democrats, and 22% were registered as Unaffiliated. Joint Stipulations ¶ 53 & Ex. 19. In the 2012 election, Democratic candidate John Delaney, a newcomer to politics, defeated Republican incumbent Bartlett by a 21% margin, and he was elected again in 2014 and 2016. *Id.* ¶ 54.

The parties have stipulated that "[o]ne widely understood consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from the [Sixth] District." Joint Stipulations ¶ 31. But the record demonstrates even more. Far from being an incidental, though anticipated, byproduct of achieving some other set of redistricting goals, the Maryland Democrats who controlled the 2011 redistricting process sought to assure themselves of a 7 to 1 Democratic delegation by flipping the Sixth District to Democratic control.

Governor O'Malley, who was both "the leader of [Maryland's] Democratic Party," O'Malley Dep. 46:20–21 (ECF No. 177-3), and "directly in charge of running the congressional redistricting process," *id.* at 30:19–20, agreed that he "set out to draw the borders in a way that was favorable to the Democratic Party," *id.* at 9:22–10:2. As he later testified:

> [T]hose of us in leadership positions in our party, the Speaker, the Senate President, the Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that, while our — while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also — part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many [goals].

Id. at 81:1–11. Specifically, O'Malley wanted to use the redistricting process to change the overall composition of the U.S. House Delegation to seven Democrats and one Republican by flipping either the First District, on the eastern shore of Maryland, or the Sixth District, in Western Maryland. *Id.* at 22–27. Because altering the political makeup of the First District, the only other Maryland district represented by a Republican, would have required awkwardly "jump[ing] the Chesapeake Bay and draw[ing] a line in such a way that [would] put[] . . . more Democratic voters [in] the Eastern Shore [district]," *id.* at 24:16–19, he stated that "*a decision was made to go for the Sixth*," *id.* at 27:3–4.

Following the customary process in Maryland, Governor O'Malley pursued two courses for developing a revised congressional map. For one, he created the public-facing "Governor's Redistricting Advisory Committee," and for the other, he "asked Congressman [Steny] Hoyer, . . . the dean of the [U.S.] House delegation," to "lead the effort . . . to inform the [Committee] about congressional redistricting" and "come up with a map that a majority of the congressional delegation supports." O'Malley Dep. 47:20–48:5; *see also* Willis Dep. 185–88 (ECF No. 177-14) (agreeing that, historically, "[t]he process starts with the [Democratic] members of Congress," who "[e]ndeavor to come to a consensus," "and then it flows to the governor and legislators," who "do their best to respect the wishes . . . of the congressional delegation"). Consistent with this customary procedure, the record shows that the work performed on behalf of the Democratic members of

Maryland's congressional delegation largely shaped the contours of the new Sixth District that the Advisory Committee ultimately recommended to Governor O'Malley. *See* Miller Dep. 97:19 (ECF No. 177-15) (testifying that the map "primarily was drawn by the congressional people").

The Advisory Committee held public hearings across the State from July through September 2011 and received comments from members of the public. Joint Stipulations ¶ 22. At hearings conducted in western Maryland, residents provided suggestions regarding potential changes to the shape of the Sixth District. Several of these residents testified about various connections between Frederick County and Montgomery County — including Interstate 270 ("I-270"), a 35-mile highway running between the City of Frederick and southern Montgomery County — and advocated for replacing part of the Sixth District with territory from Montgomery County. None of the speakers contemplated a map that would remove much of Frederick County *itself*, which had been included in its entirety in the Sixth District since 1872. *See, e.g.*, Public Hearing Testimony (ECF No. 186-3) at MCM 000029–31 ("[T]he start of the Sixth District is pretty easy, with Garrett, Allegany, Washington, and Frederick, you've got a nucleus there. . . . Once you start with those four counties, . . . your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest extent possible, and . . . leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district").

While the Advisory Committee was holding public hearings across the State, the Democratic members of Maryland's U.S. House Delegation — led by Representative Hoyer, a self-described "serial gerrymanderer," ECF No. 191-3 — had already begun to redraw the State's congressional map. Indeed, around the time that the results of the 2010 census became available in late February/early March 2011 — months before the Advisory Committee was even created — Hoyer and the other Maryland Democrats in the House retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations. ECF No. 177-17; *see also* Hawkins Dep. 28–31 (ECF No. 177-4); ECF No. 177-18. NCEC was specifically charged with drawing a map that maximized "incumbent protection" for Democrats and changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican, and it was given no other instruction as how to draw the map. Hawkins Dep. 40–42, 47–49.

The primary NCEC analyst assigned to the task, Eric Hawkins, analyzed various congressional redistricting plans to inform the Democratic members of the Maryland delegation how "different options would change their districts," and he personally prepared between 10 and 20 different draft congressional maps using a GIS computer software program called Maptitude for Redistricting. Hawkins Dep. 36–38. Maptitude allows users to "[c]reate districts using any

level of geography," "[a]dd political data and election results," and "[u]pdate historic results to new political boundaries." Joint Stipulations ¶ 28. With Maptitude, "data reflecting . . . citizens' political party affiliation and voting histories[] can be used to determine how the outcome of historical elections would have changed . . . if the proposed plan had been in place in prior years," *id.* ¶ 30, thus enabling users to accurately predict the likely outcome of future elections.

Hawkins specifically used a proprietary metric created by NCEC called the Democratic Performance Index (the "DPI"), which indicates how a generic Democratic candidate would likely perform in a particular district. As Hawkins explained, the DPI "is an average of how statewide candidates perform over time in competitive elections" that is "weighted differently for different election years," and which "take[s] into account past voting history in a state or a district." Hawkins Dep. 24:12–18. NCEC also calculated separate versions of the DPI specific to federal and state races — with the federal DPI "only us[ing] federal races" and the state DPI "only us[ing] state races" — to better account for "ticket splitting." *Id.* at 25.

Hawkins used the DPI to meet the dual "goals" given to NCEC — namely, to draw a map that would maximize "incumbent protection" for the Democrats currently representing Maryland districts in Congress and that would "chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican." Hawkins Dep. 40–42; *see also id.* at 47–49. With

respect to this 7 to 1 goal, Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI, which Hawkins calculated under the pre-existing map as standing at 37.4%, indicating low Democratic performance and correspondingly strong Republican performance. Over the course of working with Maryland's Democratic House Delegation and their staff, Hawkins prepared several different draft maps under which the Sixth District would have a 51% federal DPI. In preparing these maps, Hawkins considered neither "any measure of compactness," *id.* at 126:12–13, nor whether "there was a community of interest related to the I-270 corridor," *id.* at 128:19–20. Rather, "[t]he intent was to see if there was a way to get another Democratic district in the state." *Id.* at 230:19–20.

Maps were also proposed by third-party entities, but those maps resulted in a far smaller federal DPI for the Sixth District. For example, a map proposed by the Maryland Legislative Black Caucus would have resulted in a federal DPI of 39% for the Sixth District, ECF No. 177-34, a proposal a senior congressional staffer worried would be "a recipe for 5–3, not 7–1," ECF No. 177-36. Needless to say, these proposals did not influence the maps submitted by Hawkins to the Democratic House Delegation.

Ultimately, Maryland's Democratic members of the U.S. House Delegation proposed and forwarded to the state Democratic leadership at least two maps prepared by Hawkins. The shape of the Sixth District in one of these maps, which had a DPI of 51.36%, was

very similar to the plan that was ultimately adopted. *See* Decl. of Dr. Michael McDonald at 4 & fig. 5 (ECF No. 191-5).

After Maryland's U.S. House Democrats submitted their proposals, further work was done by a group of senior staffers of O'Malley, Maryland Senate President Thomas Miller, and Maryland House Speaker Michael Busch. These senior staffers were equipped with a laptop loaded with the Maptitude software; "party registration data and voter turnout data," including at the census block level, the smallest geographic unit used by the U.S. Census Bureau; and a "data file[ ] that contained Democratic Performance Index information at the precinct level," the smallest geographic unit in Maryland (averaging around 3,000 people) at which election results are reported. Weissman Decl. ¶¶ 3–5 (ECF No. 186-11). These state Democratic officials thus continued to use the DPI — as well as other information about how local groups of citizens had previously voted and the political party with which they were affiliated — to finalize a map for the Advisory Committee.

The Advisory Committee publicly released a proposed congressional redistricting map on October 4, 2011, with the Committee's lone Republican casting the sole dissenting vote against the plan. Joint Stipulations ¶ 32. The Committee's map had a federal DPI of 53% in the Sixth District, which was greeted as "good news" by the man who was widely expected to be the Democratic nominee to represent the newly

redrawn Sixth District in the upcoming 2012 election. ECF No. 177-25.

Members and staff of the Advisory Committee briefed a joint session of the state House and Senate Democratic Caucuses about their recommended congressional plan on October 3, 2011. Joint Stipulations ¶ 35. Talking points prepared for Senate President Miller's introductory remarks encouraged him to emphasize that "[e]ven though the map isn't pretty, it accomplishes a few important goals," including "creat[ing] an opportunity for Montgomery County to control two congressional districts"; "preserv[ing] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% Democratic performance"; and "giv[ing] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. The talking points continued, "In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." *Id.*

Following Senate President Miller's remarks, Chairwoman Jeanne Hitchcock delivered a PowerPoint presentation that stated that the Sixth and Eighth Districts had been "[c]onfigured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State." Joint Stipulations, Ex. 6. The record suggests that those in attendance were skeptical that the I-270 corridor justified dramatically redrawing both the Sixth and the Eighth Districts. For example, immediately after Hitchcock's presentation, Democratic

Delegate Curt Anderson told a reporter, "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Joint Stipulations ¶ 46 & Ex. 13. And, while listening to Hitchcock give a similar presentation earlier in the day, one senior congressional aide who had been intimately involved in the redistricting process wrote to another, "This is painful to watch. . . . I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it." ECF No. 177-58.

On October 15, 2011, Governor O'Malley announced that he was submitting a map to the General Assembly "that was . . . substantially the same as" the Advisory Committee's proposal, Joint Stipulations ¶ 33, and two days later, on October 17, Senate President Miller introduced the Governor's proposed redistricting map as Senate Bill 1 at a special legislative session. With only minor technical amendments, Senate Bill 1 was signed into law on October 20, 2011, three days after it had been introduced. *Id.* ¶ 34; *see* Md. Code Ann., Elec. Law §§ 8-701 to -709.

"No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes." Joint Stipulations ¶ 36. Moreover, while the legislation was progressing rapidly through the General Assembly, numerous legislators made comments reflecting their clear understanding that the massive redrawing of the Sixth District was designed primarily to give the eventual Democratic nominee a distinct

electoral advantage over the Republican nominee. For example, one Delegate bluntly stated in a floor speech that he supported the map because it meant "more Democrats in the House of Representatives." *Id.* ¶ 44. Another Delegate stated in an October 17 interview that, "What we're doing is we are trying to get more, in terms of — currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *Id.* ¶ 47. One Democratic Senator who voted for the bill nonetheless lamented in a floor speech that partisan gerrymandering was a problem across America, adding that "it's a process where we dress up partisan and political ambition on both sides of the aisle in high principal, *but we can all tell what's really going on.*" Joint Stipulations ¶ 43(a) (emphasis added). And the only Democratic Senator to vote against the bill stated in an October 14 interview, "[W]hen you look at the way these districts are drawn, they're absolutely drawn with one thing in mind. . . . *[I]t's certainly drawn so that you can minimize the voice of the Republicans.*" ECF No. 177-41 at 16 (emphasis added).

The effect of the Sixth District's wholesale recomposition was precisely as intended. Tellingly, in October 2012, the Cook Political Report released an analysis of "all 435 newly redrawn Congressional districts in the country" using its Partisan Voter Index ("Cook PVI"), ECF No. 177-52 at 1, a well-respected

"measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole," ECF No. 177-51; *see also* Lichtman Dep. 131 (ECF No. 177-49) (testimony of State's expert witness that the Cook PVI is a "well respected" and "well regarded" metric). The Cook Report specifically examined "which districts underwent the most dramatic alterations in redistricting" and found that Maryland's Sixth District experienced the single largest redistricting swing of any district anywhere in the Nation. ECF No. 177-52 at 6–8. Specifically, before the 2011 redistricting, the Sixth District had a Cook PVI of "R+13" and a "Solid Republican" label; after redistricting, the District received a Cook PVI of "D+2" and a "Likely Democratic" label. *Id.* at 8. An academic analysis that looked at the accuracy of the Cook Report's forecasting helps unpack the significance of this swing. When the Cook Report has rated a district "Solid Republican" on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; when a district has been rated as "Likely Democratic," the Democratic candidate has won 94% of the time. *See* James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010) (ECF No. 191-8).

Moreover, the Cook Report's analysis of the effect of redistricting on the Sixth District was corroborated by NCEC's own data. According to NCEC, in the 2016 congressional election cycle, "Democrats [nationwide] won only four districts where DPI was below 50

percent"; in none of those districts was the DPI below 40%, as it was in the Sixth District prior to redistricting. ECF No. 191-7. Conversely, among the 160 districts across the country with a DPI above 50%, all but 12 were won by the Democratic candidate. *Id.* Both Cook's and NCEC's data confirmed that the Democrats held a clear electoral advantage and that Republican voices had indeed been minimized.

B. Proceedings

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 redistricting plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, ***Benisek v. Mack***, 11 F. Supp. 3d 516 (D. Md. 2014), and the Fourth Circuit summarily affirmed, ***Benisek v. Mack***, 584 F. App'x 140 (4th Cir. 2014). The Supreme Court reversed, however, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. ***Shapiro v. McManus***, 136 S. Ct. 450, 456 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). In doing so, the Court observed that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy in *Vieth* and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six additional plaintiffs and refining the theory underlying their constitutional challenge. Two of the original plaintiffs later agreed to their dismissal from the action, leaving seven plaintiffs, all of whom are registered Republicans who lived in the Sixth District prior to the 2011 redistricting. Three of these plaintiffs still reside in the Sixth District, while four of them now live in the Eighth District as a result of the redistricting.

The plaintiffs' second amended complaint alleged that those responsible for the 2011 congressional map "purposefully and successfully flipped [the Sixth District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They alleged that "[t]he drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters." *Id.* ¶ 6. They alleged further that the plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican voters and preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . . , as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintained that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c).

Based on these allegations, the plaintiffs claimed in essence that the plan's redrawing of the Sixth District's boundaries constituted unlawful retaliation in violation of their rights under the First Amendment.

In an opinion issued August 24, 2016, this three-judge court denied the State's motion to dismiss, concluding that the plaintiffs had adequately alleged a justiciable claim for relief. *Shapiro*, 203 F. Supp. 3d at 586, 600. We held that to succeed on their claim, the plaintiffs would have to prove three elements: *first*, "that those responsible for the map redrew the lines of [their] district with the *specific intent* to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; *second*, "that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect"; and *third*, "that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 596–97.

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction and requested, pursuant to Rule 65(a)(2), that the trial on the merits be advanced and consolidated with a hearing on their motion. Briefing on the plaintiffs' motion for a preliminary injunction was completed, with the parties presenting a robust evidentiary record of more than 80 exhibits, and on July 14, 2017, we conducted a half-day hearing on the motion.

II

This court is clearly of one mind that, as a general matter, partisan gerrymandering is noxious to our form of democracy. And if we read correctly the public sentiment, that view is widely shared. Indeed, the Supreme Court, with no disagreement from any Justice, has concluded that severe partisan gerrymandering is incompatible with democratic principles. Yet, Judge Bredar, writing only for himself, expresses doubts as to whether claims of partisan gerrymandering are justiciable.

To be sure, drawing the lines of congressional districts is a political process. But the Supreme Court has repeatedly recognized that the political nature of redistricting does not immunize the process from claims that are based on violations of particular provisions of the Constitution. Thus, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court recognized that when redistricting denies citizens equal protection, the issue is justiciable because "the equal protection clause is not diminished by the fact that the discrimination relates to political rights," *id.* at 210 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). Similarly, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court concluded that the political nature of redistricting does not "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*. . . . The right to vote is too important in our free society to be stripped of judicial

protection," *id.* at 6–7. In a similar vein, the Court has found justiciable an equal protection redistricting claim where "race was *the predominant factor motivating* the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). And in circumstances more analogous to those presented in this case, the Court in *Davis v. Bandemer*, 478 U.S. 109, 113, 118–27 (1986), held that a claim alleging an unconstitutional dilution of votes of one political party's members was justiciable.

While claims alleging violations of individual constitutional rights are justiciable and have been so since *Marbury v. Madison*, the Court has been unable to find a standard by which to conclude that suspect districts, although equal in population, violate the Equal Protection Clause based on extreme partisanship. *See Vieth*, 541 U.S. at 281–301. Even so, five Justices in *Vieth* concluded that the issue remained justiciable. Moreover, Justice Kennedy, canvassing the Court's decisions, appropriately recognized that claims asserting other constitutional rights, such as a violation of the First Amendment, could be reviewable. As he stated:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan

> gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Id. at 314 (Kennedy, J., concurring in the judgment). He went on to point out that "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. Indeed, in this very case, a unanimous Supreme Court expressly invited our consideration of the First Amendment theory articulated by Justice Kennedy, noting that the theory remains "uncontradicted by the majority in any of our cases." *Shapiro*, 136 S. Ct. at 456. And we concluded, from a fuller review of the Supreme Court's First Amendment jurisprudence, that a First Amendment theory is viable and justiciable. *See Shapiro*, 203 F. Supp. 3d at 594–97.

To begin, it is "axiomatic" that the government violates the First Amendment when it regulates speech "based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). As the Court noted, while restrictions based on content presumptively offend the First Amendment, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is *all the more blatant.*" *Id.* at 829 (emphasis added). As a result, "[t]he government must abstain from regulating speech when the specific motivating ideology or the

opinion or perspective of the speaker is the rationale for the restriction." *Id.* Moreover, viewpoint discrimination is no more constitutional when the offending restriction does not explicitly mention any individual viewpoint. Rather, facially neutral restrictions are nonetheless subject to strict scrutiny when they "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Moreover, the government may not suppress one viewpoint even in spheres of activity where it can lawfully restrict the categories of speech permitted and the time, place, and manner in which it is conveyed. *Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–49 (1983). So, for example, while the government may lawfully exercise significant control over its employees, it may not fire someone solely because he belongs to a disfavored political party, as this would amount to blatant "government discrimination based on the viewpoint of one's speech or one's political affiliations." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968) (barring discharge of public-school teacher for writing letter critical of school board).

Indeed, even where the government is allowed, or even required, to *consider* the viewpoint of expression that it regulates, this does not give it permission to *intentionally advance* one viewpoint over the other. Thus, in *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court evaluated a First Amendment challenge to a school board's removal of certain library books from school libraries. The Court recognized that, although the local school board "possess[ed] significant discretion to determine the content of their school libraries," its discretion could "not be exercised in a narrowly partisan or political manner." *Id.* at 870. As the Court observed, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Id.* at 870–71.

In cases where some regulation of expression is inevitable, such as in *Pico*, assessing a constitutional claim "depends upon *the motivation* behind [the government's] actions." *Pico*, 457 U.S. at 871 (emphasis added). In assessing the school board's removal of books in that case, the Court explained, "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Id.* And the Court defined "decisive factor" to mean "a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* n. 22 (citing *Mt. Healthy City*

Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

Given these stringent limitations on the government's ability to advance ideological motives by regulating speech, it would be strange indeed if a State's administration of elections were not similarly limited. In fact, the Court has noted specifically that "in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Thus, because an election campaign is "an effective platform for the expression of views on the issues of the day," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), the Court has deemed justiciable challenges to laws that threaten "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Similarly, while a State may constitutionally choose locations for polling places, even though some voters may be more inconvenienced by a location than others, *see Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016), the Constitution would obviously not permit the State to locate a polling place specifically to make it more difficult for voters of a particular party to vote.

Against the backdrop of this First Amendment jurisprudence, the plaintiffs' First Amendment claim is readily justiciable. We previously concluded that plaintiffs stated a claim in alleging that the defendants drew district lines in order to dilute and thus diminish

the effectiveness of their expression. The allegation that district lines were drawn *with the intent* to suppress the effectiveness of one political party's voters is essentially no different from the familiar claims of adverse employment action due to protected political speech, *see, e.g.*, *Mt. Healthy*, 429 U.S. at 283–84, or claims that a government has taken an otherwise permissible action with the impermissible motive of silencing one side of a political debate, *see, e.g.*, *Pico*, 457 U.S. at 871.

Moreover, judicial abdication from partisan gerrymandering cases, as advocated by Judge Bredar, would have the most troubling consequences.* If there were

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* Judge Bredar protests that it "is incorrect" to state that he concludes that partisan gerrymandering claims are not justiciable. *Ante* at 12. Yet he expresaly relies on what he considers to be the plaintiffs' failure to establish justiciability as a basis for denying their motion for a preliminary injunction. *Ante* at 13–14; *see also ante* at 2.

The standing law is that partisan gerrymandering claims *are justiciable*. *See Bandemer*, 478 U.S. at 113. To be sure, various Supreme Court Justices continue to debate the question, but they have not held otherwise. Judge Bredar relies on comments by Justices who were not speaking for the Court to conclude that justiciability has been cast into doubt. And he further speculates that any rule of justiciability previously recognized may be changed in *Gill v. Whitford*, No. 16-1161, now pending before the Court. Lower courts are admonished, however, to follow the Supreme Court's existing law until the Court changes it and not to speculate on changes. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet

no limits on the government's ability to draw district lines for political purposes, a state might well abandon geographical districts altogether so as to minimize the disfavored party's effectiveness. In Maryland, where roughly 60% of the voters are Democrats and 40% Republicans, the Democrats could create eight safe congressional districts by assigning to each district six Democrats for every four Republicans, regardless of the voters' geographical location. In a similar vein, a Republican government faced with these same voters could create a map in which two districts consisted entirely of Democrats, leaving six that would be 53% Republican. Such a paradigm would be strange by any standard. A congressman elected in such a system could have constituents in Baltimore City, others in Garrett County, and yet others in the suburbs of Washington, D.C., preventing him from representing any of his constituents effectively. Similarly, members of a single household could be assigned to different congressional districts, and neighbors would be denied the ability to mobilize politically. Such partisan gerrymandering, at its extreme, would disrupt the "very essence of districting," which "is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

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appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Drawing on traditional First Amendment jurisprudence, which includes "well-established standards for evaluating ordinary First Amendment retaliation claims," *Shapiro*, 203 F. Supp. 3d at 596, we thus previously held that a plaintiff states a claim for unconstitutional gerrymandering when he demonstrates that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Id.* at 596–97. And that is the standard that we must now apply.

III

To grant a preliminary injunction, we must conclude that the plaintiffs are likely to succeed on the merits; that without the injunction, they are likely to suffer irreparable harm; that the balance of equities favors them; and that the injunction would be in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In this case, the only issue seriously disputed is whether the plaintiffs are likely to succeed on the merits. I address the remaining requirements in Part IV.

Under the standard established in this case for a First Amendment claim, the plaintiffs must show (1) intent, (2) concrete adverse effect, and (3) causation. *Shapiro*, 203 F. Supp. 3d at 596–97. If the plaintiff makes a sufficient showing of these requirements, "the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest." *Id.* at 597.

First, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish the congressional district boundaries in 2011 with a narrow focus on diluting the vote of Republicans in the Sixth District, so as to ensure the election of an additional Democratic representative. Governor O'Malley, who was responsible for the redistricting process, asked Congressman Hoyer to begin the redistricting effort, and Hoyer retained NCEC to draw up district maps that protected Democratic incumbents and flipped the Sixth District from Republican to Democrat. Hawkins, an NCEC analyst, prepared district maps using NCEC's proprietary DPI metric to assess the likelihood that a district would elect a Democratic candidate. He homed in on maps using data that predicted a Democratic victory in the Sixth District, unlike maps submitted by third parties, which had sub-50% DPI values for the Sixth District. Hawkins submitted several maps, each with a higher DPI in the Sixth District, to the Democratic members of Maryland's congressional delegation. The delegation, in turn, culled NCEC's proposed maps down to a handful

where the DPI for the District was approximately 51% and submitted those to the Advisory Committee. The Advisory Committee's staffers then used those maps, the DPI information, and their data on party registration and voter turnout to finalize a map with a 53% DPI for the Sixth District, which the General Assembly thereafter adopted.

The Advisory Committee's reliance on the DPI was essential to satisfying the Committee's intent to flip the Sixth District from safely Republican to securely Democratic. Notes prepared for Senate President Miller's remarks to the state House and Senate Democratic Caucuses about the redistricting plan emphasized that the map "create[d] an opportunity for Montgomery County to control two congressional districts"; "preserve[d] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% [DPI]"; and "g[ave] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. Governor O'Malley admitted that his Advisory Committee sought to "create a district" that "would be more likely to elect a Democrat than a Republican." O'Malley Dep. 82:16–18; *see also id.* at 27:12–15 (describing aim of "put[ting] more Democrats and Independents into the Sixth District" to ensure "the election of another Democrat"). Senate Majority Leader Garagiola admitted that "one of the purposes[] [was] to make the Sixth Congressional District have 53 percent Democratic performance." Garagiola Dep. 27:4–9 (ECF No. 177-24). These sorts of statements, particularly by delegates

and state senators during the General Assembly's abbreviated consideration of the proposed map, are legion. *See, e.g.*, Joint Stipulations ¶¶ 40–51.

The State's argument that its officials intended only "to allow Democrats to have an equally effective voice in the election of a representative" in the Sixth District — an intent that it argues "cannot be equated with an intent to burden [Republicans'] representational rights" — is hollow. Defs' Memo. at 31. Even if the intent to make one party "more competitive" were constitutionally permissible, the record shows something materially different. Members of the Advisory Committee, with the help of NCEC, worked to craft a map that would specifically transform the Sixth District into one that would *predictably* — that is, by a 94% chance — elect a Democrat by removing Republicans from the District and adding Democrats in their place.

More fundamentally, the State's argument misunderstands the law. If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party. The First Amendment does not distinguish between these intents. A school board, for example, cannot manipulate its stock of library books for "narrowly partisan" reasons, whether its conduct is described as removing all books written by Republicans or as constructing a library full of books written by Democrats. *Pico*, 457 U.S. at 870–71. Where the government singles out a person or class of persons based

on their political affiliation and voting and acts so as to hamper their ability to effectively engage in future expression, it has run afoul of the First Amendment no matter how it characterizes its intent.

The State also argues that its officials did not act with impermissible intent because they did not target *specific voters* based on their individual party affiliation or voting history. This argument, too, is based on a misunderstanding of First Amendment jurisprudence. Here, the plaintiffs have shown that they were targeted for disfavored treatment because of a shared marker of political belief — their Republican party affiliation. The fact that the State moved Republican voters out of the Sixth District *en masse*, based on precinct-level data, and did not examine each voter's history with care before taking that punitive action does not make its action less culpable under the First Amendment. *Cf. Miller*, 515 U.S. at 920 (condemning State's targeting of areas with "dense majority-black population" for inclusion in district); *Sweezy v. Wyman*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents"). If anything, the First Amendment is *more* skeptical where the government uses peoples' nominal party alignment as a proxy for their actual expression. *See, e.g.*, *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

Thus, because State officials have admitted that they intended "to create a district where the people would be more likely to elect a Democrat than a Republican" and that they removed likely Republican

voters from the Sixth District specifically to achieve that aim, the plaintiffs have established that the State acted with constitutionally impermissible intent.

Second, with respect to the adverse effect element, the plaintiffs have shown that the redrawn Sixth District did, in fact, burden their representational rights. At the threshold, it is important to reiterate that, under the standard set forth in our denial of the motion to dismiss, a plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election — though such a showing would certainly be relevant evidence of the extent of the injury. *See Shapiro*, 203 F. Supp. 3d at 598. And, contrary to the State's argument, the plaintiffs need not show that the new Sixth District was *certain* to produce a Democratic congressman. *See Kusper*, 414 U.S. at 58 (explaining that, while restriction on primary voting did not "deprive [voters] of all opportunities to associate with the political party of their choice," it was nevertheless "a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association"); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (holding that adverse employment actions not amounting to discharge may nevertheless violate the First Amendment). Rather, the plaintiffs must show only that their electoral effectiveness was meaningfully burdened — and, of course, that it was intentionally burdened for partisan reasons. That is, a voter must have experienced a "demonstrable and concrete adverse effect" on his "right to have

'an equally effective voice in the election' of a representative.'" *Shapiro*, 203 F. Supp. 3d at 598 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)); *see also Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) ("[W]e have recognized a distinction between an adverse impact that is *actionable*, on the one hand, and a *de minimis* inconvenience, on the other").

The plaintiffs here have made such a showing. By several measures, the new Sixth District map severely disfavors Republican voters. In creating the map, the State removed over 66,000 registered Republicans from the Sixth District and added some 24,000 registered Democrats, such that Republican voters went from outnumbering Democrats 1.3 to 1 (47% of the district's registered eligible voters being Republicans and 36% Democrats) to nearly the exact inverse (44% Democrats, 33% Republicans). Joint Stipulations ¶¶ 10, 53. According to the DPI metric used by the mapmakers and the Cook PVI metric endorsed by the State's expert, Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so. Indeed, the Cook report deemed the district's swing — from "Solid Republican" (R+13) to "Likely Democratic" (D+2) — the largest of any district in the country. ECF No. 177-52 at 6–8. And, historically, "Likely Democratic" districts elect a Democrat 94% of the time. *See* Campbell, *supra*, at 628.

Moreover, while the State's linedrawing need not change the outcome of an election to be culpable, the

fact that a Democratic candidate was elected in the three elections following the 2011 redistricting supports the fact that the Republican voters have suffered constitutional injury. In other words, the Democratic officials who drew the map achieved what they aimed to do — to make Republican voters in the Sixth District less effective.

The State argues that the plaintiffs have not adequately shown that the new Sixth District map actually "chilled" their protected expression. Defs' Memo. at 38. This argument has two flaws. First, a First Amendment injury need not take the form of "chilling" or "deterring" speech. Rather, a plaintiff may claim retaliation if his expression is "adversely affected," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), and surely the government's reduction of the *effectiveness* of expression qualifies as an adverse effect. Second, there is no requirement an *individual* plaintiff show that the government's action has specifically deterred him from engaging in protected conduct. The Supreme Court's patronage cases, which are rooted in retaliation principles, have expressly repudiated any requirement "that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Rather, "[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one." *Balt. Sun*, 437 F.3d at 416. Thus, to evaluate whether the State's conduct caused a First Amendment injury, we assess only whether its

purposeful dilution of Republicans' electoral power would adversely affect the protected expression of a reasonable person situated similarly to the plaintiffs. *See id.*

The State's action here would impair a reasonable Republican voter's exercise of his First Amendment rights. Republicans in the Sixth District faced a severe political disadvantage after the 2011 redistricting. This itself is a constitutional injury. Moreover, it is not hard to see how the dilution of Republican voters' effectiveness could deter reasonable voters from full participation in the political process. A committed Republican voter who finds himself in the minority may well lose interest in voting or in supporting candidates for a legislative office that, realistically, they are unlikely to fill. A different Republican voter in the new Sixth District might choose to abandon his party, finding his energy better spent supporting moderate candidates in Democratic primaries. *See Rutan*, 497 U.S. at 73 ("[E]mployees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience"); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) ("[A] pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs"). Here, there was direct evidence of chilled expression, as participation in the Sixth District's Republican primaries dropped substantially between 2010 and 2014, which supports the notion that partisan manipulation deterred the robust exercise of representational rights.

There is also anecdotal evidence of Republicans not voting after the redistricting because of confusion or loss of interest. Of course, voters have no constitutional right to be successful in electing the candidate they favor, and voters regularly lose interest in politics or switch parties for reasons unrelated to gerrymandering. But this does not answer the relevant First Amendment question. In short, the purposeful reduction of one party's effectiveness may well chill the protected expression of that party's voters, even if no individual plaintiff establishes, as a factual matter, that *he* was so chilled.

Finally, as to causation, the plaintiffs have established that, absent the State's retaliatory intent, the Sixth District lines would not have been drawn to dilute the electoral power of Republican voters to the same extent. The framework governing our inquiry into causation is set forth in *Mt. Healthy*, 429 U.S. 274. Specifically, once the plaintiffs have established that the government's constitutionally impermissible intent "was a 'motivating factor' in [its] decision," the burden shifts to the State to show that, even absent the forbidden intent, "it would have reached the same decision." *Id.* at 287 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977)). In other words, assuming that the State intended to burden the plaintiffs' representational rights, we must then determine "if this intent was the decisive factor in [their] decision" to do so. *Pico*, 457 U.S. at 871; *see also Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (explaining that, where "the same decision would have

resulted even had the impermissible purpose not been considered," then "there would be no justification for judicial interference with the challenged decision"). Under the *Mt. Healthy* framework, therefore, where unlawful intent *in fact* drove the State to its decision, the State cannot escape liability by "hypothesiz[ing] that it *might* have employed lawful means of achieving the same result." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 n.54 (1978) (opinion of Powell, J.) (emphasis added) (declining to allow a remand because it "would result in fictitious recasting of past conduct").

The State rejects *Mt. Healthy*'s burden-shifting framework for causation, contending that it applies only in the context of public employment. But there is simply no support for the State's cramped reading of that case. On the contrary, *Mt. Healthy* stands for a general, common-sense principle applicable in *all* retaliation-based First Amendment claims — that, where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway. The Supreme Court has accordingly relied on the *Mt. Healthy* framework in several types of claims unrelated to public employment, and indeed in allegations of constitutionally forbidden intent beyond those related to protected expression. *See Pico*, 457 U.S. at 870, 871 n.22 (school board's removal of books from school library); *Wilkie v. Robbins*, 551 U.S. 537, 558 n.10 (2007) (Bureau of Land Management's intimidation of landowner to induce his grant of an easement); *Texas v. Lesage*, 528 U.S. 18, 20–21 (1999) (per curiam)

(university's rejection of application under race-conscious admissions program); *Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (village's denial of rezoning request). The framework is no less applicable here.

As already noted, the record demonstrates that the State intended to burden the plaintiffs' representational rights, which leaves the question of whether the State has shown that, absent this intent, it would have drawn lines that similarly burdened Republican voters in the Sixth District. While it probably would be impossible for the State to show that it would have drawn the *exact same district lines* absent the impermissible intent, to satisfy its end of the burden-shifting inquiry, it would at least have to show that it would have drawn lines that similarly burdened the plaintiffs' representational rights.

Even this, however, the State cannot do. It points to two primary objectives that it claims justify the Sixth District's reconfiguration in 2011 — preventing the new First District from crossing the Chesapeake Bay and grouping residents of the I-270 corridor together in one district. But the evidence of intent in this case is overwhelming and undisputed that the State drew the lines of the Sixth District to flip the District from Republican to Democratic control, and it is implausible that consideration of these other objectives would have led to a map that similarly burdened Republican voters. Again, in tasking Hawkins with drawing a map, Democratic officials provided him with only two goals — protecting Democratic incumbents and obtaining a seventh Democratic seat. Hawkins was *not*

instructed to consider whether "there was a community of interest related to the I-270 corridor." Hawkins Dep. 128:19–20. The record shows no invocation of I-270 as a justification for the shapes of the Sixth and Eighth District's until Jeanne Hitchcock's presentation of the nearly final map to the joint session of House and Senate Democratic Caucuses and, unsurprisingly, even Democratic delegates found it a flimsy justification for the dramatic reshuffling of the two districts. *See, e.g.*, Joint Stipulations ¶ 46.

The majority, in finding that the plaintiffs failed to show a likelihood of success on the causation element, commits two significant errors. First, it mischaracterizes our previous holding on the causation element to adopt a new standard that is inconsistent with First Amendment jurisprudence. Second, it applies the new standard to the facts in a confusing and inherently inconsistent manner.

The majority begins correctly by stating the causation standard from our previous holding — that the gerrymander must create a tangible, adverse impact that would not have occurred but for the unconstitutional intent of the mapmakers. *See ante* at 17. But then it leaps from this correct statement of the causation standard to its own newly created standard by requiring "proof that *but for* the gerrymander, the challenged effect (here, *the switch in political power* in the Sixth District) would not have happened." *Id.* (second emphasis added). Explaining its new standard further, the majority states that the causation element "would be satisfied *only* if [the evidence showed that]

Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact." *Ante* at 18. Indeed, it expressly contemplates that voters' injury takes the form of Bartlett's loss to Delaney, "but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*." *Id.* These arguments, however, represent a failure to understand First Amendment jurisprudence, which focuses not on who wins but on the burden imposed on First Amendment rights — here, on the right to cast an undiluted vote. In short, the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters. Under the applicable First Amendment framework, however, the adverse effect is *the dilution* of votes — and the corresponding burdening of expression by voters — regardless of how the election turned out.

Under the majority's standard requiring an altered *election outcome*, critical First Amendment violations could never be remedied. For instance, claims that the party in control of State government deliberately attempted to suppress political speech *before* an election or deliberately located polling places to inconvenience the other party could never be pursued under the majority's standard, because the plaintiffs would be unable to show that the election results were tipped as a result of the unconstitutional conduct. More to the point, under the majority's new standard, no redistricting map could be challenged *before* an election. Any

standard of causation that would so arbitrarily limit our ability to redress constitutional injuries must be rejected.

In applying its new standard to the facts in the record, the majority's analysis is yet more confusing. The majority accepts that the defendants here *did in fact intend* to retaliate against voters who had previously voted for Republican candidates in the Sixth District by drawing a map that moved over 66,000 Republicans from the old Sixth District and introduced some 24,000 new Democrats to diminish the Republicans' ability to express their political viewpoint. The majority also accepts, as it has to, that this map *was in fact adopted* and that, under this new map, the Republicans' voice was diminished and the Democrats *achieved unprecedented electoral success in the Sixth District*. I submit that only one conclusion can be drawn from these accepted facts — that a degree of vote dilution significant enough to place Republican voters at a concrete electoral disadvantage was caused by the conduct that the State specifically intended. Yet, somehow, the majority holds that these actions *did not cause* the retaliatory harm that the State intended. The majority somehow concludes that the State's plan was ineffective, despite its intended effect coming to pass. Such a view of causation necessarily embraces the bizarre notion that other, unnamed factors might have coincidently caused those effects. Under such reasoning, a defendant who intentionally poisons a victim's drink could not be found to cause the death because the victim *might have* died from a heart attack

anyway. Yet this is the argument that the majority embraces.

Moreover, applying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative, is directly contrary to the causation standard that the Supreme Court has established for retaliation claims. In *Mt. Healthy*, the Court required only a showing that the constitutionally impermissible intent was *a motivating factor*, such that the State cannot escape liability by hypothesizing some remote or speculative cause. *See Mt. Healthy*, 429 U.S. at 287.

In sum, the record amply proves that the State violated the First Amendment under the standard we previously adopted in this case. Indeed, on this record, there is no way to conclude otherwise, even as a possibility. *A fortiori*, it follows that the plaintiffs have demonstrated *the likelihood* of success on the merits, as required for entering a preliminary injunction.

IV

The other three factors governing our issuance of a preliminary injunction do not require extensive discussion. Absent an injunction, the plaintiffs are likely to suffer irreparable harm. Because the State's construction of the Sixth District in 2011 likely violated the plaintiffs' First Amendment rights, the plaintiffs are experiencing ongoing constitutional injury without a new map. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts

routinely deem restrictions on fundamental voting rights irreparable injury"). Moreover, the plaintiffs seek a preliminary injunction *now* so as to have a new map in place for the 2018 congressional election cycle. We must be mindful of the fact that, "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *Id.*

The balance of the equities here also favors the plaintiffs. To be sure, requiring Maryland to redraw the Sixth District's boundaries is no trivial matter. But where, as here, plaintiffs establish a strong likelihood of success on the merits and irreparable injury, they have generally shown that the equities work in their favor. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812–13 (4th Cir. 1991). And though there is no doubt that the State would have to expend resources in redrawing district lines that comply with our injunction, the fact that the State regularly creates new legislative maps so as to comply with other constitutional requirements, like "one person, one vote," suggests that the burden will not be unduly onerous. Indeed, our discussion of the merits reveals the ease and precision with which lines can be drawn using mapmaking software, and we are confident that the State, with the aid of such software, will have little trouble devising an alternative map that complies with the law. The plaintiffs in fact have offered an alternative map in this case where only the line between the Sixth and Eighth Districts had to be redrawn.

Finally, it is obvious that an injunction here will serve the public interest. An injunction will not only redress a serious, ongoing constitutional injury, but will also enable the plaintiffs and those similarly situated to them — a large portion of Maryland voters — to more fully participate in congressional elections.

In sum, this fulsome record overwhelmingly shows the plaintiffs' satisfaction of our First Amendment standard, and the ongoing harm can only be rectified by the entry of an injunction. I would therefore grant the plaintiffs' motion in full.

V

If the plaintiffs were to appeal the denial of their motion for an injunction, *see* 28 U.S.C. § 1253, I would have no objection to the entry of a stay. Failing that, however, the mere pendency of *Gill v. Whitford*, No. 16-1161, in the Supreme Court does not justify delaying a final decision in this case alleging a serious breach of an important constitutional right. The nature of the claim in *Gill*, as well as the facts supporting the claim, is materially different from the nature of the claim before us. *Gill* centers on an Equal Protection claim relating to statewide redistricting, while this case involves a First Amendment claim arising from the line-drawing of a single district. Accordingly, at this juncture, I do not join the majority's *sua sponte* entry of a stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. SHAPIRO, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No.: 1:13-cv-03233-JKB
DAVID J. MCMANUS, JR., *et al.*,	*	
Defendants.	*	

COMMON CAUSE; THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW; THE CAMPAIGN LEGAL CENTER, INC.,

Amici Supporting Plaintiffs.

Michael B. Kimberly and Paul Whitfield Hughes, MAYER BROWN LLP, Washington, D.C., for plaintiffs.

Jennifer L. Katz and Jeffrey Lewis Darsie, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for defendants.

Benjamin W. Thorpe, Emmet J. Bondurant, BONDURANT MIXSON AND ELMORE LLP, Atlanta, Georgia, Gregory L. Diskant, Susan Millenky, PATTERSON BELKNAP WEBB AND TYLER LLP, New York, New York, and Michael A. Pretl, Riverton, Maryland, for Amicus Common Cause. Charles E. Davidow, Washington, D.C., Pietro Signoracci, Robert A. Atkins, New York, New York, PAUL WEISS RIFKIND WHARTON

AND GARRISON LLP, and Michael Li, New York, New York, for Amicus The Brennan Center for Justice at N.Y.U. School of Law. Paul March Smith, JENNER AND BLOCK LLP, Washington, D.C., for Amicus The Campaign Legal Center, Inc.

Filed: August 24, 2016

Before Niemeyer, Circuit Judge, and Bredar and Russell, District Judges.

Judge Niemeyer wrote the opinion in which Judge Russell joined. Judge Bredar wrote a dissenting opinion.

NIEMEYER, Circuit Judge:

The plaintiffs, who are Maryland voters and registered Republicans, challenge the constitutionality of Maryland's 2011 congressional redistricting law under the First Amendment and Article I, §§ 2 and 4, of the U.S. Constitution. They allege in their second amended complaint (1) that the State drew the lines of Maryland's Sixth Congressional District with the specific intent to punish and retaliate against them and similarly situated voters by reason of how they voted and their political party registration; (2) that the State, in furtherance of this purpose, drew the Sixth District's lines in such a manner as to dilute their vote and burden their political expression; and (3) that the State succeeded in its efforts, inflicting a tangible and concrete adverse effect. The question presented is whether the plaintiffs' complaint states a justiciable claim that survives the State's motion to dismiss under Federal

Rule of Civil Procedure 12(b)(6). We conclude that it does, recognizing, as the Supreme Court stated in remanding this case to this three-judge court, that the plaintiffs' "legal theory [is] . . . uncontradicted by the majority in any of [the Court's] cases," *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), and that their complaint adequately employs First Amendment jurisprudence to state a plausible claim for relief. Accordingly, we deny the State's motion to dismiss.

I

A

At this stage, we take the factual allegations of the plaintiffs' complaint as true.

Based on the results of the 2010 census, Maryland was entitled to eight seats in the U.S. House of Representatives, the same number it had been allotted since the 1960 census. Although Maryland's population increased by 9% from 2000 to 2010, its population growth was not evenly distributed throughout the State, necessitating redistricting to ensure districts of equal population. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (recognizing that because "States must draw congressional districts with populations as close to perfect equality as possible," States "must regularly reapportion districts to prevent malapportionment").

On July 4, 2011, Governor Martin O'Malley, a Democrat, appointed five individuals to the Governor's Redistricting Advisory Committee: (1) Jeanne Hitchcock,

Maryland's Secretary of Appointments and a former Deputy Mayor of Baltimore, a Democrat; (2) State Senate President Thomas V. Mike Miller, Jr., a Democrat; (3) House of Delegates Speaker Michael E. Busch, a Democrat; (4) Richard Stewart, a businessman who chaired Governor O'Malley's reelection campaign for Prince George's County, a Democrat; and (5) James J. King, a businessman who had previously served one term in the Maryland House of Delegates, a Republican.

The Advisory Committee was charged with the task of drafting a redistricting plan and proposing a map for the State's eight congressional districts in light of the 2010 census results. To that end, it held 12 public meetings across the State between July 23 and September 12, 2011, receiving more than 350 comments from members of the public. The plaintiffs allege, however, that the Advisory Committee conducted its actual "deliberations and calculations entirely behind closed doors." Second Am. Compl. ¶ 45. When drawing its redistricting map, the Advisory Committee had access to the Maryland Board of Elections' statistical data, which provided "highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State," including "voter registration by precinct, election day turnout by precinct and party, party share of vote by voting category, and voter consistency." *Id.* ¶¶ 46–47.

The Advisory Committee completed its map on October 4, 2011, with King, the Committee's lone Republican, casting the sole dissenting vote, and presented it

to the Governor. After posting the map online and receiving additional comments from the public, the Governor announced on October 15 that he would submit to the legislature a plan that was "substantially similar" to the Advisory Committee's proposal. Two days later, on October 17, the Governor's proposed redistricting map was introduced as Senate Bill ("S.B.") 1 at an emergency legislative session. That same day, the Senate Committee on Reapportionment and Redistricting, along with the House Rules Committee, held a joint hearing on S.B. 1 before voting to approve the bill. After adopting minor technical amendments, the Senate passed the bill the next day, October 18, sending it to the House of Delegates, which, after making additional technical amendments, passed it on October 19. The Senate concurred in the House's technical amendments, and the Governor signed S.B. 1 into law on October 20, 2011, three days after it had been introduced. *See* Md. Code Ann., Elec. Law §§ 8-701 to -709.

The enacted State Plan created eight congressional districts that were mathematically equal in population—seven of the districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. The changes effected by the State Plan, however, were far more extensive than those needed to achieve population equality. Indeed, while "six of the eight existing congressional districts remained within 3% of the ideal size of 721,529 people[,] . . . the Plan shuffled nearly one-in-three Marylanders from one district to another, scrambling the

representation of 1.6 million people." Second Am. Compl. ¶ 61.

The reshuffling of Maryland's population was particularly extensive with respect to Maryland's Sixth Congressional District. Historically, the Sixth District included western Maryland and much of north-central Maryland. In the years following the Supreme Court's 1964 holding in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that States must conduct regular redistricting to ensure districts of equal population, Maryland adopted a series of five maps that were used in the 23 congressional elections held from 1966 through 2010. Under those maps, the Sixth District always included the State's five most northwestern counties in their entirety: Garrett, Allegany, Washington, Frederick, and Carroll Counties. Over the years, the Sixth District also included various portions of Baltimore, Howard, Montgomery, and Harford Counties to achieve the appropriate population count. But the identifiable core, consisting of the five northwestern counties, stayed constant, constituting not only a majority of the Sixth District's territory but also most of its population. Specifically, after the State revised its district lines in 1991 using the data from the 1990 census, 83% of the Sixth District's population lived in the five northwestern counties, and that number rose to 88% under the State's 2002 Redistricting Plan.

The 2010 census showed that, compared to the ideal district population of 721,529 residents, the Sixth District had 10,186 extra residents, a variation of only 1.4%. Yet, while the census data would have required

only a small adjustment to remove some 10,000 residents from one of the counties along the District's eastern edge, but not from the five northwestern counties, the State completely reshuffled the Sixth District. It moved 360,000 residents out of the Sixth District—virtually one-half of its population—and then added to the District 350,000 residents from Montgomery County, a Democratic stronghold that includes Washington, D.C. suburbs. The plaintiffs allege that this wholesale shifting and transfer was done not "by reference to geography or compliance with legitimate redistricting criteria," Second Am. Compl. ¶ 7(c), but rather to dilute the Republican voters' voice in the next election. The complaint alleges further that "a net total of over 65,000 registered Republican voters" were transferred from the Sixth District and "a net total of over 30,000 Democratic voters" were imported into the District, for a swing of some 95,000 voters. *Id.* ¶ 4. Moreover, although Frederick County had been included in the Sixth District continuously since 1872, the redistricting split the County's population roughly in half between the Sixth and Eighth Districts. Similarly, while Carroll County had been included in the Sixth District since 1966, the redistricting removed it from the Sixth District entirely and split its population between the Eighth and First Districts.

The plaintiffs' complaint alleges that the major reshuffling of the Sixth District's population directly affected the District's political complexion. Historically, the Sixth District was reliably Republican. Indeed, "[i]n the 70 years between January 1943 and January

2013, the [D]istrict was represented in Congress by members of the Republican Party in four out of every five years." Second Am. Compl. ¶ 78. In the 2010 election, Representative Roscoe Bartlett, the Republican candidate who had represented the Sixth District in Congress since 1993, won reelection by a margin of 28 percentage points. But because the areas removed from the Sixth District were predominantly Republican while the area added was predominantly Democratic, the parties' respective shares of the District's registered voters roughly reversed so that, at the time of the 2012 general election, 33% of the new Sixth District's registered voters were registered as Republicans, while 44% were registered as Democrats. In that election, Democratic candidate John Delaney, a newcomer to politics, defeated Representative Bartlett by 21 percentage points, with "the long-time Congressman's share of the vote dropp[ing] from 61.45% to 37.9% in a single election cycle." *Id.* ¶ 86. Delaney won reelection in 2014.

Maryland's 2011 Redistricting Plan also affected the contours of other districts, most particularly Maryland's Eighth District. That district had previously included most of the portion of Montgomery County that was reassigned to the Sixth District, and it also absorbed many of the citizens of Frederick and Carroll Counties who were removed from the Sixth District. After redistricting, the Eighth District's proportion of registered Republicans rose significantly, but registered Democrats continued to outnumber registered Republicans by a sizeable margin. Specifically, prior to

redistricting, registered Democrats outnumbered registered Republicans in the Eighth District by three to one; after redistricting, the ratio was roughly two to one. After redistricting, Representative Chris Van Hollen, a Democrat, continued to win reelection to represent the Eighth District after redistricting.

B

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 Redistricting Plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), and the Fourth Circuit Court of Appeals summarily affirmed, *Benisek*, 584 F. App'x. 140 (4th Cir. 2014). The Supreme Court, however, reversed, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *See Shapiro*, 136 S. Ct. at 456. In doing so, the Court recognized that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six

additional plaintiffs and refining the theory underlying their constitutional challenge to the 2011 congressional Redistricting Plan. The six new plaintiffs, as well as at least one of the original plaintiffs, are all registered Republicans who lived in the Sixth District prior to the Plan's enactment. While three of these plaintiffs still reside in the Sixth District, four of them now live in the Eighth District as a result of the Plan. The plaintiffs' complaint challenges the State's "cracking" of the Sixth District, alleging that those responsible for the 2011 Plan "purposefully and successfully flipped [the District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They allege that "[t]he drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." *Id.* ¶ 6. They allege further that the Plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican voters by preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . . , as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintain that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c). Based on these allegations, they claim that the Plan's redrawing

of the Sixth District's boundaries violated their rights under the First Amendment and §§ 2 and 4 of Article I of the U.S. Constitution.

The State again filed a motion to dismiss the complaint, arguing that the plaintiffs' claims are nonjusticiable because the plaintiffs "fail[ed] to set forth a discernable, manageable standard that would permit this Court to adjudicate their claims" under either the First Amendment or Article I. The State accepts that "unlawful political gerrymandering claims may be justiciable in concept" but emphasizes that the Supreme Court has yet to identify a judicially discernable and manageable standard for adjudicating such claims and has twice indicated that, in the absence of such a standard, political gerrymandering claims must be dismissed. *See League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The State argues further that the plaintiffs "failed to allege that the Plan imposed any actual restriction on any of their recognized First Amendment rights."

The plaintiffs contend that their complaint "offers . . . what was missing in *Vieth* and *LULAC*: a clear and objective standard for identifying a constitutionally significant burden on the plaintiffs' representational rights." Relying on Justice Kennedy's statement in his separate opinion in *Vieth* that "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," 541 U.S. at 314 (Kennedy, J., concurring in the judgment), they contend that the

First Amendment offers a well-settled framework for considering political gerrymandering claims. They state that the framework would require the court to determine *first*, whether "the State consider[ed] citizens' protected First Amendment conduct in deciding where to draw district lines, and did . . . so with an intent to dilute the votes of those citizens by reason of their protected conduct"; *second*, whether "the redistricting map, in actual fact, dilute[d] the votes of the citizens whose constitutionally-protected conduct was taken into account to such a degree that it imposed a concrete adverse impact"; and *third*, whether the map was "necessary as drawn to achieve some compelling state interest." When assessed against this framework, they maintain that their complaint states a justiciable claim upon which relief can be granted.

II

The U.S. Constitution gives both the States and Congress a role in setting the procedural rules by which citizens select the members of the House of Representatives. Specifically, Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, and further that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations," *id.* § 4, cl. 1. Article I thus "leaves with the States primary responsibility for apportionment of

their federal congressional . . . districts," *Growe v. Emison*, 507 U.S. 25 (1993), while also granting Congress the power to override the decisions made by the States. Congress currently uses this power only to require that States establish single-member districts. *See* 2 U.S.C. § 2c ("In each State entitled . . . to more than one Representative . . . , there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative").

The process of establishing and revising district lines is a "highly political task." *Growe*, 507 U.S. at 33. Indeed, "[t]he very essence of districting is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Because the supporters of our country's two major political parties are not evenly distributed within any State, "[i]t is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Id.* And those State officials charged with redistricting will of course "recognize the political consequences of drawing a district line along one street rather than another." *Id.* The practical "reality is that districting inevitably has and is intended to have substantial political consequences." *Id.*; *see also Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities,

see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics").

Because redistricting is quintessentially a political process that the Constitution assigns to the States and Congress, federal courts' supervision is largely limited. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (recognizing that "a controversy involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" and that, "[i]n such a case, . . . a court lacks the authority to decide the dispute before it" (internal quotation marks and citations omitted)). For example, because "[p]olitics and political considerations are inseparable from districting and apportionment," a court cannot invalidate a map merely because its drafters took political considerations into account in some manner. *See Gaffney*, 412 U.S. at 753. Indeed, such an approach "would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

Moreover, citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate. Nor do political groups have any right to a district map under which their candidates are likely to win seats in proportion to the party's overall level of support in the State. *See Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion)

("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be"); *see also Vieth*, 541 U.S. at 288 (plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups").

But even though the districting process is largely political in nature, State officials are nonetheless limited by specific provisions of the U.S. Constitution. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained" (emphasis added)). To be sure, for many years, the Supreme Court "resisted any role in overseeing the process by which States draw legislative districts," *Evenwel*, 136 S. Ct. at 1123, wary of "enter[ing] th[e] political thicket," *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion). But this changed with the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), where the Court held that a claim alleging that a state-legislative map violated the Equal Protection Clause by establishing districts with unequal populations was justiciable.

Building on *Baker*, the Supreme Court subsequently invalidated a State's malapportioned congressional map in *Wesberry*, holding that Article I, § 2's provision for the election of Representatives "'by the People of the several States' means that as nearly as is

practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7–8. Today, under *Wesberry* and its progeny, "States must draw congressional districts with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124. Similarly, the Court held in *Reynolds v. Sims* that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," 377 U.S. 533, 568 (1964), although "jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives" when drawing these districts, *Evenwel*, 136 S. Ct. at 1124. Together, *Wesberry* and *Reynolds* establish the judicially enforceable rule of "one person, one vote."

Federal courts are also authorized to ensure that the districting process remains free from constitutionally prohibited racial discrimination. Thus, a plaintiff pursuing a racial gerrymandering claim under the Equal Protection Clause states a justiciable claim when he alleges that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). By showing "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, a plaintiff triggers strict scrutiny, shifting the burden to the State to "demonstrate that its districting

legislation is narrowly tailored to achieve a compelling interest," *id.* at 920.

In addition to these constitutional limitations on the redistricting process, the Supreme Court has also recognized that *political* gerrymandering—a term that has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength," *Black's Law Dictionary* 802, 1346 (10th ed. 2014)—may well violate the Equal Protection Clause. But the Court has struggled to devise a standard for adjudicating political gerrymandering claims under the Equal Protection Clause.

In *Bandemer*, the Court held that a claim alleging that a State's reapportionment of its legislative districts violated the Equal Protection Clause by diluting the votes of one political party's members *was justiciable*. 478 U.S. at 113, 118–27. In reaching this conclusion, the Court emphasized that "[t]he question here is the consistency of state action with the Federal Constitution," and that the plaintiffs' claim did not "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking," since "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.* at 122 (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). Moreover, six Justices agreed that a plaintiff bringing a political gerrymandering claim under the Equal Protection Clause must "prove both intentional discrimination against an identifiable political group and an

actual discriminatory effect on that group." *Id.* at 127 (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part). The *Bandemer* majority splintered, however, with respect to the contours of this standard. *Compare id.* at 127–43 (plurality opinion), *with id.* at 161–85 (Powell, J., concurring in part and dissenting in part).

The Supreme Court did not take up another political gerrymandering case for 18 years until it decided *Vieth*, and then it fractured again. In that case, the plaintiffs alleged that a State's revised map for its congressional districts "constituted a political gerrymander, in violation of Article I and the Equal Protection Clause." *Vieth*, 541 U.S. at 272 (plurality opinion). All of the Justices appeared to accept that political gerrymandering, if sufficiently extreme, would violate the Constitution, *see, e.g.*, *id.* at 292–93, but there remained a lack of consensus as to the appropriate standard for "determining when political gerrymandering has gone too far," *id.* at 296. Considering and rejecting the various standards proposed by the plaintiffs and dissenting Justices, as well as the standards proposed by the plurality and the concurrence in *Bandemer*, a four-Justice plurality in *Vieth* "conclude[d] that neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting," and therefore would have overruled *Bandemer*'s holding as to the justiciability of political gerrymandering claims. *Id.* at 305. Providing

the fifth vote for affirming the dismissal of the plaintiffs' claims, Justice Kennedy concurred in the judgment on the ground that, "in the case before us, we have no standard by which to measure the burden [that the plaintiffs] claim has been imposed on their representational rights." *Id.* at 313 (Kennedy, J., concurring in the judgment). But he and the Court's four dissenters refused to join the plurality's conclusion that political gerrymandering claims under the Equal Protection Clause and Article I are necessarily nonjusticiable, declining to "foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306.

Justice Kennedy nonetheless agreed that the plurality had "demonstrate[d] the shortcomings of the . . . standards that [had] been considered to date." *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). There were, accordingly, five votes in *Vieth* for rejecting six distinct, albeit related, standards:

> *First*, the test proposed by the *Bandemer* plurality, which required a showing of an intent to discriminate plus proof that a political group had been "denied its chance to effectively influence the political process," *Bandemer*, 478 U.S. at 132-33 (plurality opinion);
>
> *Second*, the standard proposed by Justice Powell's concurrence in *Bandemer*, which "focuse[d] on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends,"

as "determined by reference to . . . criteria that have independent relevance to the fairness of redistricting," *id.* at 165 (Powell, J., concurring in part and dissenting in part);

Third, the standard proposed by the *Vieth* plaintiffs, which would have required proof that "the mapmakers acted with a predominant intent to achieve partisan advantage," as well as proof that the effect of the map was to "systematically 'pack' and 'crack' the rival party's voters" in such a way as to "thwart the plaintiffs' ability to translate a majority of votes into a majority of seats," *Vieth*, 541 U.S. at 284, 286-87 (plurality opinion) (emphasis omitted);

Fourth, Justice Stevens' proposal in his *Vieth* dissent to "apply the standard set forth in [the Court's racial gerrymandering cases] and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *id.* at 339 (Stevens, J., dissenting);

Fifth, a five-element prima facie test proposed by Justice Souter's *Vieth* dissent through which a plaintiff would show "that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles" before "shift[ing] the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage," *id.* at 351 (Souter, J., dissenting); and

> *Sixth*, the standard proposed by Justice Breyer's *Vieth* dissent, which focused on whether "partisan manipulation" of district boundaries had been used "to entrench a minority in power," *id.* at 360 (Breyer, J., dissenting).

The primary focus of all of these rejected standards, however, was determining when the use of political considerations in districting is so *unfair* as to violate *the Equal Protection Clause*.

The Court addressed political gerrymandering once more in *LULAC*, but again failed to agree on the standard that should apply. The Court there declined to revisit *Bandemer*'s justiciability holding, but five Justices, although unable to join a single opinion, agreed that the plaintiffs' theory—which focused on the mid-decennial nature of the redistricting at issue—failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *LULAC*, 548 U.S. at 414; *id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part).

Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the *Equal Protection Clause* remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge.

But the inability of the Supreme Court thus far to agree on a standard for adjudicating political gerrymandering claims brought under the Equal Protection Clause does not necessarily doom a claim that the State's abuse of political considerations in districting has violated any other constitutional provision. *See Vieth*, 541 U.S. at 294 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable"). Indeed, in this very case, the Supreme Court recognized that the plaintiffs' legal theory—which is premised on the First Amendment rather than the Equal Protection Clause—was "uncontradicted by the majority in any of [its] cases." *Shapiro*, 136 S. Ct. at 456. We therefore turn to the limitations that the First Amendment may impose on a State's redistricting.

III

Like the Equal Protection Clause, the First Amendment also operates to limit the conduct of state actors. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (recognizing that the Fourteenth Amendment makes the First Amendment "applicable to the states"). "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion). Similarly, "[t]he right to vote freely for the

candidate of one's choice is of the essence of a democratic society." *Reynolds*, 377 U.S. at 555.

In addition to these forms of *direct* expression, moreover, the First Amendment also works in tandem with other constitutional guarantees to protect *representational* rights. Indeed, "*[t]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms.*" *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (emphasis added) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)). Expounding on the significance of this "representational right," the Supreme Court has explained:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in th[is] political process[ ]. . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of [a representative]*.

Reynolds, 377 U.S. at 565 (emphasis added). Similarly, the Court in *Wesberry* recognized that Article I, § 2, of the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7–8.

Thus, at the most basic level, when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to "have an equally effective voice in the election" of a legislator to represent them. *Reynolds*, 377 U.S. at 565. In particular, the requirement of Article I, § 2, that one person's vote in a congressional election "is to be worth as much as another's," *Wesberry*, 376 U.S. at 7, provides the premise for recognizing vote "dilution" as a burden on citizens' representational rights, since dilution compromises the equal value requirement. The Supreme Court has already recognized this basic principle in the context of districts of unequal population. *See, e.g.*, *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 693–94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts"). Thus, while a State can dilute the value of a citizen's vote by placing him in an overpopulated district, a State can also dilute the value of his vote by placing him in a particular district because he will be outnumbered there by those who have affiliated with a rival political party. In each case, the weight of the viewpoint communicated by his vote is "debased." *Morris*, 489 U.S. at 693–94. And, because, in our political system, "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, the devaluation of a citizen's vote by

dilution implicates the representational right protected by the First Amendment and Article I, § 2.

The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right. *See Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring in the judgment). It penalizes voters for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences. In this way, the practice implicates the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out" (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998))); *see also Rutan*, 497 U.S. at 77–78 ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly"). Thus, under the First Amendment's retaliation prohibition, the government may neither penalize a citizen nor deprive him of a benefit because of his constitutionally protected speech

and conduct. *See Rutan*, 497 U.S. at 74–76; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Accordingly, the well-established standards for evaluating ordinary First Amendment retaliation claims can also be used for evaluating claims arising in the redistricting context.

A plaintiff bringing a garden variety retaliation claim under the First Amendment must prove that the responsible official or officials were motivated by a desire to retaliate against him because of his speech or other conduct protected by the First Amendment and that their retaliatory animus caused the plaintiff's injury. *See Hartman*, 547 U.S. at 260 (recognizing that "any . . . plaintiff charging official retaliatory action . . . must prove the elements of retaliatory animus as the cause of injury").

With respect to the causation element, a retaliation claim requires proof of "but-for causation" or a showing that "the adverse action would not have been taken" but for the officials' retaliatory motive. *Hartman*, 547 U.S. at 260. For while "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, . . . action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.*; *see also id.* at 256 ("Some official actions adverse to . . . a speaker might well be unexceptional if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is . . . the

but-for cause of official action offending the Constitution").

As for the injury element, the plaintiff must prove that government officials "took some action that adversely affected her First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). The nature of the harm necessary to support a retaliation claim varies depending on the surrounding factual circumstances. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) ("[T]he definition of adverse action is not static across contexts"). It is clear, however, that "the retaliatory acts committed by a [government official must] be more than *de minimis* or trivial," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), and that "[h]urt feelings or a bruised ego are not by themselves the stuff of constitutional tort," *Zherka v. Amicone*, 634 F.3d 642, 645–46 (2d Cir. 2011). Rather, some "concrete harm [must be] alleged and specified," *id.* at 646, and that harm must be sufficiently serious that it "would likely deter a person of ordinary firmness from the exercise of First Amendment rights," *Constantine*, 411 F.3d at 500 (internal quotation marks and citation omitted).

Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the

constitutionality of a State's redistricting legislation—a discernable and manageable standard.

When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. But vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury. Instead, to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference. Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

When a plaintiff adequately alleges the three elements of intent, injury, and causation, as described above, he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course, as consistent with First Amendment jurisprudence, the State can still avoid liability by showing

that its redistricting legislation was narrowly tailored to achieve a compelling government interest. *See Elrod*, 427 U.S. at 362 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny").

This standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process. *First*, it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts. A legislature and its mapmakers may, for example, still use data reflecting prior voting patterns to advance legitimate districting considerations, including the maintenance of "communities of interest," *LULAC*, 548 U.S. at 433 (citation omitted), and even the "protection of incumbents of all parties," *Vieth*, 541 U.S. at 284 (plurality opinion). Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("[T]he First Amendment analysis . . . is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights").

Second, a plaintiff must rely on objective evidence to prove that, in redrawing a district's boundaries, the legislature and its mapmakers were motivated by a

specific intent to burden the supporters of a particular political party. It stands to reason "that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." *Bandemer*, 478 U.S. at 128 (plurality opinion). But merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim. Rather, the plaintiff must produce objective evidence, either direct or circumstantial, that the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated.

Third, the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have "an equally effective voice in the election" of a representative. *Reynolds*, 377 U.S. at 565. Not only is this requirement of a palpable and concrete harm indicated by First Amendment retaliation jurisprudence, but it also makes common sense. Legislators draw political gerrymanders for practical reasons, and it is fitting to measure the effect of the apportionment not by whether it crosses some arbitrary statistical threshold

or offends some vague notion of fairness, but by its real-world consequences—including, most notably, whether the State's intentional dilution of the weight of certain citizens' vote by reason of their views has actually altered the outcome of an election.

The State argues against the First Amendment standard, maintaining that the standard is "arbitrary in the sense that the previous district becomes the norm or baseline against which the fairness of the new district is to be measured" when, in reality, citizens' voting patterns are dynamic. But its argument fails to account for the necessary elements of a First Amendment retaliation claim. The retaliation jurisprudence does not, as the State implies, include a presumption of fairness of the status quo ante. The prior district itself may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons. But it cannot do so to retaliate against one group for its past electoral success in that district.

The State also argues that "no individual has a constitutional right to vote in a district that is safe or competitive for that individual's preferred candidates, even where the district has been so in the past." While that may be true, it is also beside the point. As the Supreme Court has explained in the political patronage context,

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It*

> *may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Rutan, 497 U.S. at 72 (quoting *Perry*, 408 U.S. at 597). This basic principle applies with equal force in the redistricting context. While citizens have no right to be assigned to a district that is likely to elect a representative that shares their views, the State also may not intentionally drown out the voices of certain voters by reason of their views. And when a State is alleged to have not only intentionally but also successfully burdened "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Anderson*, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 30), by diluting their votes in a manner that has manifested in a concrete way, the allegation supports a justiciable claim under the First Amendment and Article I, § 2.

In sum, we recognize the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation, as described herein.

IV

With this standard in hand, we assess the plaintiffs' second amended complaint, accepting the pleaded

facts as true, to determine whether it states a plausible claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

The complaint alleges that, prior to the 2011 redistricting, Maryland's Sixth Congressional District had been "represented for nearly 20 years by Republican Roscoe Bartlett, who won reelection in 2010 by a 28-point margin." Second Am. Compl. ¶ 78. But, according to the complaint, the State's Democratic Governor and its Democratic-controlled legislature "set out to crack the [Sixth] District . . . to prevent voters in that district from [continuing to] elect[] a Republican representative to Congress," *id.* ¶ 38, a goal openly admitted by members of the Advisory Committee and various legislators, *see id.* ¶¶ 95–100. The complaint alleges that, without the input or support of any of the State's Republican leaders, and even though only "relatively small adjustments [were] needed to accommodate population growth," *id.* ¶ 61, the State adopted a redistricting plan that radically redrew the Sixth District's lines, "removing over 360,000 residents from the mostly-Republican northern counties of the district and adding nearly 350,000 residents from predominantly Democratic and urban Montgomery County," *id.* ¶ 81. It alleges that, relying on data reflecting citizens' voting histories and party registrations, "the Plan accomplished a net transfer of over 65,000 Republican voters out of the district and over 30,000 Democratic voters into the district," *id.* ¶ 84, thereby altering the balance of power between the two major political parties. The complaint alleges further that

the mapmakers' effort was successful insofar as the Sixth District "was flipped by the Plan from Republican to Democratic control" in the 2012 congressional election; "[t]he district remained under Democratic control after the 2014 congressional election"; and the district "is nearly certain to remain [under Democratic control] in all future congressional elections under the Plan." *Id.* ¶ 4.

These factual allegations adequately state intent, injury, and causation and therefore support a plausible claim that the State's redrawing of the Sixth District's lines violated the plaintiffs' rights under the First Amendment and Article I, § 2. *First*, the plaintiffs have alleged that they were registered Republicans who voted for Republican candidates in the Sixth District prior to 2011. *Second*, they have alleged that "the Maryland legis[a]ture expressly and deliberately considered Republican voters' protected First Amendment conduct, including their voting histories and political party affiliations, when it redrew the lines of the [Sixth] Congressional District; *and it did so with an intent to disfavor and punish those voters by reason of their constitutionally protected conduct.*" Second Am. Compl. ¶ 7(a) (emphasis added). *Third*, the plaintiffs have alleged that, precisely as intended, the "actual effect" of the Plan has been to "burden[ ] Republican voters in the former [Sixth] Congressional District" by "preventing [them] from continuing to elect a Republican representative to the United States House of Representatives, as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And *fourth and finally*, the

plaintiffs have adequately alleged the causation element of a retaliation claim: they have alleged (1) that the State's redrawing of the Sixth District "cannot be explained or justified by reference to Maryland's geography or other legitimate redistricting criteria" and therefore that "the cracking of the [Sixth] District would not have taken place without the legislature's [deliberate] targeting of Republican voters on the basis of their First-Amendment-protected conduct," *id.* ¶ 120–21; and (2) that "but for the cracking of the district under the Plan," "Republican voters in the former [Sixth] District would have been able to elect a Republican representative in 2012 and 2014," *id.* ¶ 7(b). If the plaintiffs succeed in proving these allegations, they will be entitled to relief, unless the State can establish that the drawing of the Sixth District's lines was narrowly tailored to advance a compelling government interest.

Accordingly, the State's motion to dismiss the plaintiff's complaint for failure to state a justiciable claim is DENIED.

BREDAR, District Judge, dissenting:

I respectfully dissent: I would grant Defendants' motion to dismiss (ECF No. 51).[1]

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[1] In 2014, I presided over this matter while sitting as a single-judge court. Addressing Plaintiffs' claims as initially framed, I found the allegations wanting under the familiar *Twombly/Iqbal* standard, and—following then-controlling Fourth

I begin by emphasizing what this opinion does *not* stand for. This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such conduct is noxious and has no place in a representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("'[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'" (alterations in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion))). Nor do I seek in

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Circuit precedent—I both denied Plaintiffs access to a three-judge court and dismissed the case. *See Benisek v. Mack*, 11 F. Supp. 3d 526 (D. Md. 2014). These two rulings were summarily affirmed by the Fourth Circuit. *See Benisek v. Mack*, 584 F. App'x. 140 (4th Cir. 2014) (mem.). However, the Supreme Court of the United States later reversed the first ruling, holding that the Fourth Circuit had set too high a bar for access to three-judge district courts under 28 U.S.C. § 2284. The Supreme Court explained that the Fourth Circuit erred in *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769, 773 (4th Cir. 2003), in which case the Fourth Circuit had determined that, where a redistricting complainant fails to state a claim, by definition the complainant's pleadings are constitutionally insubstantial and "so properly are subject to dismissal by the district court without convening a three-judge court." *See Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) ("We think [the *Duckworth*] standard both too demanding and inconsistent with our precedents. '[C]onstitutional claims will not lightly be found insubstantial for purposes of' the three-judge-court statute." (alteration in original) (citation omitted)). Without "expressing any view on the merits" of Plaintiffs' claims, *id.* at 456, the Supreme Court remanded the case for proceedings before a three-judge district court. On remand, Plaintiffs sought—and received—this Court's permission to amend their Complaint substantially, and it is Plaintiffs' modified constitutional theory that now confronts the Court.

this opinion to understate the prevalence of political gerrymandering: there is no doubt in my mind that the problem is real and widespread and that entrenched Democratic and Republican state legislatures alike exercise their control over redistricting in an effort to promote party power. *See* Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. Ill. U. L. Rev. 409, 419-23 (2007) (recounting the history of both Democratic and Republican gerrymandering efforts in Texas). Further, this opinion should not be read as a willing abdication of the judiciary's constitutional obligation to resolve cases and controversies, *see* U.S. Const. art. III, § 2, cl. 1, even when those cases and controversies involve politically charged subject matter. I have studied Plaintiffs' allegations and, in particular, their proposed First Amendment framework for resolving political gerrymandering claims. I accept, for purposes of this discussion, that the First Amendment may, as Justice Kennedy opined in *Vieth*, be the most "relevant constitutional provision in . . . cases that allege unconstitutional partisan gerrymandering," 541 U.S. at 314 (Kennedy, J., concurring in the judgment). I also assume, as I must on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, that Plaintiffs' well-pleaded factual allegations are true: accordingly, I take as a given that the Maryland Governor's Redistricting Advisory Committee ("GRAC") "focused predominantly on the voting histories and political-party affiliations of the citizens of the State" with the "clear purpose and effect of diluting the votes of Republican voters and

preventing them from electing their preferred representatives in Congress." (ECF No. 44 ¶ 6.)

But even accepting that the First Amendment supplies the relevant constitutional principle, and even assuming that official misconduct may be afoot on the discrete facts of this case, I cannot responsibly endorse Plaintiffs' proposed standard (or otherwise approve continued litigation in this matter) unless I first conclude that the standard would be viable and manageable *throughout the life* of this case and *beyond the facts* of this case. Two substantial hurdles prevent me from drawing such a conclusion. The first hurdle relates to precedent: the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems. A *per se* rule flatly prohibiting state legislatures from taking account of voting history or voter affiliation in their mapmaking would streamline the preliminary analysis, but it is not clear that such a rule is available in light of controlling law (or desirable in light of competing interests and objectives).

Even were this Court to implement such a *per se* rule, there remains a second, insurmountable barrier. Courts are simply not equipped to ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights. Yet that is precisely what the Supreme Court has required. *Compare Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion) ("We . . . agree . . . that in order to succeed the . . . plaintiffs were required

to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."), *and Vieth*, 541 U.S. at 295 (plurality opinion) ("This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms."), *with League of United Latin Am. Citizens* [*LULAC*] *v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights."). Courts cannot reliably distinguish between what Plaintiffs would term impermissible "vote dilution" and the ordinary consequences of an American political process that is organic, fluid, and often unpredictable.

Constitutional adjudication in the federal courts (and particularly adjudication that has the potential to disrupt democratic process and delegitimize democratically elected officials) must not be inconsistent or *ad hoc* but must instead be "principled, rational, and based upon reasoned distinctions," *Vieth*, 541 U.S. at 278 (plurality opinion). Because Plaintiffs have not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened, and because I have been unable to discern an acceptable alternative framework, I conclude that Plaintiffs' claims are not justiciable.[2] Accordingly, I would now dismiss Plaintiffs'

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[2] While the majority is quite correct in its observation, *supra* at 25, that Justice Kennedy's First Amendment theory remains

controlling Second Amended Complaint with prejudice. Because I conclude that Plaintiffs' claims can *never* succeed, I would spare the parties the significant expense of discovery and end this case now. Offensive as political gerrymandering may be, there is nothing to be gained (and much to be lost) in postponing the inevitable.

I. Partisanship and Precedent

Before a court can craft a principled standard for rectifying a harm, it must grasp precisely what harm it is trying to rectify. Political gerrymandering claims have left courts in a quagmire because, on the one hand, courts recognize that districting is among the most inherently political ventures that state legislatures (and their agents) undertake; on the other hand, it goes without saying that the party in power has every incentive to design and implement a map that further entrenches its power. I am persuaded that *if* courts are to have any role in policing this process (an open question as far as I, and, it would seem, a majority of the Justices of the Supreme Court are

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"uncontradicted by the majority in any [Supreme Court] cases," *Shapiro*, 136 S. Ct. at 456, it does not follow, as the majority suggests, that Plaintiffs' Second Amended Complaint "adequately employs First Amendment jurisprudence to state a plausible claim for relief." As will be seen, Plaintiffs have failed to state a claim because they, like so many complainants in redistricting cases, have failed to proffer either a reliable standard for measuring the burden of political gerrymandering or allegations on which the Court could construct such a standard.

concerned[3]), courts must depart from ambiguous precedent and hold, as a first principle, that *any* manipulation on the basis of protected First Amendment conduct is presumptively impermissible. Under such a regime, if mapmakers were to take account of protected conduct in their districting, and if voters could thereafter point to actual, measurable harms flowing from such districting, the resulting maps would be invalid (or subject to the rigors of strict scrutiny that is, more often than not, fatal in fact).

To be clear, I am not proposing that courts *should* adopt such a *per se* rule: there are competing interests

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[3] There is much discussion in the case law and the scholarly literature about the meaning of *Vieth*, and in particular the meaning of Justice Kennedy's controlling opinion. While Justice Kennedy apparently remains open to the possibility that political gerrymandering claims may be justiciable, he did not opine that they necessarily *are* justiciable. On the contrary, he acknowledged that there are "weighty arguments for holding cases like these to be *nonjusticiable*" and that "those arguments may prevail in the long run." 541 U.S. 267, 309 (2004) (Kennedy, J., concurring in the judgment) (emphasis added). Justice Kennedy further opined that the "failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make [judicial] intervention improper," though he suggested that if "workable standards do emerge to measure these burdens," courts should stand ready to order relief. *Id.* at 317. The most that should be said, then, about Justice Kennedy's take on the justiciability of political gerrymandering claims, is that he has not absolutely ruled it out. Perhaps equally plausible is Justice Scalia's read of the Kennedy opinion, *i.e.*, that lower courts should treat the opinion as a "reluctant fifth vote against justiciability," a vote that "may change in some future case but that holds, for the time being, that this matter is nonjusticiable," *id.* at 305 (plurality opinion).

at stake, and indeed a rule that would preclude the kind of nefarious viewpoint discrimination Plaintiffs describe in their Second Amended Complaint might very well sweep up neutral or even useful political considerations. In a recent dissenting opinion in a malapportionment and racial gerrymandering case, Judge Diana Gribbon Motz of the Fourth Circuit described those political or quasi-political districting criteria that the Supreme Court has deemed legitimate, which include maintaining the competitive balance among political parties; avoiding contests between incumbents, provided that incumbents of one party are not treated more favorably than those of another; and preserving communities of interest. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, No. 16-1270, 2016 WL 3568147, at *16 (4th Cir. July 1, 2016) (Motz, J., dissenting).

For present purposes, I am simply asserting that *if* courts are going to adjudicate or attempt to adjudicate political gerrymandering claims, they must begin with the proposition that mapmakers may not take account of First Amendment-protected conduct when drawing district lines. The problem, of course, is that I am not writing on a blank slate: even those Justices of the Supreme Court who have remained optimistic about the justiciability of political gerrymandering claims have nevertheless acknowledged the partisan realities of districting. *Vieth* is illustrative: while the decision was highly fragmented, each opinion can be read to include some recognition that partisanship in districting may be inevitable, if perhaps suboptimal.

See 541 U.S. at 285–86 (plurality opinion) (observing that the "Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics"; further describing partisan motives as "ordinary and lawful" (citations omitted)); *id.* at 307 (Kennedy, J., concurring in the judgment) (explaining that whereas race is an "impermissible classification," politics is "quite a different matter," and agreeing that it would be "idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it" (citation omitted)); *id.* at 336 (Stevens, J., dissenting) (explaining that "[j]ust as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate"); *id.* at 343 (Souter, J., dissenting) (acknowledging that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent"); *id.* at 355 (Breyer, J., dissenting) (opining that "pure politics often helps to secure constitutionally important democratic objectives"). The Court has echoed this tolerance for partisanship in other cases and in related contexts, such as in its racial gerrymandering and malapportionment jurisprudence. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition. . . ."); *Shaw v. Reno*, 509 U.S. 630, 662–63 (1993) (White, J., dissenting) ("Because districting inevitably is the expression of interest group politics,

and because 'the power to influence the political process is not limited to winning elections,' the question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.'" (citations omitted)); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *cf. Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (assuming but nevertheless reserving the question whether partisanship is an "illegitimate redistricting factor").

In light of this authority, lower courts may be precluded from implementing a *per se* bar on partisan considerations in districting. That said, the Supreme Court may have been more willing to tolerate partisanship in weighing the merits of equal protection claims because, as Justice Kennedy observed, "[n]o substantive definition of fairness in districting seems to command general assent," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). The Court has never held that discernible political groups are entitled to proportional representation under the Fourteenth Amendment. Conversely, the First Amendment right is a sacrosanct individual right, and the Court has recognized that targeting on the basis of political viewpoint or affiliation *outside* the redistricting context presumptively violates the First Amendment. *See id.* at 294 (plurality opinion) ("[A] First Amendment claim, if

it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." (citing *Elrod v. Burns*, 427 U.S. 347 (1976))). To date, the First Amendment framework in the redistricting context is nothing more (or less) than a "legal theory put forward by a Justice of th[e] Court and uncontradicted by the majority in any . . . cases," *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). Unless and until a majority of Justices squarely confront the propriety of partisanship in reviewing a redistricting claim brought on First Amendment grounds, it may be possible for lower courts to implement a *per se* rule in this narrow context. *Cf. Vieth*, 541 U.S. at 294 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech . . . triggers strict scrutiny is not to say that failure to give political groups equal representation . . . triggers strict scrutiny.").

This discussion is not strictly academic. To accept that political manipulation is part and parcel of redistricting is to create an insuperable line-drawing problem: how much politicking is too much, and how do we know? From *Bandemer* to the present day, the Supreme Court has been unable to answer that question with anything resembling the degree of clarity lower

courts require in order to fairly adjudicate political gerrymandering claims. But if courts were to accept the premise that state authorities may no more use voter history and affiliation for mapmaking than they may use such data for hiring, firing, and contracting decisions, then courts would have, if nothing else, at least a plausible foundation on which to attempt to construct a standard.

Ultimately, I need not resolve this matter. Even were the Court to adopt a *per se* rule forbidding partisan manipulation in districting, I would nevertheless conclude that it is infeasible to ascertain the point at which voter manipulation produces a cognizable injury the likes of which courts are equipped to redress. If there is no provable burden, then there can be no judicial relief. *See id.* at 292 ("The issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.").

II. Burden

Defendants in this case devoted much of their briefing—and a substantial portion of their oral argument—to pressing their contention that nothing about the GRAC's 2011 map chills voters' First Amendment rights: voters remain free to affiliate with the party of their choice, to vote, to run for office if they wish, and to participate in vibrant political debate wherever they find themselves. Candidly, I made a similar observation in dismissing Plaintiffs' original Complaint, *see*

Benisek v. Mack, 11 F. Supp. 3d 516, 526 (D. Md. 2014), *aff'd*, 584 F. App'x. 140 (4th Cir. 2014) (per curiam), *rev'd and remanded sub nom. Shapiro*, 136 S. Ct. 450. Since that time, Plaintiffs' theory of the case has evolved, and they now contend that the burden they (along with other Maryland voters) have suffered is not a direct restraint on their political activity but rather an indirect sanction for engaging in First Amendment-protected conduct. According to Plaintiffs, by consulting data on voting history and party affiliation and by strategically deploying that data in its mapmaking, the GRAC "diluted the votes of the minority party significantly enough that the dilution has inflicted a palpable and concrete adverse effect" (ECF No. 85 at 3) through the cracking of the 6th Congressional District.

For purposes of this discussion, I accept that the burden Plaintiffs allege they have suffered is an indirect burden and that, accordingly, much of Defendants' argument misses the mark. Likewise, much of the discussion in prior cases in which district courts have applied First Amendment principles in resolving political gerrymandering claims is only marginally relevant to the Court's analysis here: while plaintiffs in those prior cases have occasionally pleaded an indirect burden, presiding courts have generally focused on the absence of a direct restraint. *But see Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011) ("It may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment

rights."); *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *19 (N.D. Ga. May 16, 2006) ("What Plaintiffs demand is the right to have their views represented in state government by the representative of their choice. We decline to recognize such a right under the First Amendment.").

Nevertheless, even assuming that vote dilution (as Plaintiffs conceive of it) may amount to a constitutional harm,[4] I conclude that it is not a harm courts are

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[4] This, however, remains an open question: while malapportionment plainly harms the rights of those particular voters who are packed into overcrowded districts and whose votes are thereby literally diluted, it is less obvious that voters suffer individual harm simply because they are redistricted in such a way that their party of choice is less likely to prevail in congressional elections. Indeed, as Plaintiffs here seem to recognize, and as the majority acknowledges, *supra* at 17, "citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate." *See also Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) ("The First Amendment guarantees the right to participate in the political process; it does not guarantee political success."), *aff'd mem.*, 488 U.S. 1024 (1989). For this reason, I would hesitate to draw a parallel to the one-person-one-vote line of cases, as the majority has done.

Even if vote dilution, as described by Plaintiffs, does amount to a constitutional harm, I greatly doubt that such a harm is of the same order as the harm citizens suffer in the context of political patronage, the doctrinal comparator on which Plaintiffs largely rely. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 563 (2004) ("[T]he burden that the plaintiffs in the patronage cases experienced fell on them outside the political process: they lost jobs as public defenders or road workers or were denied contracts to haul trash or tow cars. . . . By contrast, in a political gerrymandering case, the question whether 'an apportionment

currently equipped to redress: I can ascertain no reliable, administrable standard, and Plaintiffs have proposed none, for distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics. Short of exposing voters and their private voting decisions to involuntary interrogative discovery—an obviously impractical and fundamentally undemocratic undertaking—it is simply not feasible to reverse-engineer elections so as to determine whether the State's dilutive efforts imposed a "real and concrete adverse impact on supporters of the disfavored political party" (ECF No. 68 at 8).

The problem lies in the nature of political affiliation itself. Unlike race, one's status as a Republican or a Democrat is not, as Justice Scalia put it, an "immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality opinion). Justice O'Connor made a similar point in *Bandemer*, writing that "while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party." 478 U.S. at 156 (O'Connor, J., concurring in the judgment). Maryland's 6th Congressional District is illustrative: while in 2012

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has the purpose and effect of burdening a group of voters' representational rights' requires deciding what voters' 'representational rights' are." (footnote omitted)).

the Democratic challenger, John Delaney, defeated Roscoe Bartlett, the incumbent Republican, by an almost twenty-one percent margin of victory, just two years later Delaney beat Republican challenger Dan Bongino by a mere 1.5%.[5] Thus, while the majority sensibly contends that the State may not "intentionally drown out the voices of certain voters by reason of their views," *supra* at 598, the problem with Plaintiffs' theory (and, more broadly, with *all* political gerrymandering claims, whether brought on First Amendment or equal protection grounds) is that courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus has voluntarily changed its tune.

Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map

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[5] These statistics are publicly available at http://elections.state.md.us, and may be considered at the Rule 12(b)(6) stage. *See Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (explaining that, where voter statistics are publicly available at state legislative website, courts may take judicial notice of this information on motion to dismiss).

assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic. *See* Kasper, *supra*, at 411; *cf. LULAC*, 548 U.S. at 446 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").[6]

Plaintiffs hasten to reassure the Court that, whatever the boundaries or implications of their proposed standard in other, future cases, in *this* case the answer could not be clearer: through savvy political engineering, the State cracked a congressional district and wrested a seat from long-held Republican control. I am compelled to wonder how Plaintiffs might seek to *prove* that claim: Plaintiffs, after all, are just nine committed or occasional Republican voters residing in two districts comprising many hundreds of thousands of residents. Plaintiffs could take the stand and testify about their personal voting histories, and they could perhaps

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[6] The majority acknowledges, *supra* at 598, that a prior map "may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons" so long as those reasons do not include partisan retaliation. But my point here goes, once again, to the question of burden: if Map X was badly gerrymandered to advance Republican interests, and Map Y is thereafter designed to promote Democratic interests, I am not certain that Republican voters who may have been indirectly impacted by the redistricting initiative have suffered a burden for which the Constitution affords redress. Put differently, if political gerrymandering is as universal and longstanding a problem as Plaintiffs and *amici* suggest, then it may be unhelpful to treat any one particular map, which may have the effect of correcting for or offsetting a prior gerrymander, as imposing a particularized burden on a discrete partisan subset of the voting population.

invite their friends and associates to do so as well. But such testimony would shed no meaningful light on the circumstances surrounding the 2012 and 2014 congressional elections. Nor, for the reasons I have already set forth, would statistical sampling, voter registration history, or any other known data set provide reliable evidence from which the Court could ascertain whether *in fact* the alleged gerrymander was outcome determinative.

Even were I to presume on the unusual facts of this case—the broken-winged pterodactyl and so forth—that the gerrymander *was* outcome determinative, such a presumption would bring me no closer to a reliable framework that I, and other judges, might employ in future cases involving subtler partisan engineering. At bottom, Plaintiffs' purported standard is a variation on Justice Stewart's much-maligned adage, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *Ad hoc* decision making and judicial stargazing cannot take the place of "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights," as "[a]bsent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent," *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment); *see also id.* at 291 (plurality opinion) (explaining that a reliable criterion is "necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts,

and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking").

III. Conclusion

There may yet come a day when federal courts, finally armed with a reliable standard, are equipped to adjudicate political gerrymandering claims.[7] Or perhaps political gerrymandering (at least in extreme cases) will be corrected by the voters themselves, who after all bear the ultimate power—if they unite—to bring about political change. *See Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in the judgment) ("In my view, the Framers of the Constitution . . . placed responsibility for correction of such flaws in the people,

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[7] In the absence of a reliable standard, the Supreme Court may nevertheless intervene—or, more likely, direct lower-court intervention—should a truly exorbitant fact pattern emerge. At oral argument in a case heard the same day as this matter, *Parrott v. Lamone*, Civ. No. GLR-15-1849, plaintiffs' counsel hypothesized that highly sophisticated demographic software might make it possible for blatantly partisan redistricting commissions to draw district lines between apartment units or rooms in a single-family home. The hypothetical is absurd, but the notion that sophisticated mapmakers could draw lines around favored (and disfavored) communities or even streets is not inconceivable. At some point, mapmaking that makes a mockery out of representative democracy may necessitate inelegant judicial intervention, and the Supreme Court may require lower courts to stand guard at the outer perimeter of rationality. *See Cox v. Larios*, 542 U.S. 947, 950 (2004) (Stevens, J., concurring) ("'[T]he unavailability of judicially manageable standards' cannot justify a refusal 'to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.'" (citation omitted)).

relying on them to influence their elected representatives."). In any event, I am not persuaded that Plaintiffs here have discovered a viable solution. And even having accepted several of Plaintiffs' unproven premises for purposes of my analysis on this Rule 12(b)(6) motion (*i.e.*, that the First Amendment is the relevant constitutional provision, that vote dilution as Plaintiffs characterize it might amount to a constitutional harm, and that the GRAC acted with the purpose and effect of targeting Republican voters), I have been unable—like a majority of Justices and every lower court to take up the question since *Vieth*—to devise a standard on which courts might reasonably rely. Consequently, I must part company with my esteemed colleagues on the panel. I would dismiss Plaintiffs' Second Amended Complaint with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No.:
DAVID J. MCMANUS, JR., *et al.*,	*	1:13-cv-03233-JKB
Defendants.	*	

* * * * * * *

NOTICE OF APPEAL

(Filed Nov. 15, 2018)

PLEASE TAKE NOTICE that defendants Linda H. Lamone and David J. McManus, Jr, hereby appeal to the Supreme Court of the United States from this Court's November 7, 2018 opinion and order granting plaintiffs' motion for summary judgment and entering a permanent injunction (Dkts. 222, 223) and from each and every opinion or ruling that merged therein. This appeal is taken under 28 U.S.C. § 1253.

November 15, 2018 Respectfully submitted,

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No. 18-726

In the Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

On Appeal from the United States District Court for the District of Maryland

MOTION TO AFFIRM

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QUESTION PRESENTED

State officials responsible for Maryland's 2011 congressional redistricting targeted plaintiffs and other like-minded voters for disfavored treatment because of their past support for Republican candidates for public office. These officials' aims were achieved: the weight of Republicans' votes in Maryland's Sixth Congressional District was severely diluted and Republicans' associational activities were significantly disrupted as a result of the gerrymander.

After more than four years of litigation and two previous appeals before this Court, all three judges below agreed that the 2011 gerrymander of Maryland's Sixth Congressional District violated the First Amendment's prohibition on official retaliation for political expression.

The questions presented are:

1. Does partisan gerrymandering violate the First Amendment's prohibition on official retaliation for political expression?

2. Is a First Amendment retaliation challenge to a partisan gerrymander justiciable in federal court?

3. Did the district court properly grant a final judgment and permanent injunctive relief to plaintiffs in light of the undisputed facts of record?

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Miscellaneous authorities

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Alexander M. Bickel, *The Passive Virtues*,
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John Fritze, *Bartlett Struggles with Campaign Disclosure*,
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Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*,
59 Wm. & Mary L. Rev. 1993 (2018) 18

INTRODUCTION

The Charter of our government establishes a representative democracy. See U.S. Const. art. I, § 2, cl. 1. "Representative democracies * * * function by electing certain [people] for certain periods of time, then passing judgment periodically on their conduct of public office." Alexander M. Bickel, *The Least Dangerous Branch* 17 (1962) (Yale 1986 ed.). "It is a matter of laying on of hands, followed in time by a process of holding to account—all through the exercise of the franchise." *Ibid.*

The practice of partisan gerrymandering—aided in modern times by sophisticated software and the most detailed troves of data imaginable—is at war with this system of government. It aims to insulate those in power—those whom the public has taken into their trust—from being held to account. Its purpose is to reduce the franchise to a charade—a meaningless exercise, the outcome of which is preordained by computer scientists and political consultants turned cartographers.

If this Court does not take the opportunity, once and for all, to condemn political gerrymandering as the First Amendment violation that it is, it will be giving a green light to lawmakers across the country to engage in gerrymandering in 2020 like never before. It will make the 2010 cycle look like child's play.

The State's position is that the Court is powerless to do anything about it—that the Supreme Court of the United States must stand idly by as American democracy is undermined. That is wrong; without at all calling into question the passive virtues (Alexander M. Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 40 (1961)), the Court is not, has not been, and cannot be a mere spectator in the public life of the Nation.

The framework the district court applied to the uncontested facts of this case is justiciable. Courts are frequently called upon to evaluate the kinds of burdens at issue here, including vote dilution (*e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017)) and associational harms (*e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983)). These are not the kinds of burdens that courts lack the tools to evaluate. And the First Amendment theory here leaves room for mapmakers to pursue all kinds of political objectives in redistricting, ensuring general consistency with this Court's prior cases.

The State's hodgepodge of rejoinders falls flat. The First Amendment retaliation doctrine, applied to partisan gerrymandering, does not outlaw pursuit of proportionally representative delegations. Nor does it assume the constitutionality of the immediately prior district; the only question is whether the State deliberately prevented voters from forming a majority in a reasonably configured district on account of their party affiliation or voting history; it makes no difference what the prior district looked like. And the doctrine likewise gives clear guidance to legislators: Lawmakers must not deliberately target voters for disfavored treatment on the basis of their past political expression. That should not be a controversial rule.

The State's efforts to hide behind procedure also fail. The grant of summary judgment below turned entirely on undisputed facts; indeed, the State itself repeatedly disavowed the need for a trial. And none of the State's evidentiary objections holds up. Courts have also often ordered new maps for the final election before the next census; the district court did not abuse its discretion to do so here.

The Court should summarily affirm. If it instead orders full briefing and argument, and it does so in

Rucho v. *Common Cause* (No. 18-422) as well, it should set the two cases for hearing on the same date.

STATEMENT

A. Factual background

The undisputed facts of record (JS App. 5a) establish the following.

1. For the great majority of the 50 years leading up to Maryland's 2011 redistricting, the State's congressional delegation had comprised five or six Democrats and two or three Republicans. But Maryland's Democratic leaders considered it their duty in 2011 to crack the Republican majority in one of Maryland's two Republican districts at the time, ensuring a "7-1" delegation from then on.

"Governor O'Malley took responsibility for creating the 2011 congressional redistricting plan." JS App. 12a. "He testified explicitly that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping either the First District on the Eastern Shore of Maryland or the Sixth District in western Maryland." *Ibid.* "After brief consideration, Governor O'Malley rejected the notion of flipping the First District because the resulting district would have to jump across the Chesapeake Bay." *Id.* at 13a. "Consequently, 'a decision was made to go for the Sixth.'" *Ibid.* (emphasis omitted) (quoting Governor O'Malley's deposition testimony).

"Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his effort, directing it to hold public hearings and recommend a redistricting plan." JS App. 13a. "But at the same time," he asked U.S. House Minority Whip Steny Hoyer, a self-described "serial gerrymanderer," to "come up with a map" on behalf of the sitting con-

gressional delegation. *Id.* at 13a-14a. "Hoyer and other members of the delegation retained NCEC Services" and instructed the firm to "draw[] a map that maximized 'incumbent protection' for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican." *Id.* at 14a. See *ibid.* (Senate President Mike Miller testifying that the map "primarily was drawn by the congressional people").

In undertaking his assignment, NCEC's president, Eric Hawkins, used NCEC's "proprietary metric * * * called the Democratic Performance Index ('DPI'), which measures how a generic Democratic candidate would likely perform in a particular district." JS App. 15a. "Hawkins testified that he used the DPI * * * to draw a map that would maximize 'incumbent protection' for the Democrats currently representing Maryland districts in Congress and that would 'chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican.'" *Id.* at 16a.

"With respect to this 7-1 goal," the court went on, "Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI." JS App. 16a. Whereas the district's DPI had been 37.4% under the previous map (indicating a near-certain Republican win), "Hawkins prepared several different maps under which the Sixth District would have had at least a 51% federal DPI." *Ibid.* "In preparing these draft maps, Hawkins considered neither 'any measure of compactness,' nor whether 'there was a community of interest related to the I-270 corridor.'" *Ibid.* "Rather, '[t]he intent was to see if there was a way to get another Democratic district in the state.'" *Ibid.* And while alternative maps were proposed by third parties during the

same timeframe, "they resulted in a far lower federal DPI for the Sixth District and were not used." *Ibid.*

"[A] group of staffers to the State's most senior Democratic leaders" was assigned ultimate responsibility for finalizing the draft map. JS App. 17a. These staffers' data files tellingly had NCEC's proprietary DPI metric built into them, and email traffic shows that Hawkins "assisted at least some of these staffers as they continued working on the congressional map" through its completion. *Ibid.*

The final map released by the Advisory Committee "had a federal DPI of 53% in the Sixth District, which was greeted as 'good news' by the man who was widely expected to be the Democratic nominee to represent the newly redrawn District in the upcoming 2012 election." JS App. 20a. Following a closed caucus meeting in which the map was introduced to the Democrats in Maryland's General Assembly, "Delegate Curt Anderson told a reporter, 'It reminded me of a weather woman standing in front of the map saying, "Here comes a cold front," and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard.'" *Id.* at 22a (quoting joint stipulations). Other lawmakers likewise acknowledged their goal of ensuring that a Democrat would win the Sixth District moving forward. *Id.* at 23a-24a.

2. "[T]he Democratic officials responsible for the plan redrew the Sixth District's boundaries far more dramatically than was necessary" to comply with the one-person-one-vote standard, which would have required "remov[ing just] 10,186 residents from the District." JS App. 7a. On the whole, the redrawing shifted several hundred thousand residents; "[t]he registered voters removed from the former Sixth District were predominately Republican, while those added were

predominately Democratic." *Id.* at 10a. "In total, the reshuffling of the Sixth District's voters resulted in a net reduction of roughly 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters." *Id.* at 11a. And "for the first time since 1840" (*id.* at 73a), it split Frederick County, which had been in the Sixth District for the prior 140 years (*id.* at 20a). As a result of this upheaval, those living in rural western Maryland—bordering West Virginia and southwestern Pennsylvania—are now represented by a congressman elected by wealthy suburban Democrats over 150 miles away, in the suburbs of Washington, D.C.

Most of the Republican voters removed from the Sixth District were reassigned to the Eighth District. JS App. 11a. "[E]ven though the number of registered Republicans in the Eighth District [therefore] rose significantly after the transfer of Republicans from the Sixth District, registered Democrats still outnumbered registered Republicans by nearly 2 to 1." *Id.* at 12a.

The results of the gerrymander have been "precisely as intended and predicted." JS App. 24a. Following the 2011 redistricting, the Sixth District swung from a "Solid Republican" ranking by the *Cook Political Report* to a "Likely Democratic" ranking. *Id.* at 25a. An academic study of the ranking's accuracy showed that, as a consequence of the redistricting, the chances that a Democrat would win the district skyrocketed from 0.3% in 2010 to 94.0% in 2012. *Ibid.* The DPI similarly "confirmed that the Democrats held a clear electoral advantage in the District as a result of its redistricting." *Id.* at 25a-26a.

"The record demonstrates further that, in addition to the reduced opportunity to elect a candidate of their choice, the plaintiffs and other active members of

Maryland's Republican Party faced new difficulties in their organizational efforts as a result of the redistricting." JS App. 26a. Plaintiff Sharon Strine testified, for example, that the gerrymander made campaigning in the district more difficult, including by depressing voter interest and enthusiasm. *Ibid.* Plaintiff Alonnie Ropp similarly testified that the gerrymander's fracturing of Frederick County made voter engagement difficult and confusing. *Id.* at 26a-27a. Plaintiff Ned Cueman explained that his connection with historic portions of the district had been severed; it was a "chop job," and he had "absolutely no connection with what is in this [new] district." *Id.* at 27a.

"Other record evidence corroborate[d]" this testimony, "including evidence showing that Sixth District registered Republican voters' participation declined in primary elections in midterm years." JS App. 28a. "Similarly, the record shows a decline in fundraising by the Republican Central Committees of the three counties that remained entirely within the Sixth District after the 2011 redistricting." *Ibid.*

B. Procedural background

1. The initial pro se proceedings and first appeal

Three initial plaintiffs filed suit, challenging the 2011 gerrymander as (among other things) a violation of their First Amendment rights. Dkt. 11, ¶¶ 2, 23.

A single-judge district court dismissed the case without convening a three-judge court. *Benisek* v. *Mack*, 11 F. Supp. 3d 516 (D. Md. 2014). The Fourth Circuit affirmed. *Benisek* v. *Mack*, 584 F. App'x 140 (4th Cir. 2014).

This Court granted review and reversed. *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015). Of relevance here, the Court held that plaintiffs' First Amendment challenge

to Maryland's 2011 gerrymander should have been referred to a three-judge district court pursuant to 28 U.S.C. 2284 because it is "based on a legal theory put forward by a Justice of this Court" and "uncontradicted" by any of the Court's cases. 136 S. Ct. at 456.

2. The denial of the motion to dismiss

On remand, plaintiffs "promptly filed a second amended complaint in February 2016," about "one week after [the] three-judge court was empaneled." JS App. 29a. "The amended complaint added six additional plaintiffs and refined the [First Amendment] theory underlying their constitutional challenge." *Ibid.*

The district court denied the State's motion to dismiss. JS App. 172a-225a.

"[W]hen a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens," the majority explained, "the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." JS App. 195a. "The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id.* at 196a.

Observing that "there is no redistricting exception" to the First Amendment's protections, the majority concluded that a plaintiff bringing a First Amendment retaliation challenge to a partisan gerrymander "must allege that those responsible for the map redrew the lines of his district with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." JS App. 198a-199a (emphasis omit-

ted). They must also prove a concrete harm and causation. *Id.* at 199a-202a.

Finding that this inquiry was judicially manageable, the court "recognize[d] the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2." JS App. 203a.

Chief Judge Bredar dissented. JS App. 206a-225a. Although he concluded that harm based on vote dilution is nonjusticiable (*id.* at 210a, 225a), he recognized that "[t]here may yet come a day when federal courts, finally armed with a reliable standard, are equipped to adjudicate political gerrymandering claims." *Id.* at 224a.

3. The denial of preliminary relief and second appeal

Following lengthy discovery, plaintiffs moved for a preliminary injunction and, in the alternative, for summary judgment. JS App. 30a. The State filed an opposition to the motion for a preliminary injunction and alternatively cross-moved for summary judgment. *Ibid.* Both parties agreed that there were no genuine factual disputes necessitating a trial. See Dkt. 177-1, at 25 (plaintiffs' brief); Dkt. 186-1, at 25-46 (State's brief).

The district court denied a preliminary injunction and stayed the proceedings. JS App. 82a-119a. Judge Niemeyer dissented. *Id.* at 119a-171a.

This Court affirmed. See *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (per curiam). Without reaching the merits of plaintiffs' First Amendment claim, the Court concluded that "a due regard for the public interest in orderly elections supported the District Court's discretionary decision to deny a preliminary injunction" given the proximity of the 2018 elections. *Id.* at 1944-1945. "On top of this time constraint," the Court explained, "was the legal uncertainty surrounding any

potential remedy for the plaintiffs' asserted injury." *Id.* at 1945. "In these particular circumstances," the Court concluded, "the District Court's decision denying a preliminary injunction cannot be regarded as an abuse of discretion." *Ibid.*

4. The unanimous entry of final judgment for plaintiffs

a. On remand a second time, the parties filed a joint status report in which the State reaffirmed that "this matter is appropriate for resolution on summary judgment," without need for a trial. Dkt. 209, at 3.

To that end, the parties filed supplemental summary judgment briefs. We reiterated in our brief that plaintiffs had suffered vote dilution according to the traditional *Gingles* preconditions. Dkt. 210, at 5-15. We also showed that Republican voters' associational activities had been significantly chilled and disrupted by the gerrymander, resulting in lower voter turnout and depressed fundraising. *Id.* at 15-18.[1]

To add further support for the second point, we attached voting data and campaign finance reports available on the State's own website, together with an affidavit that performed basic addition and division.

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[1] The State incorrectly calls this second point a "new claim." JS 11. In fact, plaintiffs alleged in the second amended complaint that the gerrymander "chilled and manipulated political participation" in the Sixth District, including by making citizens less likely to vote and "less likely to participate actively in campaigning." Dkt. 40-1, ¶¶ 112-119. In our opening summary judgment brief, we pointed to evidence that political participation had been "chilled and disrupted" by the gerrymander. Dkt. 177-1, at 18-19. And in our principal brief before this Court in the second appeal, we explained (at 43) that successful gerrymanders depress associational activities by "reduc[ing] * * * political engagement" and "inhibit[ing] fundraising and recruitment of volunteers."

The district court unanimously denied the State's motion to strike this material. Dkt. 219.

b. On November 7, 2018—the day after the 2018 congressional elections—the three-judge court unanimously granted final judgment to plaintiffs and enjoined the State from using the 2011 redistricting map in any future elections. JS App. 1a-77a.

The district court held first that plaintiffs have standing. JS App. 43a-47a. "The plaintiffs in this case, unlike the plaintiffs in *Gill* [v. *Whitford*, 138 S. Ct. 1916 (2018)], have brought and pursued the kind of single-district challenge that *Gill* recognized as providing * * * standing." *Id.* at 47a.

"Turning to the merits," the court ruled that the "undisputed facts" in the record "establish[] each element of [plaintiffs'] First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history." JS App. 48a.

> ***First***, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's [eight-member] congressional delegation.

Ibid. (boldface added). Indeed, "the record is replete with direct evidence of this precise purpose." *Id.* at 49a.

The court rejected the State's argument that an intent to help Democrats is not the same as an intent to harm Republicans. "If the government uses partisan registration and voting data purposefully to draw a

district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party." JS App. 50a. There is no legal basis to "distinguish between these intents" in a two-party, winner-take-all election. *Ibid.*

The court also rejected the State's argument that the First Amendment requires proof that lawmakers "target[ed] *specific* voters based on their individual party affiliation or voting history." JS App. 51a. "The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment." *Ibid.*

> ***Second***, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights.

JS App. 52a (boldface added). On this point, the court stressed that "plaintiffs must have experienced a 'demonstrable and concrete adverse effect' on their right to have 'an equally effective voice in the election' of a representative, which they can establish by showing that they have been placed at a concrete electoral disadvantage." *Ibid.* And "[t]he plaintiffs here have made that showing" with evidence of vote dilution confirmed by both parties' experts. *Id.* at 53a.

Drawing on Justice Kagan's concurring opinion in *Gill*, the court held further that "plaintiffs can prove injury in the form of associational harm, as 'distinct from vote dilution,' by showing that the State has 'burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects.'" JS App. 58a (quoting 138 S. Ct. at 1938-1939).

Here too, the court held, "the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights," in several ways. JS App. 61a. For example, "voter engagement in support of the Republican Party dropped significantly" following the gerrymander. *Id.* at 62a. Testimony thus "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters," making it more difficult for plaintiffs and other Republicans "to 'band together in promoting among the electorate candidates who espouse their political views.'" *Ibid.* In addition, there was undisputed evidence "that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections." *Id.* at 63a.

The "undisputed evidence" thus "amply demonstrate[d] that the plaintiffs' associational rights were burdened." JS App. 63a.

> ***Finally***, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

JS App. 54a (boldface added). And it was the same "reshuffling that caused the associational harms noted." *Id.* at 64a.

Having held that the undisputed record evidence established a First Amendment violation, the court addressed the standard for entering a permanent injunction. On this score, the court emphasized that plaintiffs' request for permanent injunctive relief dates to

the original complaint, filed in 2013. JS App. 66a. "While it is true that the case has dragged on" in the interim, the court found that the "protraction cannot be attributed to the plaintiffs, but to process." *Ibid.* The court thus held that both plaintiffs and defendants had been diligent in their litigation of the case. *Ibid.*

Concluding that the "balance of the equities" and the "public interest" both favor a permanent injunction (JS App. 64a-67a), the court enjoined the State from using the 2011 redistricting map in future elections and ordered the preparation of a new map.

c. Chief Judge Bredar concurred in the judgment. JS App. 67a-76a. Although he remained skeptical of our vote dilution theory because it turns in part on "evidence of electoral outcomes as proof that the gerrymander succeeded" (*id.* at 70a), Chief Judge Bredar "embrac[ed]" the "associational rights theory" (*id.* at 71a). "Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win the Sixth District," he reasoned, "the State certainly caused harm." *Id.* at 72a. In this way, "[t]he State *retaliated* against voters for those associations." *Ibid.*

d. Judge Russell concurred separately, joining both Judge Niemeyer's lead opinion and Chief Judge Bredar's concurrence. JS App. 76a-77a.

e. The State moved for a discretionary stay of the injunction. Dkt. 226. Plaintiffs consented on the conditions that (1) the parties brief jurisdiction before this Court on a sufficiently expedited schedule to ensure adequate time for this Court either to summarily affirm or to note probable jurisdiction and rule on the merits this Term and (2) the State stipulate to the fact that there will be sufficient time to draw a new map

before the 2020 elections following a decision from this Court in June 2019. See Dkt. 227.

ARGUMENT

After more than four years of litigation and nine published decisions (including two from this Court) the district court entered a unanimous final judgment in favor of plaintiffs, enjoining enforcement of Maryland's unlawful 2011 political gerrymander of its Sixth Congressional District.

The standards determined and applied by the district court, grounded in well-settled First Amendment doctrine, are readily justiciable. And plaintiffs' entitlement to relief under those standards is beyond cavil. The Court accordingly should affirm.

I. PARTISAN GERRYMANDERING VIOLATES THE FIRST AMENDMENT

A. Plaintiffs' First Amendment retaliation claim is justiciable

1. The First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their speech or politics, whether it be in the context of hiring or firing employees, granting or terminating contracts, or punishing or rewarding prison inmates. See *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996) (public employment); *Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996) (public contracts); *Ortiz* v. *Jordan*, 562 U.S. 180 (2011) (prisoner retaliation).

The same logic describes the constitutional violation inherent in partisan gerrymanders. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Rutan* v. *Republican Party*, 497 U.S. 62, 69 (1990) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality)). Indeed, "[n]o right is more precious in a free country

than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964)).

Because there is this "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)), it follows that "general First Amendment principles" prohibit a State from subjecting citizens to "disfavored treatment" because of their "voting history" or "association with a political party." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). That is, citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Ibid.* Indeed, "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. Accord *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 461 (2006) (*LULAC*) (Stevens, J., concurring in part and dissenting in part).

The State has never expressly disagreed with these basic principles. It has never asserted a right to use redistricting to burden voters by reason of their support for the opposition party, nor has it disagreed that partisan gerrymandering, like political patronage, "is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod*, 427 U.S. at 357 (plurality). The State instead has taken the position that the First Amendment retal-

iation framework is nonjusticiable when applied in the redistricting context. That is mistaken.

2.a. The starting point for federal litigation is "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Among those limitations is the "narrow" political-question doctrine, which arises in two principal circumstances: those in which there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and those in which there is "a lack of judicially discoverable and manageable standards for resolving [the controversy]." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012).

"The second [circumstance] is at issue here"; it reflects the maxim that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality). In law, unlike politics, ad hoc decision-making will not do; "judicial action must be governed by *standard*, by *rule*." *Ibid.* The "lack of judicially discoverable standards" indicates the commitment of the issue to the "political departments." *Baker* v. *Carr*, 369 U.S. 186, 214 (1962).

That is not to say that all cases with political consequences involve nonjusticiable political questions; the doctrine "is one of 'political *questions*,' not one of 'political *cases*.'" See *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986) (emphasis added) (quoting *Baker*, 369 U.S. at 217). Thus, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid.*

b. Application of the First Amendment retaliation doctrine to cases like this one is manifestly justiciable.

The doctrine provides a timeworn framework that asks objective questions answerable with traditional evidence, by reference to ordinary legal standards. There is, in other words, a discernible and judicially enforceable right at issue here, and there are "principled, well-accepted rules" for enforcing it. *Vieth*, 541 U.S. at 308, 311 (Kennedy, J.).

Applied in this context, the First Amendment retaliation doctrine comprises three elements: (1) Did the State consider citizens' protected First Amendment conduct in deciding where to draw district lines, and did it do so with an intent to burden those citizens by reason of their political beliefs? (2) If so, did the redistricting map, in fact, dilute the votes of the targeted citizens or disrupt their political association? And (3) if so, is there a constitutionally acceptable explanation for the map's ill effects, independent of the intent to discriminate on the basis of political belief?

No one seriously disputes that the first and third elements are justiciable. Courts regularly adjudicate the question of legislative intent. See Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018) (citing examples). Courts also routinely address whether there are legitimate, alternative explanations for otherwise unconstitutional burdens. See generally *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977).

The only question, therefore, is whether the second element of the First Amendment framework—the requirement that plaintiffs show that the redistricting plan burdened them in a practical way—is justiciable in federal court. Given the practical and functional nature of the burdens imposed, it plainly is.

c. We begin with the obvious: Vote dilution is a justiciable harm. See *Gill*, 138 S. Ct. at 1930-1931

(majority); *Cooper* v. *Harris*, 137 S. Ct. 1455, 1470 (2017). It is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority'" or by "concentrat[ing minority voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

The most developed body of law on vote dilution is in the context of racial vote dilution under Section 2 of the Voting Rights Act. To establish that vote dilution has "impede[d] the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 48), a Section 2 plaintiff must satisfy the so-called *Gingles* preconditions:

First, the targeted voters must be sufficiently numerous and "geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (quotation marks omitted).

Second, "the minority group must be politically cohesive." *Ibid.* (quotation marks omitted).

Third, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Ibid.* (alterations incorporated; quotation marks omitted).

Each of these three elements is directed at the questions of burden and causation. If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably drawn] single-member district" in the area, then the drawing of the district's lines "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50.

Similarly, if the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51.

And if the majority does not "vote[] sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[] its ability to elect its chosen representatives." *Ibid.*

When these three conditions are satisfied, however, it follows that there has been a denial of "equal electoral opportunity" as a result of the lines that the legislature drew. *Johnson* v. *De Grandy*, 512 U.S. 997, 1012 (1994).[2]

We demonstrated below that the *Gingles* preconditions are satisfied in this case. *E.g.*, Dkt. 210, at 6-8; Dkt. 177-19, at 3-4 (expert report of Dr. Michael McDonald). Indeed, satisfaction of the preconditions is the premise of the swings in DPI and PVI, which also showed that plaintiffs and other Sixth District Republicans were deprived of "an equally effective voice in the election of a representative." JS App. 52a-53a.

Separate and apart from the *Gingles* preconditions, a plaintiff can also establish vote dilution by "pro-

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[2] To be sure, *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to demonstrate a Section 2 vote dilution claim. 512 U.S. at 1011. The Court stressed that the focus of the inquiry must be, instead, on the deprivation of "equal electoral opportunity" in light of all "relevant facts." *Id.* at 1012. But *Johnson* was expressly framed as an interpretation of Section 2 of the VRA. And *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), emphasized that this Court's opinions interpreting "the text of [Section] 2" do "not apply to cases in which there is intentional discrimination." *Id.* at 19-20. We thus rely on the *Gingles* preconditions only as a commonsense guide for identifying burden and causation in partisan gerrymandering cases involving intentional discrimination.

duc[ing] an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring). We did that, too. See Dkt. 177-1, at 21.

d. The principal objective of any partisan gerrymander is to dilute the votes of the opposition party. "But partisan gerrymanders inflict other kinds of constitutional harm as well," including "infringement of the[] First Amendment right of association." *Gill*, 138 S. Ct. at 1934, 1938 (Kagan, J., concurring). For example, "[m]embers of the 'disfavored party' * * * deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office." *Ibid.* "By placing a state party [and its supporters] at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Ibid.*

As the district court held, "the kinds of injury resulting from such associational violations [like this] are readily discernable and significant: 'Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.'" JS App. 57a (quoting *Anderson*, 460 U.S. at 792).

These are traditional First Amendment burdens, readily visible to the judicial eye. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" can be "heavily

burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-788. Courts faced with First Amendment challenges to such regulations must evaluate the burdens imposed using "an analytical process that parallels [their] work in ordinary litigation." *Id.* at 789. This requires consideration of "the character and magnitude of the asserted injury" measured against "the precise interests put forward by the State as justifications for the burden imposed." *Ibid.*

The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of commonsense observation—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. The deadline applied "unequally" among the political parties and therefore "burden[ed] the availability of political opportunity" based on the "political preferences" of voters—and was therefore unlawful. *Id.* at 793-794. The Court reached similar conclusions in *Cook* v. *Gralike*, 531 U.S. 510 (2001), concerning ballot notations, and *Elrod*, concerning patronage practices.

Application of this framework here is readily manageable. As the district court held, the "undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened." JS App. 63a. "Members of the Republican Party in the Sixth District, deprived of their natural political strength by [the] partisan gerrymander, were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Ibid.* There is nothing nonjusticiable about that conclusion or the analysis underlying it.

The point, at bottom, is a simple one: If a State may not intentionally "burden[] the availability of political opportunity" using discriminatory filing dead-

lines (*Anderson*, 460 U.S. at 793); "dictate electoral outcomes" using ballot notations (*Gralike*, 531 U.S. at 523); or "deny a benefit to a person because of his constitutionally protected speech or associations" using patronage practices (*Elrod*, 427 U.S. at 359), neither may it intentionally do those things by manipulating district lines. And if the burdens are capable of rational judicial assessment in those other contexts, they are equally so in this one.

B. The State's rejoinders are misguided

The State offers unpersuasive rejoinders.

1. The State insists first (JS 16-18) that the decision below will outlaw the use of political data in pursuit of proportionally representative delegations, in violation of the holding of *Gaffney* v. *Cummings*, 412 U.S. 735 (1973). Not so.

Although it is not a question presented here, a State's good faith effort "fairly to allocate political power to the parties in accordance with their voting strength" (*Gaffney*, 412 U.S. at 754) would almost surely pass strict scrutiny. In *Branti* v. *Finkel*, 445 U.S. 507 (1980), for example, the Court concluded that "political affiliation" may be "a legitimate factor to be considered" when "essential" to a compelling government interest; the Court offered the apt example of achieving political equipoise in a slate of election judges. *Id.* at 518. See also *Elrod*, 427 U.S. at 367-368 (plurality) (a government official's discrimination based on political views is permissible to serve the "overriding interest" of hiring political loyalists in important "policymaking positions"). In light of these precedents, a narrowly-drawn effort to *undo* past gerrymandering and ensure fair representation is not likely to violate the First Amendment.

Regardless, *Gaffney* did not involve a First Amendment challenge. That matters, because an issue that is "neither brought to the attention of the court nor ruled upon" is "not to be considered as having been so decided as to constitute [a] precedent[]" on the issue. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). Accord, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). The same goes for every other gerrymandering case this Court has addressed under different constitutional provisions. See *Cooper*, 137 S. Ct. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (observing that prior cases not involving First Amendment challenges have suggested that States "may engage in constitutional political gerrymandering").

2. The State says (JS 18) that the decision below permits no consideration of party affiliation. A simple read of the applicable framework shows otherwise: "the First Amendment analysis" asks "not whether political classifications were used," without more; rather, it asks "whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J.). Thus, mapmakers may "still use data reflecting prior voting patterns to advance legitimate districting considerations, including the maintenance of 'communities of interest.'" JS App. 200a.

Along similar lines, the State mistakenly suggests that because every redrawing of district lines risks some voter confusion, the standard applied below has no limit. JS 19, 24. But proof of associational harms, without more, would not make for a claim under the framework adopted below; rather, the harms must be a specifically intended penalty for citizens' politics.

The State offers the head-scratching rejoinder (JS 19) that the intent element of the test "contains no

means of distinguishing between permissible and impermissible political considerations." But the difference is self-evident between political considerations that *are* in service of a specific intent to burden voters for their past voting history and those that *are not*. See *Vieth*, 541 U.S. at 315 (Kennedy, J.). The State later says (JS 25-27) that gerrymandering defendants "will face difficulty" disproving intent. That gets matters backward: Proving intent in a case like this is "inordinately difficult." *Gingles*, 478 U.S. at 43-45. Indeed, many claims of unlawful intent are certain to be screened at the pleading stage. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680-681 (2009).

3. The State wrongly asserts (JS 20-22) that "[t]he intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map," in effect "[e]nshrining pre-existing maps as the constitutional touchstone for future redistricting."

Again, voters targeted by a gerrymander must show only that they are sufficiently numerous and "geographically compact to constitute a majority in [a] reasonably configured legislative district" in the area. *Cooper*, 137 S. Ct. at 1470. Thus, the benchmark for measuring vote dilution is not the immediately prior district; it is, instead, the full range of hypothetical districts that could have been drawn in the area—just as in any other vote dilution case. See *ibid.* To be sure, we know in this case that Republican voters *are* sufficiently numerous and compact because, between 1991 and 2011, they constituted a majority of a reasonably drawn district in western Maryland. But that is merely evidence to satisfy the standard, not a statement of the standard itself.

This observation clarifies that a deliberate continuation of a prior partisan gerrymander would also vio-

late the First Amendment, all other factors satisfied. The State is therefore wrong when it asserts (JS 21) that "voters whose districts did not change * * * would be barred" from challenging a redistricting map. We made this point below (Dkt. 210, at 6-7 & n.3), but the State has declined even to acknowledge, much less rebut, our argument.

4. In its only contention addressing justiciability as distinct from the merits, the State asserts (JS 24) that "a [numerical] standard for measuring burden is indispensable." In the State's view (JS 23-24), it is acceptable for legislators to intentionally inflict *some* degree of harm on voters for their voting histories, as long as it doesn't go too far—the problem is that the decision below does not offer any basis for determining "how much is too much." That is wrong on multiple levels.

To begin, it is wrong to say that *some* degree of intentionally inflicted harm in response to the expression of political views is constitutionally acceptable. The distinction that the First Amendment retaliation doctrine draws is one of kind, not degree: It forbids States from deliberately diluting citizens' votes and disrupting their political associations because lawmakers disapprove of those citizens' political views. That prohibition does not depend on the "size" of the burden. But it does leave a wide range of valid political considerations that are permissible in redistricting, including avoiding contests between incumbents (*Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)), respecting municipal boundaries and communities of interest (*LULAC*, 548 U.S. at 441), and allocating specific institutions to particular districts to preserve affinity relationships (Dkt. 104, ¶ 50).

Even if that were not so, the First Amendment does not demand a numerical standard for measuring

burden. "[A]s the branch whose distinctive duty it is to declare 'what the law is,' [this Court is] often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." *United States* v. *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring). "[I]t is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution" one case at a time. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 679 (1970). Thus, the Court has never before required a universal "'litmus test' that would neatly separate valid from invalid" burdens as a precondition to exercising Article III jurisdiction in election-law cases. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality). It should not start here.

II. THE DISTRICT COURT PROPERLY GRANTED JUDGMENT TO PLAINTIFFS

A. The decision below rests entirely on undisputed facts

After repeatedly telling the district court that the parties' disputes are strictly legal and that no trial was necessary, the State now faults the district court for not ordering a trial after all. The State thus likens this case to *Hunt* v. *Cromartie*, 526 U.S. 541 (1999), asserting (JS 28) that the court improperly "resolved disputed facts pertaining to multiple elements of plaintiffs' claims." That gives new meaning to the phrase "wide of the mark."

a. As an initial matter, *Hunt* is readily distinguishable. There, the district court granted summary judgment "before either party had conducted discovery and without an evidentiary hearing." 526 U.S. at 545. Although the parties attached "supporting materials" to their summary judgment papers, the plaintiffs "offered only circumstantial evidence in support of

their claim" and notably lacked "direct evidence of intent." *Id.* at 545, 547.

Here, the opposite is true: "The parties have conducted and completed extensive discovery, and neither the plaintiffs nor the State has requested any more." JS App. 3a. After all that, "the record is replete with direct evidence" of intent (*id.* at 49a), including numerous facts that were jointly stipulated by the parties (*id.* at 50a; Dkt. 104) and otherwise admitted by the State (*e.g.*, Dkt. 191-15, at 16). In light of the undisputed nature of the relevant facts, both parties took the position that no trial was warranted. *E.g.*, Dkt. 177-1, at 25; Dkt. 186-1, at 25-46.[3]

b. Beyond that, there were no disputes of material fact warranting a trial. The State asserts (JS 29-30) that there is a dispute between (on the one hand)

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[3] Against this background, it is debatable whether the district court's decision is better understood as a summary judgment or a judgment following submission on the papers.

"In a nonjury case" like this, "when the basic dispute between the parties," if any, "concerns only the factual inferences that one might draw from the more basic facts to which the parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, the parties are, in effect, submitting their dispute to the court as a 'case stated.'" *United Paperworkers* v. *Int'l Paper Co.*, 64 F.3d 28, 31 (1st Cir. 1995). Accord, *e.g.*, *EEOC* v. *Maricopa Cty. Cmty. Coll.*, 736 F.2d 510, 513 (9th Cir. 1984). In that event, the district court is "freed from the usual constraints that attend the adjudication of summary judgment motions, and may engage in a certain amount of factfinding, including the drawing of inferences." *United Paperworkers*, 64 F.3d at 31 (quotation marks omitted).

If the decision below *is* better understood as a judgment following submission on the papers, clear error (rather than de novo) review applies. See *United Paperworkers*, 64 F.3d at 31; *Maricopa Cty. Cmty. Coll.*, 736 F.2d at 513. Cf. *Cooper*, 137 S. Ct. at 1464-1465 (giving the district court "significant deference on appeal," including clear-error review of factual findings).

evidence establishing that some of the plaintiffs were politically engaged and (on the other hand) evidence establishing that plaintiffs' associations were disrupted. That evidence is factually consistent. Even if it created a dispute, the dispute would be immaterial: The point is that plaintiffs' ability to band together with *others* has been inhibited by the gerrymander's associational interruptions, not that they *personally* became disengaged in politics. See JS App. 60a-61a.

The State is also wrong to say (JS 33) that the district court "refused to accept as true defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions." In fact, the district court expressly assumed the truth of the State's assertion that "other causes" were at work. JS App. 55a. It found, however, that there was no evidence that any of the supposed alternative justifications was capable, alone or together, of "explain[ing] the dramatic exchange of populations between the Sixth and Eighth Districts." *Ibid.* Rightly so.

The State's evidentiary objections (JS 30-33) are likewise unavailing. For starters, the admissibility of evidence is a legal matter—an objection to the entry of evidence does not mean that the evidence is "disputed" in the Rule 56 sense. Nor is there anything unusual or problematic about the district court's disposition of the State's objections; a court may "implicitly dispose[]" of evidentiary objections at the Rule 56 stage "by granting the summary judgment motion and relying on the evidence * * * objected to." *Campbell* v. *Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013). Accord, *e.g.*, *Ambat* v. *City & Cty. of S.F.*, 757 F.3d 1017, 1032 (9th Cir. 2014).

Nor do the State's evidentiary objections hold up on their merits. As an initial matter, the question is only

whether the cited evidence is *capable* of being "presented in a form that would be admissible in evidence" at trial, regardless whether it is presently so. Fed. R. Civ. P. 56(c)(2). All of the evidence met that standard.

Neither Strine's nor Ropp's testimony was hearsay because neither was offered to establish the truth of the matters asserted. Strine, for example, testified that "every time we were out [campaigning]," voters told her "it's not worth voting anymore." JS App. 26a. The testimony was not offered as proof that it literally wasn't worth voting anymore. It was offered instead as evidence of voter sentiment, reflecting depressed voter interest and engagement. Cf. *United States* v. *Brown*, 490 F.2d 758, 762-763 (D.C. Cir. 1973) ("[T]he statement 'X is no good' circumstantially indicates the declarant's state of mind toward X."). The same is true with respect to Ropp's testimony concerning voter confusion. JS App. 26a-27a.

The State's objection (JS 31-33) to the campaign finance reports is bizarre, and the court below correctly rejected it (Dkt. 219). First, the reports—which are made available on the defendants' own website—are "unsworn statements declared to be true under penalty of perjury," and they are thus admissible as "declarations" for purposes of Rule 56. *Williams* v. *Long*, 585 F. Supp. 2d 679, 685 (D. Md. 2008). Second, the reports are self-authenticating records of regularly conducted activity. *E.g.*, *Doali-Miller* v. *SuperValu, Inc.*, 855 F. Supp. 2d 510, 518-519 (D. Md. 2012). Third, they are subject to judicial notice. *E.g.*, *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 133 (D. Conn. 2007). Bottom line: The reports obviously could have been admitted

into evidence at trial. And the State did not offer any evidence bringing their contents into dispute.[4]

Finally, the State is wrong (JS 34) that the causation element of plaintiffs' claim required a trial. The preliminary injunction decision erroneously held that plaintiffs had to prove that the gerrymander alone dictated the outcomes of the congressional elections in 2012, 2014, and 2016 and that it would "continue to control the electoral outcomes in [the] district." JS App. 100a, 105a-113a. The opinion granting summary judgment corrected that error, holding that our burden was to show only that the plaintiffs "have been placed at a concrete electoral disadvantage." *Id.* at 52a. Thus, the difference in the two decisions is legal.

B. The district court correctly rejected the State's delay argument

The State's delay argument can be dispatched quickly. The district court—which had a front-row seat to all aspects of the litigation for the past four-plus years—found that there were no "dilatory efforts" by either side, attributing the dragging on of the litigation to "process." JS App. 66a. That conclusion was not an abuse of discretion.

This Court's affirmance of the denial of preliminary relief does not change matters. The Court based its decision on the late filing of the preliminary injunction motion and the proximity of the 2018 election. *Benisek*,

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[4] The State introduced evidence bearing on plaintiffs' claim of associational burdens (see JS 31), but it did not include evidence bearing on fundraising specifically. It now attempts to introduce such evidence for the first time on appeal. See JS 8 & n.3; JS 33 & n.10. That evidence—which has been reported to be inaccurate (*e.g.*, John Fritze, *Bartlett Struggles with Campaign Disclosure*, Balt. Sun (June 24, 2012), perma.cc/2Z64-4NWJ?type=image)—is not properly before the Court. See Fed. R. App. P. 10(a).

138 S. Ct. at 1943-1945. But as the district court explained (JS App. 66a), permanent injunctive relief "was requested when the litigation was first commenced in 2013."[5] And as the State admits (JS 38-39), "there remain[s] time to implement a new plan for the 2020 election." See also Dkt. 227. A denial of relief for a "serious constitutional violation" simply because the litigation took years to conclude would "demean[]" plaintiffs' First Amendment injuries. JS App. 65a.

Nor is it an answer to say "[just] bear it because it will be over soon." JS App. 65a. The State's citations to case law do not suggest otherwise. In *White* v. *Daniel*, 909 F.2d 99 (4th Cir. 1990), "there [were] no elections scheduled before * * * [the next] census," meaning that the case was moot. *Id.* at 104. Here, the 2020 election has yet to take place. And in *Skolnick* v. *Illinois State Electoral Board*, 307 F. Supp. 691 (N.D. Ill. 1969), the passage of time made correcting the one-person-one-vote claim in that case practically impossible. *Id.* at 694-695. The same cannot be said here. Every other case cited at pages 36 to 37 of the jurisdictional statement is similarly distinguishable.

Courts regularly enter injunctive relief late in a redistricting cycle when the constitutional violation can be corrected. *E.g.*, *Perez* v. *Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017) (granting injunction in August 2017), affirmed in part and reversed in part on unrelated grounds, 138 S. Ct. 2305 (2018). It was not an abuse of discretion for the district court to do so here.

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[5] The initial pro se complaint is "to be liberally construed." *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

For the foregoing reasons, the Court should summarily affirm. If it notes or postpones probable jurisdiction in this case and *Rucho* v. *Common Cause* (No. 18-422), it should consider scheduling oral argument for the same date. See *Benisek* v. *Lamone*, No. 17-333, 3/28/2018 Hr'g Tr. 26:8-27:7 (Justice Breyer proposing "reargument" in multiple partisan gerrymandering cases at once so that the Court could "see them all together"). Doing so would ensure a broader spectrum of legal arguments and a more substantial combined factual record upon which to consider the issues presented in the appeals.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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DECEMBER 2018

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OPPOSING MOTION TO AFFIRM

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This Court should note jurisdiction and deny plaintiffs' motion to affirm, which advocates a standard different from those stated below in either of the three-judge court's competing majority opinions. Granting the motion would only exacerbate the uncertainty created by the three-judge court.

ARGUMENT

I. The Motion Should Be Denied Because it Seeks Affirmance of a Partisan Gerrymandering Standard That Differs from the Three-Judge Court's.

Plaintiffs ask this Court to affirm based on a flawed standard that was not articulated by the court below. Plaintiffs' abandonment, in several critical respects, of the decisions below shows that not even they believe the lower court's rulings should be the last word on the subject. This alone counsels denial of the plaintiffs' motion.

In maintaining that their First Amendment retaliation claims are justiciable, plaintiffs focus on the three-judge court's burden element: plaintiffs must "show that the redistricting plan burdened them in a practical way." Motion to Affirm 18. In this element's defense, plaintiffs jettison the lower court's analysis in favor of importing the test for vote dilution developed under § 2 of the Voting Rights Act, a test absent from the opinions below. *Compare id.* at 18-20 (citing, *inter*

alia, *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986)), *with* J.S. App. 31a-43a, 48a-56a, 67a-76a.

Whereas Judge Niemeyer's "burden" discussion invokes generalities, such as "*electoral effectiveness—i.e., . . . opportunity to elect a candidate of choice*," J.S. App. 52a, without defining what that showing entails, plaintiffs propose a different test that features numerical standards. Motion to Affirm 19. Whatever the merits of the plaintiffs' proposed test, it is not the approach taken by the lower court.

Similarly, plaintiffs purport to embrace this Court's precedents acknowledging that some consideration of political affiliation in redistricting is permissible. *See* Motion to Affirm 23-24. But plaintiffs' nod to precedent is contradicted by the three-judge court's judgment requiring the State to redraw the boundaries of the Sixth District "without considering how citizens are registered to vote or have voted in the past or to what political party they belong," App. 79a. *See Satterlee v. Matthewson*, 27 U.S. 380, 410 (1829) ("[I]t is *the judgment* of [the lower] court * * * and not the *reasoning of the judges* upon it, which this Court is now called upon to revise."). Plaintiffs also argue that a redistricting plan adhering to this Court's precedents upholding the consideration of political affiliation in certain circumstances "would almost surely pass strict scrutiny." Motion to Affirm 23. Plaintiffs' resort to strict scrutiny analysis would itself place their standard in tension with this Court's precedent. *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality op.). But even aside from that difficulty, plaintiffs' argument goes beyond the

three-judge court's analyses, which do not address the level of scrutiny.

Plaintiffs also deny that the practical effect of the lower court's standard would be to "[e]nshrin[e] pre-existing" and often gerrymandered maps "as the constitutional touchstone for future redistricting." *See* Motion to Affirm 25. But here, too, plaintiffs stray far afield from the three-judge court's reasoning. They argue that the benchmark for evaluating the gerrymander "is not the immediately prior district" but rather "the full range of hypothetical districts that could have been drawn in the area." *Id.* But the lower court said nothing of the sort. Instead, Judge Niemeyer's opinion purported to compare the new district to the old in ways that bear upon both voters' representational rights (J.S. App. 53a-54a) and their associational rights (J.S. App. 61a-63a). So, too, did Judge Bredar's opinion. J.S. App. 73a-75a.

If nothing else, these differences separating the plaintiffs from the three-judge court's decision demonstrate why granting their motion would deprive Maryland of the clarity its legislature needs, if future redistricting plans are to have any hope of satisfying the applicable standard, whatever that standard may be. Granting summary affirmance of the divided three-judge court will not supply the needed guidance. Given this Court's recognition that "[a]scertaining the reach and content of summary actions may itself present issues of real substance," *Hicks v. Miranda*, 422 U.S. 332, 345 n.14 (1975), the problems such a disposition would

engender weigh heavily in favor of denying the motion and noting jurisdiction.

II. Plaintiffs' Arguments for Affirmance Raise Multiple Unresolved Issues That Are Ill-Suited for Summary Disposition.

A. The Lower Court's Standard Extends First Amendment Retaliation Doctrine to Legislative Activity.

As the Tenth Circuit has observed, no precedent of this Court expands the prohibition of "adverse discretionary executive action [that] was motivated by the plaintiff's speech or association—to legislative enactments." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 840 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Moreover, courts of appeals have rejected First Amendment challenges alleging burdens on speech or association due to facially constitutional legislation if, as in the case of retaliation, the claims require inquiry into governmental motivation. *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (stating such challenges do "not present[ ] a cognizable First Amendment claim"); *see also Moser*, 747 F.3d at 842; *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467-70 (4th Cir. 2012); *Southern Christian Leadership Conf. v. Supreme Ct. of La.*, 252 F.3d 781, 795 (5th Cir. 2001); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d

770, 775 (7th Cir. 1999); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-59 (4th Cir. 1989).

Both groups and individuals often find themselves frustrated in their legislative efforts and, consequently, they are subject to policies and statutes that indirectly burden their expression or association, like restrictions on student practice of law, *Southern Christian Leadership Conf.*, 252 F.3d at 784, or laws reducing labor protections for teachers, *Hearne*, 185 F.3d at 773. But this Court has consistently rejected challenges where plaintiffs allege only indirect burdens on their First Amendment rights, even where no motivation inquiry is required. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 695 (2010); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Adding an inquiry into legislative motive further complicates matters. The implications of expanding "statutory-motive cases to the arena of freedom of speech and association" are "daunting." *Moser*, 747 F.3d at 842. It is too easy for potential plaintiffs to allege that a facially neutral statute "becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign." *Hearne*, 185 F.3d at 775. Courts are ill-suited to decide, in every contested legislative process, "whether legislators were motivated to punish" an association advocating for legislation, "or were opposed" to the policy position of the association, "or were simply in favor" of the specific

legislative proposal under consideration. *Moser*, 747 F.3d at 843.

Here, the three-judge court's standards are based on a First Amendment retaliation cause of action, J.S. App. 42a-43a, that has never been extended to legislative activity. It requires inquiry into legislative motive, J.S. App. 43a, and an evaluation of indirect burdens on plaintiffs' asserted rights, *id.* These concepts are not "well developed and familiar," *Baker*, 369 U.S. at 226, because courts have declined to apply them to statutes and legislative action. Any endorsement of importing these concepts into the legislative sphere would, at minimum, require plenary review.

B. Plaintiffs' Unreasonable Delay Precludes Injunctive Relief.

Plaintiffs seek to relitigate this Court's prior unanimous conclusion that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. Plaintiffs rely on the three-judge court's contrary finding on remand that it has "not seen any dilatory effects . . . either by the plaintiffs or by the State," App. 66a, but that finding contravenes this Court's law-of-the-case doctrine and, therefore, constitutes an abuse of discretion. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

Plaintiffs also assert that "Courts regularly enter injunctive relief late in a redistricting cycle," Motion to Affirm 32, but for that proposition plaintiffs cite only

one example, *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017), a case that did not involve a record of "plaintiffs' unnecessary, years-long delay," *Benisek*, 138 U.S. at 1944. Instead, *Perez* was the product of a complex history beyond plaintiffs' control and ended in this Court reversing the majority of the district court's injunction. *Abbott v. Perez*, 138 S. Ct. 2305, 2315-19 (2018) (discussing complex procedural and legislative history). That history is far from typical or "regular," and contrasts starkly with Maryland's history in the same period, throughout which the legislature's 2011 Congressional plan has been in effect, having withstood multiple legal challenges, including *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

Even if the injunction ordered in *Perez v. Abbott* had not been reversed, it would still be distinguishable from the injunction issued below. In *Perez*, the court ordered relief three years before the decennial census and in time to complete redrawing of the map before the third election conducted under the challenged plan. 138 S. Ct. at 2335. Here, the court below issued its injunction less than two years before the next census and after four elections had already occurred under the 2011 plan. As explained in the jurisdictional statement, the combination of plaintiffs' delay and the closeness of the next reapportionment threatens disruption of the electoral process and renders the injunction an abuse of discretion.

III. The Three-Judge Court Erred by Departing from the Summary Judgment Standard.

The Court should also reject plaintiffs' suggestion that this appeal should be exempt from the summary judgment requirements that necessitated reversal of a three-judge court in *Hunt v. Cromartie*, 526 U.S. 541 (1999). Though *Hunt* involved claims of racial rather than partisan gerrymandering, the pertinent parts of its holding apply here and cannot be distinguished away.

First, though plaintiffs make much of the parties' filing of cross-motions for summary judgment asserting an absence of disputed facts, *Hunt* also came to this Court from a ruling on cross-motions for summary judgment. *Id.* at 545 ("The parties filed competing motions for summary judgment and supporting materials[.]"). Like the decision below, the three-judge court's decision in *Hunt* purported to rely on "uncontroverted material facts," *id.*, but that assurance did not dissuade this Court from noting jurisdiction and then reversing for failure to heed the summary judgment standard. As federal appellate courts have repeatedly explained, "[t]he ordinary standards for summary judgment remain unchanged on cross-motions for summary judgment:" a court must do what the court below failed to do, which is "construe all facts and inferences arising from them in favor of the party against whom the motion under consideration is made." *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017); *accord Auto-Owners Ins. Co. v. Stevens & Ricci, Inc.*, 835 F.3d 388, 402 (3d Cir. 2016); *Craig v. Bridges*

Bros. Trucking LLC, 823 F.3d 382, 387 (6th Cir. 2016). The filing of cross-motions does not mean that "there are no genuine issues." *Hot Stuff Foods, LLC v. Houston Cas. Co.*, 771 F.3d 1071, 1076 (8th Cir. 2014) (citation omitted).

The plaintiffs also try to distinguish *Hunt* because the parties there did not pursue discovery, but the lack of discovery did not feature in this Court's analysis or disposition. 526 U.S. at 554. Instead, *Hunt* applied the summary judgment standard explained in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), cases that involved motions for summary judgment "[f]ollowing discovery," *id.* at 245; *see Celotex*, 477 U.S. at 326. *See also Georgia State Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1346 (11th Cir. 2015) (on cross-motions for summary judgment, reversing for impermissible weighing of evidence where "discovery was completed").

The plaintiffs further identify the lack of "direct evidence of intent" in *Hunt*'s record, 526 U.S. at 549, but the court below relied on post-hoc statements of intent, J.S. App. 49a-50a; statements of legislators uninvolved with map drafting, J.S. App. 20a-24a, and opponents of the legislation, J.S. App. 24a, and, moreover, omitted consideration of the intent of the Maryland voters who approved it at referendum. Dkt. 104 ¶39. Even as to those statements, *Hunt* precludes summary judgment "in favor of the party with the burden of persuasion," *id.* at 553, because "'all justifiable inferences are to be drawn in [defendants'] favor.'" *Id.* at

552 (citation omitted). For "'[s]ummary judgment may be inappropriate even where the parties agree on the basic facts,'" such as words someone uttered, "'but disagree about the inferences that should be drawn from these facts.'" *NAACP*, 775 F.3d at 1347 (citation omitted).

Like the summary judgment decisions reversed in *Hunt* and *NAACP*, the decision below does not reflect "inferences drawn in Appellants' favor." *Id.*, 775 F.3d at 1347. Notwithstanding plaintiffs' characterization, the three-judge court did not accept "as true" and fully "believe[ ]," *Hunt*, 526 U.S. at 551, 552, the State's legitimate legislative decisions that resulted in the Sixth District's boundaries. If the court had credited defendants' justification, it would have at least acknowledged evidence that, after accounting for changes to the Sixth District's boundaries necessitated by redrawing of districts not challenged here—the First and Fourth Districts—the net combined number of registered Republicans and Democrats reassigned in and out of the Sixth District was insufficient to account for the 2012 Congressional election result. Dkt. 177-19, 13; Dkt. 186-31, 2. Instead of accepting this evidence as true and probative, the court assailed the "utter implausibility" of defendants' evidence. J.S. App. 55a.

Moreover, a court cannot forgo ruling on evidentiary objections and, nonetheless, treat challenged evidence as "undisputed." "Before ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its

ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). The failure to do so constitutes reversible error if "not harmless," including where the failure to address objections leaves the parties "confused on precisely what constitutes the actual record" and causes them to "dispute what evidence [the appellate court] should actually consider."[1] *Id.* at 974; *accord Ambat v. City & County of San Francisco*, 757 F.3d 1017, 1032 (9th Cir. 2014) (failure to resolve objections harmless only due to reversal and remand).

Finally, contrary to plaintiffs' notion that it is somehow "debatable" whether the district court's decision could be understood as "a judgment following submission on the papers," Motion to Affirm 28 n.3, applicable precedent removes any doubt. In reviewing an appeal from disposition of cross-motions for summary judgment, the Court has emphasized that it "must assess the record under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990); *see id.* at 900 (Blackmun, J., dissenting) (referencing "the parties' cross-motions for summary judgment"). This assessment is de novo. *Eastman Kodak Co. v. Image Tech.*, 504 U.S. 451, 466 n.10 (1992).

As plaintiffs note, some courts have held that on cross-motions for summary judgment, if the parties

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[1] *Campbell v. Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013), cited by plaintiffs, is an unpublished decision that lacks precedential value under 11th Circuit Rule 36-2, and is unpersuasive because none of the cases it cites involved evidentiary objections on motions for summary judgment.

stipulated to all facts, or one party "gave no indication" that "any additional evidence . . . existed" other than the "conceded facts" asserted in the opponent's motion for summary judgment, then the appellate court may engage in "clear-error review." *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 (1st Cir. 1995) (citations omitted). But "[w]hen determining whether this was the path taken by the parties," the appellate court must "inquire into the intentions of the parties and the district court judge, as evidenced by the record on appeal." *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 644 (1st Cir. 2000).

Here the record discloses no intention to treat the cross-motions for summary judgment as a "case stated" tantamount to a bench trial on the papers.

The parties briefed the cross-motions as summary judgment motions and, though they entered a short stipulation of facts, Dkt. 104, the parties also submitted voluminous separate evidence, much of it contested. That circumstance alone disqualifies this matter for "case stated" treatment. *See, e.g.*, *NAACP*, 775 F.3d at 1345.

As for the three-judge court, it gave no hint that it intended to treat cross-motions as a case submitted for trial on the papers. The scheduling order recited that "[p]ending before the Court" was each party's "motion for summary judgment" as to which "the parties may present oral argument." Dkt. 213. At oral argument, Judge Niemeyer made repeated reference to the

summary judgment standard. Dkt. 221, Tr. 2:2-9, 20:4-15, 52:2-16.

Thus, contrary to plaintiffs' contention, this record provides no basis for exempting the parties' cross-motions for summary judgment from the requirements of Rule 56.

CONCLUSION

The motion to affirm should be denied.

Respectfully submitted,

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No. 18-726

IN THE

Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF REPRESENTATIVE-ELECT DAVID TRONE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule 37.2, Representative-elect David Trone respectfully requests leave to submit a brief as *amicus curiae* in support of appellants. Undersigned counsel provided notice of an intent to file this amicus brief to counsel for the parties on December 14, 2018, more than 10 days before this brief was due. Appellants' counsel has consented to the filing of this brief. Appellees' counsel has withheld consent.

Mr. Trone, a Democrat, was elected in November 2018 to represent the people of Maryland's sixth district in the House of Representatives. He will become a member of the 116th U.S. Congress on January 3, 2019. This case concerns whether Maryland's sixth district will retain its current form for the 2020 election cycle, when Mr. Trone hopes to stand for re-election. The evident intent of the appellees, plaintiffs below, is to ensure that the sixth district will be redrawn to make it more difficult for Mr. Trone or a member of his political party to prevail in the 2020 election. Mr. Trone campaigned throughout the sixth district in 2018 and believes he understands its ethos. As a politician on the frontier of the partisan gerrymandering issue and a member of the next Congress, he has concluded that the three-judge court's decision is impracticable and potentially harmful, and that solutions should come from Congress. None of the parties in this case has Mr. Trone's perspective and no one, he believes, is more directly affected by the ruling below than he is.

Accordingly, Mr. Trone respectfully requests that the Court grant his motion for leave and accept the attached brief for filing in this matter.

December 19, 2018

Respectfully submitted,

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Md. State Bd. Elections, Eligible Active Voters on Precinct Register (as of Oct. 21, 2012), available at https://results.elections.maryland.gov/press_room/documents/PG12/PrecinctRegisterCounts/statewide.pdf 12

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae David Trone has been elected to represent the people of Maryland's sixth district in the House of Representatives and will become a member of the 116th U.S. Congress on January 3, 2019. Mr. Trone first ran for office in the 2016 Democratic primary for Maryland's eighth congressional district, finishing second. On August 2, 2017, he announced his candidacy for an open seat in the adjacent sixth district and thereafter campaigned extensively throughout the district. In June 2018, he won the Democratic Party nomination over four challengers. The Washington Post endorsed Mr. Trone in the general election "by a mile" over a Republican candidate who had "dismissed Montgomery County, where she and a big chunk of the district's constituents live," in favor of the more Republican-leaning sites in the west of the district. Editorial Board, *David Trone for Congress in Maryland*, Washington Post (Oct. 22, 2018). On November 6, 2018, Mr. Trone won the general election with 59 percent of the vote, compared with 38 percent for the Republican candidate and about 3 percent for other candidates.

Mr. Trone is a Maryland native who grew up on a struggling family farm in south central Pennsylvania, near the Maryland border. He completed graduate business school and started a small business in Pennsylvania, and then moved to Montgomery

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[1] No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief. The parties received notice of this filing.

County, Maryland, where he and a brother built and ran one of the country's largest and most successful retailers of wine and other beverages. The company is based in Montgomery County and today employs more than 4000 people nationwide. Mr. Trone and his wife raised four children in Montgomery County, where Mr. Trone once coached 13 different youth sport teams in a single year. He has contributed millions of dollars to local and national charities.

Mr. Trone's unusual background in conservative-leaning endeavors like farming and entrepreneurship, layered against an extensive history of liberal philanthropy, helped him connect with voters throughout the sixth district. The district encompasses an historic corridor of Maryland that runs from the commuting exurbs of Washington D.C. into rural communities rooted in farming, manufacturing, and tourism. At one time the political and commercial interests of the district were roughly linked by the original route of the Baltimore & Ohio Railroad and by the Chesapeake & Ohio Canal, two of the State's greatest public works projects. Today the district is defined more by Interstates 270 and 70, along with the non-navigable, upper reaches of the Potomac River and its tributary, the Monocacy. Mr. Trone believes the people of the district today, while broadly split among the two major political parties, are not deeply conservative or liberal, but instead are united by a pragmatism and industriousness that suits his background and personality. He is honored to be their representative and hopes they re-elect him in 2020. He desires that the sixth district retain its current form until then.

SUMMARY OF ARGUMENT

This Court has struggled to find a workable test that will define constitutional limits on partisan gerrymandering. The resulting uncertainty is not a jurisprudential flaw; it is a feature of competing constitutional values that cannot be easily reconciled. Ignoring this reality, the three-judge court gave life to the aphorism that for every complex problem there is an answer that is clear, simple, and wrong. The court fashioned and applied a concise three-part test that yielded an absurd result: the invalidation, as an excessively partisan gerrymander, of a redrawn congressional district that is geographically compact and politically competitive; is more compact and competitive than the one it replaced; and is far more competitive than the state as a whole.

Perhaps the quest for a simple test to measure unconstitutionally partisan gerrymandering is worth pursuing. But not in this case, which is easily resolvable by accepting that a redrawn district is constitutional if it satisfies any one of five objective measures of the geographical shape and political composition of the redrawn district, rather than by requiring a review of the conduct and the subjective intent of legislators, map-drawers, voters, and other stake-holders in the redistricting process. In this case, the Court should hold that a redrawn congressional district is not subject to constitutional attack for partisan gerrymandering, regardless of the multiple reasons it was redrawn, if the resulting district is:

1. Reasonably compact and cohesive;

2. More compact and cohesive than its predecessor;
3. Reasonably competitive as measured by the percentage split in party registrations;
4. More competitive, as measured by the percentage split in party registrations, than its predecessor; or
5. More competitive than the state-wide split in party registrations.

Maryland's re-drawn sixth district meets all five of these criteria, but any one should be enough to pass constitutional muster. The Court has been clear that a partisan motive is not enough to invalidate a redrawn district. *E.g.*, *Gaffney* v. *Cummings*, 412 U.S. 735, 752-53 (1973). A natural corollary is that a re-drawn district that has geographic or political cohesion, or that diminishes objective measures of partisanship when compared with the prior district, cannot be unconstitutional even if partisanship was a significant force in the redistricting process. A redrawn district that meets those criteria is fundamentally within the purview of the state's political actors. Only if a re-drawn district violates these criteria should the judiciary examine the subjective intent of the redistricting authorities or the individual harms to voters.

Adopting one or more of these neutral principles may not resolve every case of partisan gerrymandering, but it will provide clear, achievable, and constitutional targets for redistricting personnel. And it will supplant the dangerous precedent reached by the three-judge court in this case, in which a finding of sufficiently partisan intent inevitably results in a constitutional injury, and an order to

redraw a district that is perfectly satisfactory as a constitutional matter and could very easily become more partisan as a result of the order.

ARGUMENT

I. HISTORY, GEOGRAPHY, AND POLITICAL DEMOGRAPHY OF MARYLAND'S SIXTH DISTRICT

In assessing the redrawn sixth district, the court below focused mostly on what it saw as partisan intent in repositioning clusters of voters after the 2010 decennial census. Mixed into its assessment of intent, however, was some commentary about the geographic and demographic characteristics of the new district. The tenor of the commentary was that the new district made less sense than the old because it traded large portions of four northern and eastern counties for a section of western Montgomery County. *See* JS App. 54a.

The court's commentary was misguided. The redrawn sixth district has a firm historical grounding and is more geographically and politically cohesive than the one it replaced. The three-judge court observed that "[s]ince 1966," the sixth district included "all of Maryland's five most northwestern counties – Garrett, Allegany, Washington, Frederick, and Carroll Counties." JS App. 5a. But the 1966 map was not drawn by state politicians; it was drawn by an earlier three-judge court that had concluded the unequal populations in the existing districts violated the Supreme Court's "one person, one vote" rule. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731, 734 (D.

Md. 1966). By contrast, from 1872 through 1966, all of Montgomery and Frederick counties were included with the three western counties in a single congressional district. *See* ECF 186-17, at Maps 7-10. Moreover, in 1972 the sixth district included portions of northern Montgomery County, *see id.* at Map 12, and after the 1980 census the sixth district was redrawn to include large portions of western and northern Montgomery. *Id.* at Map 13. Montgomery became essentially its own district after the 1990 census, *id.* at Map 14, but was then fragmented after the 2000 census, with a small arm in the north of the county assigned to the sixth district. *Id.* at Map 15.[2]

This 2002 map remained in place through the 2010 elections and became the baseline for the three-judge court's assessment of the current sixth district. The 2002 (baseline) and 2011 (current) maps are reprinted below as they were introduced in the record (excluding their inserts, which focused on other districts). *See* ECF 186-14, 186-15. The sixth district

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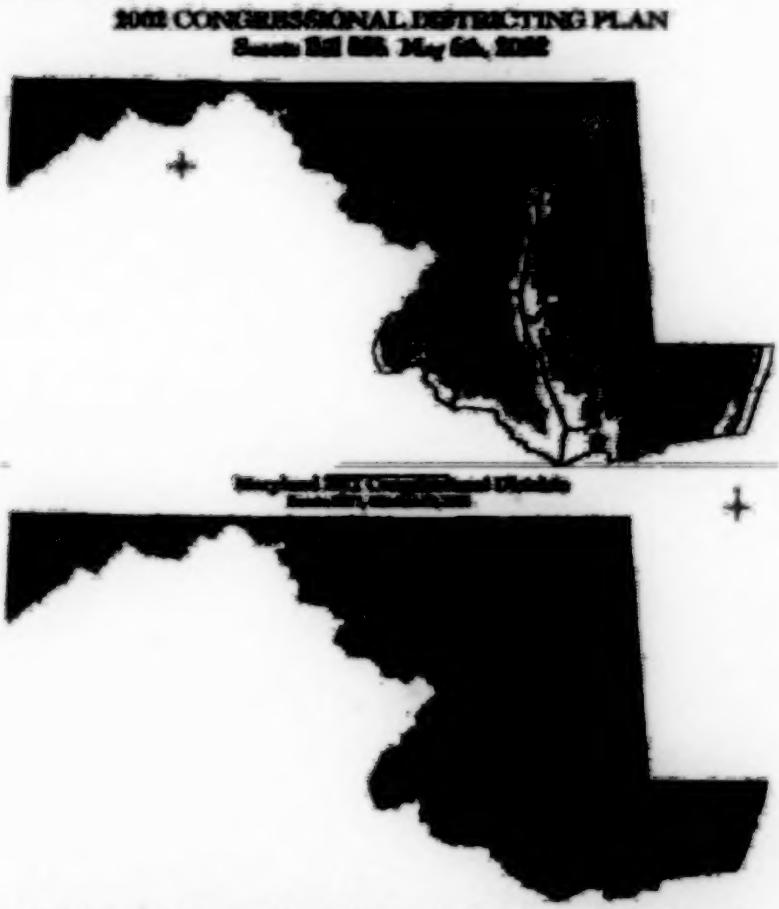
[2] Prior to the 1992 redistricting, voters in the sixth district had a long history of electing members of both parties, many of them moderates. Starting in 1911, the succession ran: Democratic (1911-17, David J. Lewis); Republican (1917-31, Frederick N. Zihlman); Democratic (1931-39, David J. Lewis); Democratic (1939-41, William D. Byron); Democratic (1941-43, Katharine Byron); Republican (1943-53, James G. Beall); Republican (1953-59, DeWitt S. Hyde); Democratic (1959-61, John R. Foley); Republican (1961-69, Charles M. Mathias Jr.); Republican (1969-71 John G. Beall Jr.); Democratic (1971-78, Goodloe E. Byron); Democratic (1979-93, Beverly Butcher Byron). After the 1992 redistricting, the seat was held for 20 years by Roscoe Bartlett, a conservative Republican. *See* Maryland's 6th congressional district, Wikipedia, available at https://en.wikipedia.org/wiki/Maryland%27s_6th_congressional_district (last accessed Dec. 12, 2018).

is salmon in the 2002 map and light green in the 2011 map.



The court focused on the net change in Democratic- or Republican-registered voters in the district without acknowledging that the redrawn district was more compact and cohesive than its predecessor. As shown above, the 2002 map extended from the Susquehanna River in the east all the way to the State's western border, encompassing large pieces of Harford and Baltimore counties that have never been

meaningfully connected with western Maryland. *See* ECF 186-8, at 18, 20. Even Carroll County has minimal cultural connection to western Maryland. Harford, Baltimore, and Carroll counties are all part of the Baltimore-Columbia-Towson metropolitan statistical area.

By contrast, the northern and western portions of Montgomery County in the current sixth district are closer to the western counties and have long been politically and culturally associated with them. Historically, the district was connected by the Potomac River, by the Chesapeake and Ohio Canal that runs alongside it, and by the original western line of the Baltimore & Ohio Railroad. The B&O, running west from Baltimore along the Patapsco, turned south just below Frederick and ran roughly along the Frederick corridor of the current district, before turning west along the Potomac toward the coal fields in the western counties (crossing into what is now West Virginia for a stretch). A spur into Frederick opened in 1831, forming the Frederick Branch that still carries commuters today under the banner of the State's MARC service. The development and operation of the C&O Canal and B&O Railroad were major political issues in Maryland in the 19th Century, when regional political blocs often sought state investment and support for railways and canals. The Canal in particular was a longtime financial albatross for the State and was a major funding concern at the State's 1867 Constitutional Convention before it finally stabilized, at least for a time, in the late 19th Century. *See, e.g.*, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION 788-816 (J. Connolly ed. 2018) (reprinting convention debates). The Canal and the Railroad were western Maryland's

principal commercial corridors before the proliferation of the automobile and they created common interests for communities along the line.

Today, the district remains connected by the Potomac and Monocacy rivers. The Canal right-of-way is now a popular linear park that traverses most of the district. And the most heavily populated sections are connected by the I-270/I-70 corridor running north and west out of Washington D.C. This corridor is the State's modern growth engine, forming its own community of technology and other modern businesses and institutions. *See* ECF 186-17, at 19; ECF 186-8, at 15, 18, 22. (The national headquarters of Mr. Trone's business is situated at the base of the corridor, just outside the district.)

The redrawn sixth district is not perfectly geometric – a near impossibility in Maryland – but it is reasonably compact and cohesive given Maryland's odd shape and the constitutional requirement of proportionate representation. The State introduced ample evidence from highly qualified experts explaining that the redrawn district possessed demographic, economic, and transportation cohesiveness. *E.g.*, ECF 186-17, at 17-18. What's more, the three-judge court never tried to explain why the new map was less geographically, historically, or culturally cohesive than the prior map, preferring to focus on the relative *changes* in political-party registrations.

This was a flawed methodology because the preexisting sixth district was no paragon of nonpartisanship; it was instead drawn to provide a safe seat for Republicans. If the test for constitutionality turns on party-registration changes

from one map to the next, the relevant measure should not be the total swing from one party to the next, but the net change in competitiveness; i.e., whether the district is more or less competitive, regardless of which party has the edge.

This point is readily established through numbers furnished by plaintiffs' expert witness, Michael P. McDonald. In attempting to show the voter "swing" in the redrawn sixth district, a concept credited by the three-judge court, Dr. McDonald reported the following statistics (correcting for trivial errors):

	Benchmark [2002]		Adopted [2011]		Change
	Number	Percent	Number	Percent	Number
Demo.	159,661	35.8%	184,120	44.8%	24,459
Repub.	207,966	46.7%	141,548	34.4%	-66,418
No Pty	77,892	17.5%	85,535	20.8%	7,643
Total	445,519	100.0%	411,203	100.0%	-34,316

Thus, Dr. McDonald and the court focused on a swing of 90,877 party registrations (24,459 more Democrats plus 66,418 fewer Republicans). As shown in the table below, however, the redrawn sixth district was more competitive than the 2002 version when measured by the relative differences among the two major parties.

	Benchmark [2002]		Adopted [2011]	
	Number	Percent	Number	Percent
Dems – Reps	-48,305	-10.8%	42,572	10.4%
(Reps+NP) - Dems	126,197	28.3%	42,963	10.4%
Reps – Dems	48,305	10.8%	-42,572	-10.4%
(Dems+NP) - Reps	29,587	6.6%	128,107	31.2%

This table shows that the percentage difference between registrations for the two major parties was slightly less in 2011 (10.4 vs. 10.8 percent). Further, Democrats had a smaller registered-voter advantage in 2011 than Republicans had in 2002 (42,572 vs. 48,305). Finally, if the Republican candidate in the redrawn district carried the nonaligned voters, the Republican would have had a substantially greater chance of defeating a Democrat than the other way around under the prior map (Republicans plus No Party outweighed Democrats by 42,963 in 2011, while Democrats plus No Party outweighed Republicans by only 29,587 in 2002). This type of result is not unprecedented in Maryland, which is all the more reason why courts should be cautious to declare constitutional injuries by gerrymandering. Maryland's most conservative district, the first, is generally a Republican stronghold. The Republican candidate prevailed there in every election from 1990 through 2006, winning by 53, 52, and 38 points in the elections of 2002 to 2006. *See* Md. State Bd. Elections, Elections by Year, Representative in Congress (elections of 2002 through 2006).[3] But in 2008, with

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[3] Available at
https://results.elections.maryland.gov/elections/2002/results/g_representative_in_congress.html;
https://results.elections.maryland.gov/elections/2004/general/congress.html;
https://results.elections.maryland.gov/elections/2006/results/general/office_Representative_in_Congress.html.

no change in district boundaries, the Democratic candidate won. *See id.* (election year 2008).[4]

Moreover, the redrawn sixth district was significantly more competitive than the State as a whole. In 2012, Democrats comprised 55.7 percent of all registered voters in the state, versus 26.0 percent for Republicans – a ratio of more than 2.1 to 1, and a percentage-point spread of 29.8. *See* Md. State Bd. Elections, Eligible Active Voters on Precinct Register (as of Oct. 21, 2012).[5] The redrawn sixth district, by contrast, has a Democrat-to-Republican ratio of 1.3 to 1 and a percentage-point spread of only 10.4. By these absolute measures, the redrawn sixth district is substantially more competitive than Maryland as a whole. And the sixth district proved to be the most competitive of Maryland's eight congressional districts in the 2018 general election, *see* Md. State Bd. Elections, Elections by Year, Representative in Congress (election year 2018),[6] suggesting that the district had returned to its historical competitiveness under the challenged map.

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[4] Available at https://results.elections.maryland.gov/elections/2008/results/general/gen_results_2008_4_008X.html.

[5] Available at https://results.elections.maryland.gov/press_room/documents/PG12/PrecinctRegisterCounts/statewide.pdf.

[6] Available at https://results.elections.maryland.gov/elections/2018/results/general/gen_results_2018_2_008X.html.

II. THE COURT SHOULD ENDORSE OBJECTIVE CRITERIA THAT ESTABLISH WHEN A REDRAWN DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK

The three-judge court acknowledged that the Constitution gives authority to draw election districts to the political branches of the state and federal governments. JS App. 31a, 33a (citing U.S. Const. art. I, § 2, cl. 1 & art. I, § 4, cl. 1). The court further recognized that this Court has addressed the constitutionality of partisan gerrymandering in a series of cases, most arising under the Equal Protection Clause, and has never invalidated a district on that basis or even settled on a clear standard for doing so. *See* JS App. 38a. In Amicus's view, the facts of this case are well within existing Equal Protection precedents, clearly foreclosing any relief under that clause. *See, e.g., Vieth* v. *Jubelirer*, 541 U.S. 267, 281 (2004) (plurality); *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Gaffney* 412 U.S. at 752-53; *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 423 (2006) (plurality) [hereafter, "*LULAC*"].

Doubtless because of these precedents, plaintiffs in this case sought relief under the First Amendment, and the three-judge court found in that Amendment a test for partisan gerrymandering that is notable for its breadth as much as for its novelty. After 50 years of this Court's rejecting constitutional challenges to partisan gerrymandering, the divided three-judge court found (through different two-judge majorities) *two* justiciable violations of the First Amendment. The tests it fashioned for proving these violations,

moreover, turned out to be quite easy to satisfy, and if endorsed by this Court it would effectively nullify longtime judicial reticence about intruding on congressional redistricting.

Two of the three judges below (Niemeyer and Russell, JJ) found that plaintiffs could prove a violation of their First Amendment representational rights by establishing (1) that the state actors drew the map with "specific intent" to burden them "because of how they voted or the political party with which they were affiliated"; (2) that the redrawn district diluted their votes "to such a degree that it resulted in a tangible and concrete adverse effect"; and (3) that the intent to burden was a but-for cause of the adverse effect. JS App. 59a. The same two judges found that plaintiffs could prove a violation of their First Amendment associational rights by proving the same elements, except that element (2) required proof of a burden on the "targeted citizens' ability to associate in furtherance of their political beliefs and aims." *Id.* (Chief Judge Bredar concurred in the associational-rights holding, but on somewhat narrower grounds.)

The three-judge court's decision has some grounding in Justice Kagan's concurring opinion in *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018), and in Justice Kennedy's earlier concurring opinion in *Vieth*. *See* 541 U.S. at 314-16. By contrast, the plurality in *Vieth* was skeptical of a First Amendment basis for partisan gerrymandering claims, "for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in

hiring for non-policy-level government jobs." *Id.* at 294.

The three-judge court's decision in this case proves the *Vieth* plurality's point. The court's two tests for First Amendment justiciability turned out to be very easy to satisfy – so easy that the court granted a permanent injunction on plaintiffs' motion for summary judgment, relying extensively on unreliable hearsay. Plaintiffs might answer that the test was satisfied because the facts were egregious, but that is unpersuasive for two reasons. To be sure, the record included ample evidence that some state officials intended the sixth district to lean Democratic. But as Appellants' Jurisdictional Statement explains, it also included evidence of nonpartisan intent, *see* JS 5-7, and nothing in the record suggested a specific intent not to comply with the law as articulated by this Court. That law has been clear for decades that extensive partisan intent in redistricting is permissible, at least if the challenge is brought under the Equal Protection clause. *E.g.*, *Gaffney*, 412 U.S. at 752-53. The three-judge court fundamentally confused partisan intent, which is clearly permissible, with unlawful intent to harm specific voters because of their party affiliation, which was not remotely proven.

More important, the tests fashioned by the three-judge court are satisfied in nearly every case where political actors control redistricting and the prevailing voter registrations in the redrawn district change from one party to the other. The intent element of the three-judge court's test, although ostensibly requiring a "specific intent" to burden voters based on their prior votes or party affiliation,

in fact requires nothing more than proof of an intent that the redrawn district favor one party over the other. It might have been a different case if the three-judge court required, for instance, proof that redistricting officials curved an otherwise straight boundary around the house of a specific political opponent in retaliation for that opponent's political affiliation, or speech. But nothing like that happened in this case, and as a practical matter the court's "specific intent" element is readily provable. After that, the other two elements – causation and damages – are gimmes. A few voters testify about their political ennui after redistricting, and the case is over. Indeed, in this case, the court did not even require first-hand testimony.

Nothing in this Court's precedents, or in the three-judge court's decision, explains why partisan gerrymandering challenges should be easier to win under the First Amendment as compared to the Fourteenth. The questions that have animated jurisprudence in this area for decades are "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929. These questions are aimed at ensuring that the judiciary respects its limited role. *Id.* In *Gill*, decided just last term, seven justices agreed that "[f]oremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affect[s] the plaintiff in a personal and individual way." *Id.* (quotation marks omitted).

The alleged First Amendment injuries in this case were essentially identical to the injuries alleged in

the Equal Protection cases: dilution of the plaintiffs' vote, or their enthusiasm to vote, because of a perception that their party's candidate will not win. Despite the three-judge court's attempt to frame the plaintiffs' injury as personal, partisan gerrymandering cases are by nature impersonal. If the intent is to "flip" a district, as the three-judge court believed, the target is the district as a whole, not any individual voter.

This Court may not want to declare a broad rule equating the justiciability standard for partisan gerrymandering challenges under the First and Fourteenth amendments. As noted, for instance, the First Amendment might provide relief if map-makers specifically re-districted a political opponent who criticized the re-districters. But that is not remotely what happened in this case.

Instead, Amicus suggests that the Court proceed cautiously, as it has done for decades in this area, by holding that any number of objective principles preclude relief in this case and others like it, whether the claim is under the First or Fourteenth Amendments. Those principles are set forth in the next section.

III. BY REASONABLE OBJECTIVE MEASURES, MARYLAND'S REDRAWN SIXTH DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK FOR PARTISAN GERRYMANDERING

The Court should reverse the judgment below because at least five objective and undisputed facts should put this case beyond the reach of constitutional challenge. A decision on these grounds

would not foreclose all challenges to partisan gerrymandering under the First or Fourteenth Amendments, but it would establish clear safe harbors for map-makers that accommodate competing constitutional principles: namely, that the Constitution commits re-districting authority to political actors and does not prohibit partisanship in the process, yet also affords each citizen a right to cast a vote that counts as much as any other citizen's vote. It will also permit Congress to fashion a national solution to partisan gerrymandering that will possess a political legitimacy that can come only from federal legislation.

First, the Court should hold that a redrawn district that is reasonably compact and cohesive is not subject to a collective gerrymandering challenge even if the redrawn map was intended to, and does, change the district's prevailing party affiliation. Permitting such challenges would unreasonably intrude on state officials' constitutional power to draw congressional election districts, and to consider partisan interests as they do so. *See, e.g.*, *Gaffney*, 412 U.S. at 754 ("neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State"). Whatever limits the Constitution imposes on partisan gerrymandering, they cannot be crossed if the new district has reasonable geographic and cultural cohesion.

Second, the Court should hold that a redrawn district is not subject to a collective gerrymandering challenge if the map is more compact and cohesive than its predecessor. The *ne plus ultra* of nonpartisan districting is probably a geometric grid transposed over a state map with lines adjusted as little as possible to ensure equal populations per district. Perfect nonpartisanship may be impossible but movement in that direction should not be subject to punishment. Absent evidence that map-makers specifically targeted individual voters in violation of their constitutional rights, a district that becomes more compact and cohesive than its predecessor cannot give rise to a "concrete and individualized" injury, even if the district "flips" as a whole.

Third, the judiciary should not adjudicate partisan gerrymandering claims if the redrawn district is reasonably competitive as measured by the percentage split in party registrations. If a district is politically competitive, there can be no injury of a constitutional dimension regardless of the map-makers' intent.

Fourth, partisan gerrymandering claims should not be justiciable if the redrawn district is more competitive than the prior district, as measured by the percentage split in party registrations. Again, State officials should not be discouraged from making a district less partisan, even if the result is not perfect.

Finally, partisan gerrymandering claims should not be justiciable if the redrawn district is more competitive than the State as a whole. *See Gaffney*, 412 U.S. at 754 ("judicial interest should be at its lowest ebb when a State purports fairly to allocate

political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"); *LULAC*, 548 U.S. at 419 (Kennedy, J.) ("a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority"). In that instance, no individual citizen in the redrawn district can possibly establish the type of concrete and individualized injury required for justiciability. Every citizen in the redrawn district who could claim an injury of any kind is by definition in a more favorable position than he or she has a right to expect.

As set forth above in Part I, the record in this case establishes each of these criteria. The second, fourth, and fifth items are essentially incontrovertible and are easily applied in other cases. The first and third require some judgment in individual cases, including this one, but they are amply supported by the record in this case. In any event, the five criteria considered as a whole should establish beyond question that the three-judge court's sweeping decision in this case should be reversed.

* * * *

The three-judge court's evident exasperation with partisan gerrymandering may have impelled it to find a judicial solution. *See, e.g.*, JS App. 67a (Bredar, C.J., concurring) ("Partisan gerrymandering is noxious, a cancer on our democracy."). Amicus himself is no fan of partisan gerrymandering, but that does not mean it is a terminal disease, much less one that the judiciary can or should cure. The district-by-district resolutions that would come from judicial review of partisan gerrymandering claims

can only mire the courts in partisan politics. Were this Court to invalidate a Democratic district in a strongly Democratic state like Maryland, Democrats nationwide would cry foul, and rightly question why Republican gerrymanders in Republican-controlled states are not subject to the same scrutiny.[7]

The absence of a broad-based judicial solution does not consign the republic to live with partisan gerrymandering. On the contrary, the Constitution gives Congress secondary authority to "make or alter" the States' primary authority to prescribe the "Times, Places and Manner of holding Elections ... for Representatives." U.S. Const. art. I, § 4; *see* The Federalist No. 59 (A. Hamilton). Congress's power almost certainly includes the ability to curtail or eliminate partisan gerrymandering at the national

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[7] Plaintiffs' and the three-judge court's insistence that gerrymandering is anti-democratic is true in theory, but not necessarily in practice. Amicus agrees that the democratic ideal is a complete absence of partisan gerrymandering (and he would readily support nationwide legislation that accomplishes that goal). But if some partisan gerrymandering is permitted (or occurs even if not permitted), democracy is hindered, not helped, when one party engages in it and the other does not. Congress is a national legislature; a single state's delegation achieves nothing by itself. If, hypothetically, a Republican-gerrymandered delegation from North Carolina is not offset to some degree by a Democratic-gerrymandered delegation from Maryland, representation in Congress will be less reflective of the electorate as a whole. This is why a national legislative solution is so critical. Judicial solutions will always have problems of timing (because gerrymandering challenges will not be decided in all districts at the same time), as well as precision (because courts cannot legislate clear anti-gerrymandering rules, but can only fashion standards as derived from broad Constitutional text).

level, *see Vieth*, 541 U.S. at 276-77; *Davis*, 478 U.S. at 143-44 (Burger, C.J., concurring), and Congress has often considered bills that would fashion a nationwide solution. *E.g.*, Citizen Legislature Anti-Corruption Reform Act, H.R. 145, 115th Cong., § 5 (1st Sess. 2017) ("Each State shall conduct Congressional redistricting (beginning with the redistricting carried out pursuant to the decennial census conducted during 2020) in accordance with a redistricting plan developed by a nonpartisan independent redistricting commission."). A decision by this Court endorsing the three-judge court's judgment and rationale will undermine decades of precedent and disrupt settled expectations about what is permissible in redistricting. The elimination of partisan gerrymandering is a desirable goal, but only Congress can ensure that the remedy applies uniformly throughout the Nation.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

JOINT APPENDIX
VOLUME I OF V (JA1 – JA350)

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

O. JOHN BENISEK, ET AL.,
Plaintiffs,
v.
LINDA H. LAMONE, *Administrator, Maryland State Board of Elections, et al.*,
Defendants.

No. 1:13-cv-03233-JKB

NO.	DATE	DESCRIPTION
1	11/05/2013	COMPLAINT against Linda H. Lamone, Bobby S. Mack, filed by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro (attachments omitted).
		* * *
5	11/20/2013	MOTION for Leave to File Amended Complaint by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro (attachments omitted).
		* * *
10	12/02/2013	PAPERLESS ORDER granting 5 Motion for Leave to File Amended Complaint; granting 6 Motion for Extension of Time to Answer. All

NO.	DATE	DESCRIPTION
		Defendants' answers due on or before 12/17/13. Signed by Judge James K. Bredar.
11	12/02/2013	AMENDED COMPLAINT against Linda H. Lamone, Bobby S. Mack, filed by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro (attachments omitted).
		* * *
13	12/17/2013	MOTION to Dismiss for Failure to State a Claim by Linda H. Lamone, Bobby S. Mack Responses due by 1/3/2014 (attachments omitted).
		* * *
18	12/31/2013	RESPONSE in Opposition re 13 MOTION to Dismiss for Failure to State a Claim filed by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro (attachments omitted).
19	01/17/2014	REPLY to Response to Motion re 13 MOTION to Dismiss for Failure to State a Claim filed by Linda H. Lamone, Bobby S. Mack.
		* * *
21	04/08/2014	MEMORANDUM. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
22	04/08/2014	ORDER granting 13 Motion of defendants to Dismiss for Failure to State a Claim. Signed by Judge James K. Bredar.
23	04/28/2014	NOTICE OF APPEAL as to 22 Order on Motion to Dismiss for Failure to State a Claim, 21 Memorandum Opinion by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro.
		* * *
26	10/07/2014	JUDGMENT of USCA (certified copy) "AFFIRMING" the judgment of the District Court as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
27	10/17/2014	STAY OF MANDATE of USCA as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
28	11/12/2014	ORDER of USCA "DENYING" petition for rehearing and rehearing en banc as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
29	11/20/2014	MANDATE of USCA as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.

NO.	DATE	DESCRIPTION
		* * *
31	12/08/2015	JUDGMENT of US Supreme Court reversing and remanding case for further proceedings consistent with this opinion as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
32	01/08/2016	NOTICE of Appearance by Michael B. Kimberly on behalf of All Plaintiffs.
33	01/12/2016	ORDER of USCA vacating the judgment of the district court and remanding the case as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
34	01/12/2016	JUDGMENT of USCA vacating the judgment of the district court and remanding to the district court for further consideration (certified copy) as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.
		* * *
37	02/03/2016	MANDATE of USCA as to 23 Notice of Appeal filed by O. John Benisek, Stephen M. Shapiro, Maria B. Pycha.

NO.	DATE	DESCRIPTION
38	02/03/2016	Correspondence from Judge Bredar to Judge Traxler re: three-judge panel.
39	02/04/2016	THREE JUDGE PANEL ORDER Designating the Honorable Paul V. Niemeyer, United States Circuit Judge for the Fourth Circuit; the Honorable Ellen Lipton Hollander, United States District Judge for the District of Maryland; and the Honorable George L. Russell, III, United States District Judge for the District of Maryland, to serve in the hearing and determination of this matter. Signed by Judge Chief Judge William B. Traxler, Jr.
40	02/16/2016	MOTION for Leave to File *Second Amended Complaint* by O. John Benisek, Maria B. Pycha, Stephen M. Shapiro Responses due by 3/4/2016 (attachments omitted).
41	02/16/2016	NOTICE of Appearance by Paul Whitfield Hughes on behalf of O. John Benisek, Maria B. Pycha, Stephen M. Shapiro.
42	02/18/2016	REVISED THREE JUDGE PANEL ORDER Designating the Honorable Paul V. Niemeyer,

NO.	DATE	DESCRIPTION
		United States Circuit Judge for the Fourth Circuit; the Honorable James K. Bredar, United States District Judge for the District of Maryland; and the Honorable George L. Russell, III, United States District Judge for the District of Maryland, to serve in the hearing and determination of this matter. Signed by Chief Judge William B. Traxler, Jr.
43	03/03/2016	ORDER setting a simultaneous scheduling hearing; Directing the Benisek matter is now recaptioned and the case title in this Court going forward will be Shapiro v. McManus and the Clerk is directed to amend the docket; granting 40Motion of plaintiffs for Leave to File an amended complaint. Signed by Judge James K. Bredar.
44	03/03/2016	SECOND AMENDED COMPLAINT against Linda H. Lamone, David J. McManus, Jr., filed by Maria B. Pycha, Stephen M. Shapiro, O. John Benisek, Jeremiah DeWolf, Sharon Strine, Charles W. Eyler, Alonnie L. Ropp, Edmund Cueman, Kat O'Connor (attachments omitted).

NO.	DATE	DESCRIPTION
		* * *
49	03/24/2016	Consent MOTION for Extension of Time by Linda H. Lamone, David J. McManus, Jr. Responses due by 4/11/2016 (attachments omitted).
50	03/25/2016	ORDER granting 49 Motion of defendants for Extension of Time to respond to Second Amended Complaint. Signed by Judge James K. Bredar.
51	04/20/2016	MOTION to Dismiss for Failure to State a Claim by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
52	04/22/2016	Four-Judge Court Hearing held on 4/22/2016 before Judges James K. Bredar, Paul V. Niemeyer, Ellen L. Hollander, and George Levi Russell, III.
53	04/22/2016	MEMORANDUM to Counsel re dates for further proceedings. Signed by Judge James K. Bredar.
		* * *
55	04/26/2016	Joint MOTION for Extension of Time *of Briefing Deadlines* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen

NO.	DATE	DESCRIPTION
		M. Shapiro, Sharon Strine Responses due by 5/13/2016 (attachments omitted).
56	04/26/2016	ORDER granting 55 Joint Motion to Extend Filing Deadlines. Signed by Judge James K. Bredar.
		* * *
68	05/20/2016	RESPONSE in Opposition re 51 MOTION to Dismiss for Failure to State a Claim filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine.
		* * *
82	06/21/2016	REPLY to Response to Motion re 13 MOTION to Dismiss for Failure to State a Claim filed by Linda H. Lamone, David J. McManus, Jr.
83	06/29/2016	MOTION for Leave to File *Surreply in Opposition to Motion to Dismiss* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine Responses due by 7/18/2016.

NO.	DATE	DESCRIPTION
84	07/01/2016	ORDER Granting 83 Motion for Leave to File Surreply. Signed by Judge James K. Bredar.
85	07/01/2016	SURREPLY filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine to 51 MOTION to Dismiss for Failure to State a Claim.
		* * *
87	07/12/2016	Three-Judge Court Hearing / Motion Hearing held on 7/12/2016 re 51 MOTION to Dismiss for Failure to State a Claim filed by Linda H. Lamone, David J. McManus, Jr. before Judge Paul V. Niemeyer, Judge James K. Bredar and Judge George Levi Russell, III.
88	08/24/2016	OPINION.
89	08/24/2016	ORDER denying 51 Motion of defendants to Dismiss the second amended complaint. Signed by Judge James K. Bredar on Behalf of the Three Judge Court.
		* * *
96	09/07/2016	ANSWER to 44 Amended Complaint, by Linda H. Lamone, David J. McManus, Jr.

NO.	DATE	DESCRIPTION
		* * *
101	10/12/2016	STIPULATION re 99 Miscellaneous Correspondence *Stipulated Scheduling Order* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine.
102	10/13/2016	PAPERLESS ORDER re 101 Stipulation, filed by Edmund Cueman, Stephen M. Shapiro, Sharon Strine, Alonnie L. Ropp, O. John Benisek, Jeremiah DeWolf, Maria B. Pycha, Charles W. Eyler, Kat O'Connor : The STIPULATED SCHEDULING ORDER (ECF No. 101) is APPROVED. The next TELEPHONE DISCOVERY CONFERENCE will be held on 11/15/16 at 12:00 p.m. Counsel for the Defendants shall arrange for and initiate the conference call to Chambers. The agenda for the call shall be as stated in the Stipulated Scheduling Order. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
103	11/14/2016	STATUS REPORT *(Joint)* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine.
104	11/14/2016	STIPULATION *(Joint Stipulations of Fact and Law)* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine (attachments omitted).
105	11/15/2016	STIPULATION of Dismissal *of Plaintiffs Maria A. Pycha and Stephen M. Shapiro* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Maria B. Pycha, Alonnie L. Ropp, Stephen M. Shapiro, Sharon Strine.
106	11/16/2016	ORDER Approving 105 Stipulation of Dismissal of Plaintiffs Maria A. Pycha and Stephen M. Shapiro. Signed by Judge James K. Bredar.
107	11/16/2016	ORDER directing Clerk to amend case caption. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
108	11/16/2016	SCHEDULING ORDER; Status Report due by 3/24/2017. Signed by Judge James K. Bredar.
109	12/30/2016	MOTION to Intervene by Stephen M. Shapiro (attachments omitted).
		* * *
111	01/04/2017	Corrected MOTION to Compel *Non-Parties' Production of Documents and Deposition Testimony* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
112	01/09/2017	MOTION for Protective Order *to quash non-party deposition subpoenas* by Thomas V. Mike Miller, Jr, Michael E. Busch, Richard Stewart, Jeanne Hitchcock (attachments omitted).
113	01/09/2017	Consent MOTION to Shorten Time by Michael E. Busch, Jeanne Hitchcock, Linda H. Lamone, David J. McManus, Jr., Thomas V. Mike Miller, Jr, Richard Stewart, Richard S. Madaleno, Jr (attachments omitted).

NO.	DATE	DESCRIPTION
114	01/10/2017	Corrected MOTION for Protective Order *to quash non-party deposition subpoenas* by Michael E. Busch, Jeanne Hitchcock, Thomas V. Mike Miller, Jr, Richard Stewart (attachments omitted).
115	01/10/2017	ORDER re discovery motions. Signed by Judge James K. Bredar.
		* * *
118	01/16/2017	MOTION for Protective Order *from Rule 30(b)(6) deposition notice* by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
119	01/16/2017	RESPONSE to Motion re 111 Corrected MOTION to Compel *Non-Parties' Production of Documents and Deposition Testimony* filed by Michael E. Busch, Jeanne Hitchcock, Richard S. Madaleno, Jr, Thomas V. Mike Miller, Jr, Richard Stewart (attachments omitted).
120	01/16/2017	RESPONSE in Opposition re 114 Corrected MOTION for Protective Order *to quash non-party deposition subpoenas* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf,

NO.	DATE	DESCRIPTION
		Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
121	01/17/2017	RESPONSE in Opposition re 109 MOTION to Intervene filed by Linda H. Lamone, David J. McManus, Jr.
122	01/17/2017	RESPONSE in Opposition re 109 MOTION to Intervene filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
123	01/19/2017	REPLY to Response to Motion re 111 Corrected MOTION to Compel *Non-Parties' Production of Documents and Deposition Testimony* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp.
124	01/19/2017	REPLY to Response to Motion re 112 MOTION for Protective Order *to quash non-party deposition subpoenas* filed by Michael E. Busch, Jeanne Hitchcock, Thomas V. Mike Miller, Jr, Richard Stewart (attachments omitted).

NO.	DATE	DESCRIPTION
		* * *
126	01/23/2017	MOTION for Protective Order by C. Anthony Muse, Curtis Stovall Anderson (attachments omitted).
127	01/24/2017	MOTION for Protective Order by Robert J. Garagiola (attachments omitted).
128	01/27/2017	RESPONSE in Opposition re 127 MOTION for Protective Order , 126 MOTION for Protective Order filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
129	01/29/2017	REPLY to Response to Motion re 127 MOTION for Protective Order , 126 MOTION for Protective Order filed by Curtis Stovall Anderson, Robert J. Garagiola, C. Anthony Muse.
130	01/30/2017	MEMORANDUM AND ORDER DENYING 109 Motion to Intervene. Signed by Judge James K. Bredar.
131	01/30/2017	RESPONSE in Opposition re 118 MOTION for Protective Order *from Rule 30(b)(6) deposition notice* filed by O. John

NO.	DATE	DESCRIPTION
		Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
132	01/31/2017	MEMORANDUM AND ORDER granting 111 Motion of plaintiffs to Compel; denying 112 Motion for Protective Order to quash non-party deposition subpoenas by Thomas V. Mike Miller, Jr, Michael E. Busch, Richard Stewart, Jeanne Hitchcock ; denying 114 Corrected Motion for Protective Order to quash non-party deposition subpoenas by Michael E. Busch, Jeanne Hitchcock, Thomas V. Mike Miller, Jr, Richard Stewart. Signed by Judge James K. Bredar.
133	02/03/2017	ORDER denying 126 Motion for Protective Order and to Quash Non-Party Deposition Subpoenas Served on Delegate Curtis S. Anderson and Senator C. Anthony Muse; denying 127 Motion for Protective Order to Modify Non-Party Deposition Subpoena Served on Robert Garagiola. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
134	02/03/2017	REPLY to Response to Motion re 118 MOTION for Protective Order *from Rule 30(b)(6) deposition notice* filed by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
135	02/08/2017	MOTION for Other Relief *for Order of Full Court Approving or Otherwise Directing Compliance with Discovery Orders* by O. John Benisek, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
136	02/09/2017	Joint MOTION for Extension of Time to Complete Discovery by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
137	02/09/2017	MARGINAL ORDER granting 136 Joint Motion for Extension of Time to Complete Discovery. Signed by Judge James K. Bredar.
138	02/09/2017	ORDER directing the States counsel to appear on February 10, 2017, at 3:30 p.m., in Courtroom 3D, and then and there SHOW CAUSE why the individuals and entities who are

NO.	DATE	DESCRIPTION
		the subjects of the Courts discovery orders should not be held in contempt. Signed by Judge James K. Bredar.
139	02/09/2017	MOTION for Other Relief *for Review by Three-Judge Court and for Stay* by Curtis Stovall Anderson, Michael E. Busch, Jeanne Hitchcock, Richard S. Madaleno, Jr, Thomas V. Mike Miller, Jr, C. Anthony Muse, Richard Stewart (attachments omitted).
140	02/09/2017	ORDER granting 139 Motion for Review by Three Judge Court and Stay and setting briefing schedule. Signed by Judge James K. Bredar.
		* * *
143	02/13/2017	MEMORANDUM AND ORDER granting 125 Motion to Compel Defendants Production of Documents Responsive to Plaintiffs First Set of Requests for Production, Defendants Responses to Plaintiffs First Set of Interrogatories, and Defendants Answers to Plaintiffs First Set of Requests for Admissions filed by Alonnie L. Ropp, Jeremiah DeWolf, O. John Benisek, Edmund Cueman,

NO.	DATE	DESCRIPTION
		Sharon Strine, Kat O'Connor, Charles W. Eyler. Signed by Judge James K. Bredar.
144	02/13/2017	MOTION for Reconsideration re 130 Memorandum and Order on Motion to Intervene by Stephen M. Shapiro (attachments omitted).
145	02/14/2017	MEMORANDUM AND ORDER granting 118 Motion for Protective Order from Rule 30(b)(6) deposition notice by Linda H. Lamone, David J. McManus, Jr.; the notice issued by Plaintiffs under Rule 30(b)(6) is QUASHED. Signed by Judge James K. Bredar.
146	02/14/2017	MOTION for Protective Order by Martin O'Malley (attachments omitted).
		* * *
148	02/15/2017	STIPULATION *Regarding Confidentiality of Discovery Material* by Elijah Cummings, Steny Hoyer, C.A. Dutch Ruppersberger, John Sarbanes, Chris Van Hollen.
149	02/15/2017	MEMORANDUM AND ORDER denying 144 Motion of Stephen M. Shapiro for Reconsideration. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
150	02/15/2017	REPLY to Response to Motion re 109 Motion to Intervene filed by Stephen M. Shapiro.
151	02/15/2017	STIPULATED CONFIDENTIALITY ORDER. Signed by Judge James K. Bredar on 2/15/2017.
152	02/16/2017	RESPONSE in Opposition re 139 MOTION for Other Relief *for Review by Three-Judge Court and for Stay* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
153	02/16/2017	MOTION for Sanctions by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
		* * *
155	02/21/2017	REPLY to Response to Motion re 139 MOTION for Other Relief *for Review by Three-Judge Court and for Stay* filed by Curtis Stovall Anderson, Michael E. Busch, Jeanne Hitchcock, Richard S. Madaleno, Jr, Thomas V. Mike Miller, Jr, C. Anthony Muse, Richard Stewart.

NO.	DATE	DESCRIPTION
		* * *
157	02/28/2017	PAPERLESS ORDER re 139 MOTION for Other Relief *for Review by Three-Judge Court and for Stay* filed by Jeanne Hitchcock, Curtis Stovall Anderson, Richard Stewart, C. Anthony Muse, Richard S. Madaleno, Jr., Michael E. Busch, Thomas V. Mike Miller, Jr.: IT IS ORDERED THAT counsel for the parties participate in oral argument during a hearing before the three-judge Court on Monday, March 6, 2017, at 2 p.m., in Courtroom 1A, United States Courthouse, Baltimore, Maryland. The Court will not take evidence during the hearing. The Court anticipates that the hearing will last for approximately one hour. To the extent they have not already done so, consistent with the Court's ECF policies, the parties will supply paper courtesy copies of any filing (including prior filings) that, together with exhibits, has fifteen or more pages; further, they shall ensure a sufficient number of copies has been provided to the Court for

NO.	DATE	DESCRIPTION
		all three judges. Signed by Judge James K. Bredar.
158	02/28/2017	RESPONSE in Opposition re 146 MOTION for Protective Order filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
159	03/02/2017	RESPONSE in Opposition re 153 MOTION for Sanctions filed by Curtis Stovall Anderson, Michael E. Busch, Jeanne Hitchcock, Thomas V. Mike Miller, Jr, C. Anthony Muse, Martin O'Malley, Richard Stewart (attachments omitted).
160	03/02/2017	RESPONSE in Opposition re 153 MOTION for Sanctions filed by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
161	03/03/2017	Joint MOTION for Extension of Time to Complete Discovery *and Extend Deadlines for Expert Witness Disclosures*by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).

NO.	DATE	DESCRIPTION
162	03/03/2017	PAPERLESS ORDER granting 161 Motion for Extension of Time to Complete Discovery. The modified deadlines shall be as stated in the motion. Signed by Judge James K. Bredar.
163	03/06/2017	Three-Judge Court Hearing held on 3/6/2017 before Judge James K. Bredar, Judge Paul V. Niemeyer and Judge George L. Russell, III.
164	03/07/2017	NOTICE by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine re 153 MOTION for Sanctions *Withdrawal of Motion for Sanctions.*
165	03/07/2017	PAPERLESS ORDER WITHDRAWING AND DENYING AS MOOT 153 Motion for Sanctions. Signed by Judge James K. Bredar.
166	03/13/2017	MEMORANDUM AND ORDER directing three-judge court of Judge Niemeyer, Judge Bredar, and Judge Russell affirms the orders of Judge Bredar dated January 31, 2017, and February 3, 2017. Signed by Judge Paul V. Niemeyer.

NO.	DATE	DESCRIPTION
167	03/13/2017	REPLY to Response to Motion re 146 MOTION for Protective Order filed by Martin O'Malley.
168	03/16/2017	MEMORANDUM AND ORDER denying 146 Motion for Protective Order and to Quash Non-Party Deposition Subpoena Served on Former Governor Martin OMalley; the request for a stay is MOOT. Signed by Judge James K. Bredar.
169	03/16/2017	ORDER directing the stay of 143 Memorandum and Order is hereby LIFTED. Signed by Judge James K. Bredar.
170	03/27/2017	Joint MOTION for Extension of Time to Complete Discovery *and Extend Deadlines for Expert Witness Disclosures*by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
171	03/28/2017	PAPERLESS ORDER granting 170 Motion for Extension of Time to Complete Discovery. The modified deadlines are as stated in the motion. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
172	03/30/2017	STIPULATION *for Protective Order* by Michael E. Busch, Linda H. Lamone, Richard S. Madaleno, Jr, David J. McManus, Jr., Thomas V. Mike Miller, Jr.
173	03/31/2017	STIPULATED ORDER REGARDING CONFIDENTIALITY OF DISCOVERY MATERIAL. Signed by Judge James K. Bredar.
174	05/02/2017	Joint MOTION for Extension of Time *for Expert Disclosures* by Linda H. Lamone, David J. McManus, Jr.
175	05/03/2017	PAPERLESS ORDER granting 174 Motion for Extension of Time. The Motion is GRANTED. The schedule is MODIFIED as jointly requested. Signed by Judge James K. Bredar.
176	05/31/2017	Joint MOTION for Extension of Time to Complete Discovery by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
177	05/31/2017	MOTION for Preliminary Injunction, MOTION TO ADVANCE AND CON-

NO.	DATE	DESCRIPTION
		SOLIDATE THE TRIAL ON THE MERITS by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
		* * *
179	06/01/2017	PAPERLESS ORDER granting 176 Motion for Extension of Time to Complete Discovery. Signed by Judge James K. Bredar.
180	06/02/2017	STATUS REPORT *(Joint)* by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
181	06/05/2017	MOTION for Extension of Time by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
182	06/08/2017	ORDER granting 181 Motion of defendants for Extension of Time to file their response in opposition to plaintiffs' motion for preliminary injunction and in the alternative for summary judgment and to file defendants' cross-motion for summary judgment. Signed by Judge James K. Bredar.

NO.	DATE	DESCRIPTION
183	06/08/2017	MOTION for Leave to File a brief as amicus curiae by Stephen M. Shapiro (attachments omitted).
		* * *
185	06/28/2017	ORDER Setting date for hearing on ECF 177 Plaintiffs Motion for Preliminary Injunction and Motion to Advance and Consolidate the Trial on the Merits; Directing the parties to submit simultaneous briefs addressing the appropriateness of a stay to be filed on or before Tuesday, July 11, 2017; Denying 183 Motion for Leave to File an Amicus Brief; Granting 184 Joint Motion to Enlarge Page Limits. Signed by Judge James K. Bredar.
186	06/30/2017	Cross MOTION for Summary Judgment *and Reponse in Opposition to Plaintiffs' Motion for Preliminary Injunction and, in the Alternative, for Summary Judgment* by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
187	06/30/2017	STATUS REPORT by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.

NO.	DATE	DESCRIPTION
		* * *
190	07/06/2017	ORDER Setting agenda items for July 14 2017 hearing; denying 189 Motion for Leave to File a Brief as Amicus Curiae. Signed by Judge James K. Bredar.
191	07/10/2017	REPLY to Response to Motion re 186 Cross MOTION for Summary Judgment *and Reponse in Opposition to Plaintiffs' Motion for Preliminary Injunction and, in the Alternative, for Summary Judgment*, 177 MOTION for Preliminary Injunction, MOTION TO ADVANCE AND CONSOLIDATE THE TRIAL ON THE MERITS , RESPONSE in Opposition filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine (attachments omitted).
		* * *
195	07/11/2017	Correspondence Correcting Earlier Submission: 191 Reply to Response to Motion,,,, Response in Opposition to Motion (attachments omitted).

NO.	DATE	DESCRIPTION
196	07/12/2017	STIPULATION *of the Parties* by Linda H. Lamone, David J. McManus, Jr.
197	07/14/2017	Three-Judge Court Hearing held on 7/14/2017 before Judge Paul V. Niemeyer, Judge James K. Bredar and Judge George L. Russell, III.
198	07/20/2017	Consent MOTION for Extension of Time *for Reply* by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).
199	07/20/2017	ORDER granting 198 Consent Motion of defendants to extend time to file their reply in support of their cross-motion for summary judgment. Signed by Judge James K. Bredar.
		* * *
201	08/01/2017	REPLY to Response to Motion re 186 Cross MOTION for Summary Judgment *and Reponse in Opposition to Plaintiffs' Motion for Preliminary Injunction and, in the Alternative, for Summary Judgment* filed by Linda H. Lamone, David J. McManus, Jr. (attachments omitted).

NO.	DATE	DESCRIPTION
202	08/24/2017	MEMORANDUM Before NIEMEYER, Circuit Judge, and BREDAR and RUSSELL, District Judges.
203	08/24/2017	ORDER denying 177 Motion of plaintiffs for Preliminary Injunction. Signed by Judge James K. Bredar.
204	08/24/2017	ORDER ENTERING STAY; 177 Motion for Summary Judgment by plaintiffs is held in abeyance; 186 Cross-Motion by the State is held in abeyance; all further dates and deadlines are stayed. Signed by Judge James K. Bredar.
205	08/25/2017	NOTICE OF APPEAL as to 202 Memorandum Opinion, 203 Order on Motion for Preliminary Injunction, Order on Motion for Miscellaneous Relief by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine.
206	12/18/2017	SUPREME COURT ORDER directing further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

* Additional relevant docket entries for proceedings from June 22, 2018 to December 11, 2018 appear in Volume V beginning at page 1164.

Deposition of Governor Martin O'Malley

[6] MARTIN O'MALLEY, having been first duly sworn, was thereafter examined and testified as follows:

EXAMINATION BY MR. RYAN:

Q. Could you state your name for the record, please?

A. Sure. My name is Martin O'Malley, O-apostrophe-M-A-L-L-E-Y. I'm the 61st Governor of Maryland.

Q. And, Governor O'Malley, what years were you the governor of the state? [7]

A. I was governor from 2007 through 2000—through January, I believe, 21st, 2015.

Q. And just a few background questions. Where do you live today?

A. I live here in the land of the free and the home of the brave.

Q. What part of Maryland do you live in?

A. Baltimore City.

Q. Okay. And are you employed?

A. I am. I'm doing a number of things. I just got done teaching up at Boston College at the law school this semester, a course on leadership and performance management, and I'm also leading a "Smart Cities" initiative for serving on the advisory board, and then I do a little consulting here and there.

Q. I'd like to—

A. I'm advising, hopefully, promising technology companies—hopefully.

Q. I'd like to turn your attention to the congressional redistricting in Maryland that took place following the 2010 census, so the 2011 congressional redistricting. [8]

A. Right.

Q. Okay? And could you describe generally for us what your role was in the redistricting process in Maryland?

A. Sure. 2000—2010 was the census, and after every census the process unfolds for redistricting and apportionment and making sure that the district borders respect the principle of One Person, One Vote. It was a process I had been through a couple of times before as a chief executive, as mayor of Baltimore. In fact we had to go from having six districts with 18 members to 14 with a single member. And this was the first time I had gone through it, but I was chief executive and the Governor of Maryland, so I was the primary driver, as in our country most governors are, in the redistricting process such as exists today in the United States.

Q. And what goals, if any, did you have with respect to the redistricting process?

A. Yeah, our goals were—our goals were several. I mean, number one was that we had to abide by the legal requirement and the responsibility of [9] accommodating the growth that had happened in Maryland and making sure that the borders honored that principle of One Person, One Vote, and that we did not—and that we did not, you know, violate any of the other constitutional prohibitions established through case law and the like in terms of representation, fairness, packing of underrepresented minority citizens and the like.

We also had the motive and in fact campaigned on it that, because redistricting in our country is a process that is driven by our elected officials—and currently in our country most of them are either Democrats or Republicans—it was—it was some-

thing that everyone was aware of in redistricting that, if there were a Republican governor, he or she would be drawing those borders in a way that was more advantageous to the Republican Party, and, if we had a Democratic governor, that I would be drawing those districts in a way that was more advantageous to our party, and that's what I did, constitutionally and legally.

Q. So you set out to draw the borders in a way [10] that was favorable to the Democratic Party.

A. Yes, among other considerations, first and foremost being our statutory obligations, and—and constitutional prohibitions against, you know, or constitutional mandates about One Person, One Vote, and the other case law I mentioned.

Q. And One Person, One Vote refers principally, am I correct, to the number of citizens in each congressional district?

A. Correct, yeah, that we—right—or, I mean, it was kind of a three-layered process, right.

So we had the House—the legislative districts, the state legislative and the Senate, and the members of Congress, and in all of those you have to be mindful not to deviate from—I forget what the actual math is, but there's some standard mathematical deviation that you're not supposed to stray from based on the latest census and the best count we have on the numbers of people living in various places, neighborhoods, jurisdictions.

Q. And did you put a process in place to advise you on redistricting matters? And we're [11] talking here about just the congressional redistricting, not the state legislative districts.

A. Okay. You don't want to talk about the state?

Q. Well, maybe if we have time we'll do that.

A. All right. The process was set out, I believe, in state law, and I believe that was state law that preceded my term of office, and that's the process we followed, so yes.

Q. Did you appoint a commission, an advisory commission?

A. I did. I appointed some of them. In other words, some of them were there by operation of state statute. I do believe that on that commission the statute lays out who shall be on that commission and which ones are at my discretion.

The Senate president, I believe, is on there by statutory mandate. That's a shall—it's not a may—and the speaker as well. And then I had the ability and I believe the discretion to appoint others. I believe it was also required that one of my appointees be a registered Republican, and that was a [12] former delegate, a man that served on our Small Business Commission for the state, James King from Annapolis, restaurant owner.

I appointed—I believe Jeanne Hitchcock was on that as well. She was our appointment secretary and had some experience in redistricting having had to have gone through—I think we did two redistrictings in the city, come to think of it. I think we did one after the census, and then I think we were forced to do another one when a petition was sent to the voters to downsize the size of the city council.

So but Jeanne's experience and because Jeanne was always somebody that did intergovernmental affairs for me as mayor and continued some of those duties as a deputy chief of staff, Jeanne was on it.

Joe Bryce, our legislative director, he was the man—my chief of all of our legislative agenda, so marriage equality, gun-safety legislation, restoring voting rights, abolishing the death penalty. It was Joe who had to work day in and day out with the Speaker's office, the Senate's President's office, and everyone else. [13]

I believe we also had—I don't know if John McDonough was on the committee, but he certainly—but he certainly was involved in the process. And Richard Stewart, a businessman from Prince George's County, was also on the commission.

And, Mr. Ryan, I could be leaving somebody out, so you'd have to—this was, like, six, going on seven years ago. So which of those people was actually on the commission and which weren't on but went to the meetings because that's what I asked them to do, I'm a little vague on.

Q. That's okay. We've got the names of the commission members. I'm just—

A. Did I leave anybody out?

Q. I'm just trying to test—I don't think so. I'm trying to test your memory a little bit—

A. It used to be better.

Q. —to help us with some future questions. Well, that happens. So let me—what was the mission of the commission?

A. The mission—I'm sorry. Can you hand me [14] that?

(Cell phone)

A. Sorry. Time out. I used to have 27,000 people who would take care of this. Let me turn this off, gentlemen, so that doesn't happen again.

Q. That's all right.

A. Witness with you—I'm sorry. What was the last question?

Q. What was the mission of the commission?

A. The mission of the commission—

Q. Yes.

A. —was to fulfill the statutory mandate of reapportioning congressional districts, mindful of the mandate of One Person, One Vote, making sure that there was not a greater—that it was as balanced as it could possibly be based on the latest census results.

Their mission was also to solicit public input on the map, hold a number of public hearings all around the state, and allow people to voice their concerns, their desires, and to work with the Senate president, the Speaker, as well as our members of [15] Congress, and liaise between them and me, as we rushed towards whatever the statutory deadline was within which to submit a map.

So that was their mission. And having done this before, it, you know, it's not a process that makes anybody happy anywhere. People whose districts aren't changed are disappointed that their district wasn't somehow made better from their individual perspective, and those whose districts are changed decide that it was a great injustice done to them. So people are never happy with this, but they are a process.

And the mission of the commission was to be as collaborative as possible and knowing that in our state, because it is still a partisan exercise, one that has to muster consensus support in both the Senate and the House, they were also—they were also doing their very best to be as collaborative as they could be knowing that, ultimately, it had to,

not only pass the Maryland General Assembly, it would also likely be taken to court, and it could well be petitioned to public referendum. [16]

I don't know how unusual that is, but there was a case—not to go down this rabbit hole—but there was a case that happened in Maryland that allowed—that made it a lot easier because of the Internet for citizens to petition any item to a public referendum if it were not connected to the budget.

So it became a great organizational tool for our brothers and sisters in The Party of Lincoln, and they petitioned to referendum all in the same year marriage equality, what else was on—The Dream Act, which, you know, I had a lot of enthusiasts signing up for the falsehood that they were peddling that we were giving free tuition to illegal immigrants, and redistricting was on the ballot at the same time.

And then through our own, you know, through our own mosh pit of compromise, we sent—I believe gaming was on the ballot that year in 2012—so we anticipated, Mr. Ryan, that the map would go through a tremendous amount of scrutiny. And that's without even mentioning the editorial, and, you know, the natural journalistic criticisms and critiques that would—that would come. [17]

So that was their—that was their mission, to do it as collaboratively as possible with as broad of a consensus as possible, being very, very mindful that we must obey all laws and obey the constitutional mandate as well as the latest interpretations in case law when it applies to redistricting.

Q. Okay. So I'm going to ask the court reporter to mark—

(Exhibit 141 marked for identification.)

Q. So we're going to hand you some exhibits today, Governor O'Malley. This has been marked as Exhibit 141, and it appears to be a press release concerning key appointments to your—or to the—well, your Governor's Redistricting Advisory Committee. And do those look like the names on the first page of the people that you appointed to the commission?

A. Yes, they do.

Q. Okay. Now once the committee, the GRAC, G-R-A-C, began its work, did you—did you meet with them during the course of their work? [18]

A. I don't recall. I probably didn't, but I would have been aware of the progress of their work and the schedule of hearings, because some of the people on this commission, in particular, Joe Bryce and Jeanne Hitchcock, were very trusted members of my administration. Our offices were all on the same floor. We were at the—we were at frequent meetings week in and week out, especially during the legislative session, as—as it rolled forward. I don't recall—I could be—I could be wrong. I don't recall ever meeting with the commission as the Commission.

Q. Okay. Did you make an effort—so you worked with Ms. Hitchcock on a regular basis, correct?

A. Every day.

Q. Right. And did you keep up with her what was going on with the Commission?

A. Yes, in a sense, and—and Joe Bryce and probably the Speaker and the Senate President and Joe McDonough, though I see Joe McDonough isn't on here, but he—but he was involved as well, having worked, you know, being from Prince George's and

I think [19] having worked at one time for Steny Hoyer, if I'm not incorrect, or at least...

Anyway, so I kept in touch with them, Mr. Ryan, but it was more on a sort of, you know, I had a sense of when their meetings were coming up, sometimes perhaps Joe Bryce would say to me, hey, people in this city, a lot of people turned out, they don't want their city split between two state legislative districts, they want one. And then at other times, you know, some people in other cities would rather have had their city split in three different ways because they had more voting strength.

So they report on things like that vaguely, but I trusted, because they're very capable people, I trusted that, you know, if there were a problem they would let me know, and, if there were some feedback I needed to hear, they would, you know, they could keep me abreast of it.

I don't recall any—I don't recall any sort of—I don't recall in the course of developing the House map or the Senate map any occasion where they said, hey, we all really need to meet with you right [20] away and talk with you about this, that or the other thing, or there has been a breakdown or something, or something we need to reconsider. They were working...the Senate president was also somebody I spoke with every day.

Keep in mind that in a 90-day session, I mean, it's like—it's like you have plates spinning on a bunch of different sticks, you know, so there are many things that are chugging down that 90-day session, and this was one of them.

Q. So the committee, The Advisory Committee, was going to give you advice on where to draw the congressional districts, correct?

A. Yes, and then—I never sat down with my pen and drew a border, but the purpose of the commission was to solicit that, distill it. They were some of my most trusted people, and they kept me regularly updated as to how the meetings went that they were holding.

I don't recall how many meetings they had. I'm guessing that they probably had at least a half dozen around the state, perhaps more, and the goal was to [21] spread the meetings out over a sufficient cut and swath of a diverse little state to get the feedback.

The most—most of the feedback I received was not about the congressional map. It was more—it was more about—the kind of running feedback I received had more to do with members of the Maryland Municipal League wanting their city to be represented by this senator or that senator or this House member or that House district, you know. So that's—that's what I vaguely recall, is that, to the extent people turned out for these hearings and in the greatest numbers and with strong opinions, it was on how the state borders would affect municipal representation in Annapolis. There was not a whole lot of feedback that I can recall seven years later about the congressional map with the exception of the anticipation that, you know, because of the population flow in our state being on this side of the largest estuary in North America, that the borders would change the most out that 270 Corridor in a kind of west-northwesterly direction from the nation's capital.

Q. So with respect to the congressional [22] redistricting, did there come a time when you decided that there would be a goal of increasing the Maryland congressional delegation from six Democrats to seven?

MS. KATZ: Objection, lack of foundation.

A. Excuse me?

MS. KATZ: You can answer the question.

A. What did you say?

MS. KATZ: I just made an objection, but you can answer the question.

Q. No, there's no judge, so she makes the objection and the judge rules on it later.

A. I understand. I just wanted to hear her basis so I could better answer your question.

Q. She hasn't—I haven't established that you know—that you know enough to answer that question, but I think I'll—I think I'm comfortable with that one.

A. Yeah, look, the redistricting process in the United States of America and most states—some notable exceptions of late, and, hopefully, more states will follow suit and go to bipartisan, nonpartisan redistricting commissions—that's what [23] they do in Iowa. They have found other ways to do it in a couple other states.—but most of the states,

I understood, from having been a lifelong Democrat and having served on the Baltimore City Council for eight years, having served as mayor, having run twice for governor, that in our state I understood very well that the redistricting process was still a partisan process, one that allowed, provided, the parameters of legality, statutory, case law, constitutional, provided those parameters

were observed, that ours was a state where that partisan motive was allowable.

So in running for governor probably many times people in the audience would ask me, you know, in Democratic circles, about redistricting and how many Congress people we might lose if Governor Ehrlich were to win the reelection and if we were not to win.

So that was something that everyone—you asked me when did I—when did I arrive at that decision. It was not a decision I made. It was a decision that was made by those that set up the statutory process that put the pen for redistricting in the hand of whichever man or woman the people [24] elected to be governor during that period of time in which redistricting happens.

Q. But there did come a time when that decision was made specifically to flip the Sixth Congressional District from Republican to Democrat, correct?

MS. KATZ: Objection, leading.

A. The—the—in this sense: we knew that our population had shifted and grown; we knew that that growth was mostly out West; we knew, to accommodate that growth, the borders would change most on the western side of the Eastern Shore. There were some who said, oh, we should extend—we should do all we can, One Person, One Vote, and the other legal parameters being observed, we should actually create some way to jump the Chesapeake Bay and draw a line in such a way that puts more voters in the Eastern Shore—more Democratic voters on the Eastern Shore—but that—that—I mean, it's a pretty big body of water, and the—and so we didn't go in that direction.

So, yes, there came a—there came a decision, [25] which everybody kind of—I don't know that there was any meeting. It became apparent from the growth patterns on the map, particularly the growth that 270 and into Frederick where actually they have more biotech jobs than in all of Baltimore now, because the growth was mostly westerly out of the Washington suburbs, most everybody understood that that would be—that the entire map on the Western Shore would kind of shift a little bit to the north and to the west.

Q. Right, but in your capacity as governor of the state, you made a decision that what you'd like to see is the Sixth District converted from a majority of Republican voters to a majority of Democratic voters; is that a fair statement?

MS. KATZ: Objection, leading.

A. Well, I think it's fair to say that, as we did the redistricting, that we knew it would impact the Sixth, and our hope was—my intention was—that it would impact it in—all things being equal—in a more positive way for our nominee, whoever that might be. [26]

There was thoughts at the time that a state senator named Rob Garagiola, who lived out that way, depending on how the borders fell—were drawn, that he would run for Congress there, but, as you guys—as you gentlemen probably know, you don't have to live in a congressional district to run for Congress from there. So the man who actually ran was a self-financed millionaire, pretty conservative Democrat who votes frequently with Wall Street interests and didn't even live in the district, but he ran for Congress there.

But, yes, it was apparent that, as we move west and along with the population, just as Frederick has grown in the natural migration—the County of Frederick, which is due northwest of Montgomery County—just as Frederick has grown with the growth of the Washington suburbs, and in that growth become more Democratic as well as more Independent, that the—that the Sixth District, when the borders were drawn, however they were drawn, would likely pick up more Democratic votes and more Independent votes.

So, yes, that was—that was something [27] well-known, acknowledged. Was a decision made? I suppose in the sense that we decided not to try to cross the Chesapeake Bay, that a decision was made to go for the Sixth. But, Mr. Ryan, keep in mind that on the Western Shore of Maryland that's where seven of the eight congressional districts are, and there was only one that was—that was Republican. The other—the other six—did I say seven? That's where seven of the eight congressional districts are. Six of them were already Democratic, and so, yes, we—everybody pretty much knew that, as we redrew the lines, it would put more Democrats and Independents into the Sixth District. And, hopefully, in the course of the campaign, I hoped, as a Democrat, that that would mean the election of another Democrat.

Q. Do you recall that approximately 350,000 residents from Montgomery County were moved into the Sixth District?

A. I don't recall that, but I wouldn't deny that.

Q. Why was that done?

A. For redistricting and the borders, I mean [28] for the redistricting process.

Q. Fair enough. And what—when you say "for the redistricting process," what specific goals were advanced by moving 350,000 Montgomery County residents into the Sixth District?

A. The Congressional representation of Montgomery County improved, the number of Democrats and Independents living in—and progressive-minded people living in the Sixth Congressional District probably increased, and, as I said before, a couple of times, and as I, you know, it was also my hope that we would—that the people would elect a Democratic Congressperson rather than a Republican at the end of this process. I felt that was, not only my responsibility, but my duty, provided we obeyed the dictates of the law constitutionally, statutorily, and the latest case law when it comes to fair representation in congressional redistricting process—in the congressional redistricting process.

Q. Was it fair to the Republicans in the Sixth District the redistricting that occurred in your view?

A. Yeah, well, that's interesting. You know, [29] if the goal—if the goal, Mr. Ryan, is to increase—if the goal is to increase the voting strength proportionally of Republican voters, and to reduce the Democratic advantage by Congressional District, the map actually resulted in, I do believe, reducing the Democratic margin in probably six—maybe seven—at least six of the eight congressional districts, and, as I—and people in the Sixth District were free to vote for whatever Congressperson they felt best represented their interests.

I mentioned that the election of John Delaney, I mean, he was—he's probably one of the more conservative members of Congress in the delegation, especially when it comes to, you know, his opinion

with regard to Wall Street and—and some of—and a lot of those sort of issues, so—

So, look, let me state unequivocally, categorically, I believe that our whole country needs to develop a better process for congressional redistricting. That was a position I took as a presidential candidate. It was a position often repeated, even probably in the course of this [30] redistricting. But the process I had and the statute I had was one that allowed for that—that set this up as a partisan exercise by statute, and, as the elected governor, I did my duty within the metes and bounds of that statute. And I am glad that Maryland elected another Democratic Congressperson, even though I frequently disagree with him on many, many issues. That's—he doesn't represent my congressional district.

Q. If I might, Governor, I want to explore a little bit with you. When you say the statute set up a partisan process, what do you mean by that?

A. I mean that the people on the Commission are all appointed by the elected governor, and that in our state we have partisan primary process for selecting, not only our nominees for governor, but also their lieutenant governor, and that the result of that partisan election is to put the chief elected executive directly in charge of running the congressional redistricting process. So that's what I mean by in statute.

It is designed—I might also add that, by [31] statute, they put the Speaker on, who is also a person elected by the members of that body, each of whom runs in partisan elections after they get through their primaries, and the same with the Senate President.

So this is not a commission that's chaired by a judge. It is not—though often—they are always subject to judicial scrutiny—it's a—that's what I mean by partisan commission, partisan statutory framework, as it is probably in, I think, 46 of the 50 states right now—at last count. I could be off on that. I can't swear to that.

(Exhibit 142 marked for identification.)

A. Thank you, Linda.

Q. Governor, you've been handed Deposition Exhibit 142, and just take a quick look at that. Do you recognize this document?

A. I do not.

Q. Okay. And do you know—

A. But I might have seen it at the time.

Q. Okay.

A. I saw a lot of documents. [32]

Q. Fair enough. Do you know who Blaine Young is?

A. Sure do.

Q. And do you recall if Mr. Young had objections to the proposed redistricting?

A. This particular Mr. Young, unlike his parents, had objections to everything I did while I was governor.

Q. Okay. And this particular letter, which is dated October 6th, 2011, concerns putting the citizens of Frederick County into different congressional districts. Is that a fair statement?

A. Hold on here.

Q. Sure.

A. (Reading from the document.) (Clarification by reporter.)

A. I'll read silently.

Yep, that's what it says. He says he doesn't want Frederick County split. It was thought that he would run for Congress, but I think he has since developed other problems.

Q. Did you respond to Mr. Young's concerns? [33]

A. I hope so.

Q. Do you remember?

A. I tried to respond to everybody. We had a policy of writing back to everybody, even people that made a habit of leveling personal ad hominem attacks on a daily basis over the radio waves at me, but we tried to respond to everybody.

Q. Okay. And—

A. I'm sure my—I'm sure the Board saw this.

I'm sure Joe Bryce saw it, and he probably would have told me, you know, probably would have told me, but, again, it wouldn't—it wouldn't have surprised me from this particular Mr. Young. Now his father is a prince, a senator from Frederick and was the mayor of Frederick, but this particular Mr. Young was a radio personality, prided himself as being a right wing sort of firebrand in the vein of a Rush Limbaugh, kind of county version.

Q. Did Mr. Young's letter that's marked as 142, did that change anything in terms of the redistricting?

A. I would—I don't know. I would doubt it. [34]

Q. Were there complaints from people in Frederick County other than Mr. Young that you recall about splitting the county?

A. I don't recall. Probably. There probably—you know, there—probably. I don't recall, though. I don't recall. Whenever—there's always two schools of thought, and this was true in city council as well when it came to city council lines in neighbor-

hoods. There were always two schools of thought. One group of neighbors didn't want their neighborhood split between two councilmen or councilpeople, and another group of neighbors absolutely wanted it split between two councilpeople because they wanted to double their odds of actually getting stuff done if they had a problem by having their neighborhood represented by two people.

So one of the frequent debates in any redistricting, whether it's city council, whether it's the House seats, the Senate seats or congressional is: will my neighborhood or county or city or town be represented by one person or two people—or in some [35] cases three.

And there is—and people have differences of opinions on that. People, like Mr. Young, who was probably looking at running for Congress, was purported to be running for Congress before he developed other problems, he would advocate for his home county because he was an elected official from Frederick County. He would, of course, naturally want his entire base to be within a new congressional district wherein, as one of the most partisan Republicans in this state, he might seek one day to run.

Q. Well, did you take his concerns seriously or did you just dismiss them as the rantings of a political partisan?

A. No, of course, I took his—I took his—I took his feedback seriously. I took everybody's feedback seriously. When you're governor, you listen to all and you have agreed to serve all, and I did my very best throughout my time as governor to treat every person with dignity and respect. How they treated others was their choice, but for my part, I [36]

mean, we—we treated everybody with dignity and respect, and I hope that he got a letter in response.

I don't know if he did. But we—unless it bypassed our correspondence process, he would have received some reply from me, especially since he was also an elected official.

Q. And the purpose of putting Frederick County to two different congressional districts was to advance the goal of a Democrat being elected from the Sixth District, correct?

MS. KATZ: Objection.

A. One goal among many.

Q. Okay.

A. The primary goal was to reapportion the congressional district lines in a way that was fair, especially in respect—in respect to the principle of One Person, One Vote.

The greatest population growth, the migration of development, housing, jobs that happened in our state in the prior ten-year period was mostly out west from Montgomery County into Frederick and even into Hagerstown in some—in some sense. So that was [37] the—that was the pattern of population growth.

I grew up in Montgomery County, in Rockville, Maryland, and going home there now, when I go back to see my mom and bring the grandkids down there, it's hard to recognize some of those suburbs north of Rockville compared to the place it was when I grew up there, and even more dramatic is the pattern of development and population march that's gone right from Montgomery County right into Frederick. So that's where the population is.

Charles County also, in fairness, Charles County has also seen some of a southern migration, but because of the peninsular effect of that Southern Maryland piece and probably the highway quality that is 270, more of the sort of bedroom community migration of population has been right into Frederick and right into the Sixth Congressional District—

Q. Okay.

A. —out of Montgomery County.

(Exhibit 143 marked for identification.)

Q. So you've been handed Exhibit 143, which is [38] a map of the Fifth Congressional District.

A. Right.

Q. Okay. And you would have looked at this—

A. Yep, at some point.

Q. Right. And you agree that this was an appropriate—these were appropriate boundaries for the Sixth Congressional District, correct?

A. Yes. I will note, though, also for the record that this is the panhandle of Maryland. This little thin part up here that's only about a mile and a half wide was not of my making. That was the result of the Calvert boys going to a border dispute with the king with bad maps. We used to go up as high as Southern Philly and Harrisburg, so that little thin part out here, that's been there for three hundred years.

Q. All right. No, I got that. You haven't redrawn the borders of the state.

A. Right.

Q. We're just talking about the congressional districts here, right?

A. Right, but, I mean, the map you've shown me [39] is, I mean, in terms of the shape of the states, it's one of those parts of our state, not unlike many of the peninsulas created by our rivering geography, that's one of those parts of the state that people, I'm sure when they drive through, ask themselves how the heck did this state ever get to have this border out here, you know.

Q. Right.

A. So, I mean, in other words, it's impossible—it's impossible from Frederick to Garrett to make that a square unless I took over Pennsylvania. That's all I was pointing out.

Q. Or Virginia.

A. Or Virginia. Truthfully, the other thing that they screwed up on, the Calverts, they were using the northern branch of the Potomac rather than the southern branch. So our original border, not only went all the way up to Harrisburg in the grant from King Charles, but it also went down—instead of the northern fork here, it actually went much more south, and it did take up a big chunk of Virginia, and they—they went—they went to the border dispute [40] with the wrong maps.

Q. So just looking at Exhibit 143, and you go pretty far—the Sixth District goes pretty far into Montgomery County.

A. It sure does, sir.

Q. Not—even all the way, maybe even including part of Chevy Chase there, right?

A. It follows mostly the east side of the 270 Corridor, yes, sir, until it gets to Washington County, and then it follows the county border due north.

Q. So could you just explain to the person on the street why not—why not put Frederick County all in the Sixth District? Wouldn't that make more sense just geographically?

A. Not when you consider so many people that live in Frederick now live—rather work—in that 270 Corridor. MedImmune, who has their headquarters—if they haven't been gobbled up in the concentration of corporations—but MedImmune, who is one of our leading biotech companies, was headquartered in Montgomery County. Their next campus [41] was out in Frederick.

So that corridor, that 270 Corridor, does unite a lot of people along that—along that route, as does—as does the biotech industry, NIH, that whole research corridor. As I mentioned earlier, Frederick now has more—even with Johns Hopkins' presence here in Baltimore City, Frederick now has more biotech jobs than Baltimore does, so . . .

Q. So in drawing the—in redistricting in 2011, you looked at commuting patterns along 270; is that—is that right?

A. Among many other factors. Among many other factors, yes, growth patterns. Generally the, yes, we looked at the growth patterns, growth being jobs, where people sleep, commuting patterns, all of that sort of stuff, yes, sir.

Q. Is it possible for you to describe for us the relative importance of converting the Sixth District to a Democratic-majority district compared to the other factors that you looked at in redistricting?

MS. KATZ: Objection, mischaracterizes and is vague and ambiguous. You can answer. [42]

A. Like hot to warm? One to ten?

Q. Yes, relative, relative considerations. A lot of considerations you took into account, right?

A. Right. There was a, yeah, it was—it was certainly—it was certainly a consideration. As governor, I was also leader of the Democratic Party.

Q. Right.

A. That's also a responsibility. It's a trust placed in me by—by the people that voted for me and gave me my party's nomination to carry into the general, and then—and then given to me by all people, Democrats, Independents and Republicans alike. And I'm sure those Independents and Republicans that did vote for me understood that I was a Democrat.

And so, first and foremost, our obligation was to fulfill our mandate by law to do the redistricting process and to do it in a timely way immediately following the census.

Second was to make sure we obeyed all of the statutory, constitutional and case law as it has developed with regard to balancing those districts and making sure that—that it was done particularly [43] respectful of One Person, One Vote and mindful not to—not to—not to discriminate in any way against underrepresented minority groups.

And then a third factor was, when we redrew this, yes, we wanted to do it in a way, all things being equal and legal and constitutional, that will make it more likely rather than less likely that a Democrat, whoever he or she is that wins the party's nomination in any of the congressional districts, is able to prevail in the general election.

So those were all part of the consideration that went into the map, along with other things, like the desire of local county officials, the desire of the

mayors, the men and women that govern the 123 municipalities in our state. Some wanted to be split between districts; some didn't want to be split between districts.

And all of those things had to be fine-tuned and done with—mindful always of the actual— the best—the best population data that we could muster from the census. No census is completely accurate, but it's the best we've done as a people. [44]

So all of those things worked into this, and it was a collaborative process. I asked the House leadership to do their best to work on it, be mindful, backup from the deadline, make sure you get people's input, make sure we have the votes to pass it, make sure in the Senate. And the same process I had asked our congressional delegation to engage in as well.

They engaged in that less successfully, and I in the end had to allocate more of my own office and staff time to getting the maps finalized, bringing in the members of Congress, hearing their—each of their individual concerns, to the extent they were willing to share them with me, and then moving forward by the deadline with a map.

Q. When you say "collaborative process," to what extent did Republicans participate in that process?

A. Well, the—you might ask the question did Democrats or Republicans participate in that—and by that you mean the members of Congress?

Q. No, Republicans in the Maryland legislature, Republicans, former Republican [45] officeholders, Republican voters, just Republicans generally. Because you said it was a collaborative process, and then you mentioned the leadership of the—

A. Right.

Q. And those are Democrats, right?

A. James King is a Republican.

Q. Mr. King being?

A. James King. Let me go back to—

Q. Right.

A. James King served as a member of the House of Delegates from 2007 to 2011, reading from Exhibit 141.

Q. All right?

A. He represented District 33A, Anne Arundel County, small business owner who employs more than a hundred Maryland residents. Recently named Business Owner of the Year by the West County Chamber of Commerce and in 2008 named Taxpayers Advocate of the Year by the Maryland Taxpayers Association.

So James was on the Commission, and James—and at the town halls, depending on where the town [46] halls or the hearings were held, there were numerous people, Republicans, Independents as well as Democrats at all of those.

Q. So, I guess, in my own mind I'm drawing a distinction between participation and collaboration. Collaboration was your word, okay, so let me see if I can get at it a different way.

What compromises did you make in the redistricting process to satisfy concerns that were expressed to you, if any, by Republicans?

A. To the extent those happened, it was mostly—I would think that it was at the commission level and with Joe Bryce and James King and the others on the borders. I don't recall particulars of that, partly because those maps went smoothly, but I'm sure that there were probably numerous accom-

modations and manners in which the map was informed by and advice taken from Democrats as well as Republicans, but always mindful. And I was clear with this, that I am the elected governor; I'm also the leader of the Democratic Party.

Q. Right. [47]

A. And as I've said many, many times here before, part of my intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less.

Q. With respect to the Sixth Congressional District, were there any compromises with the Republicans on the boundaries of that district?

A. Yeah, look, the—I had asked Congressman Hoyer, as the dean of the House delegation—

Q. Yes.

A. Senator Mikulski and Senator Cardin were not about to get involved in redistricting. They're legislators. They run at wide—I mean at large—and they didn't want to go near this with a ten-foot pole. This was one of the things that never popular, nobody ever likes the map. Nobody ever likes the map—no, I shouldn't say that. Nobody ever likes the map.

So I had asked Congressman Hoyer, knowing he had many times been through the redistricting process, and since he was the dean of the House delegation, I [48] said, Congressman, would you please, mindful of our deadline, lead the effort here to inform the Commission about congressional redistricting, and do your best to come up with a map that a majority of the congressional delegation supports.

I'm sure we had conversations about, look, the natural migration is north and west out of the Washington suburbs. I told him that the Chesapeake Bay seems like a pretty natural geographic border, and I told—and so in those conversations both of us kind of understood that the redistricting and the change in the lines would mostly be affecting the Western Shore where the greatest numbers of people live and where the population growth was best.

Now, as we came up on the deadline for submitting it, I asked either Joe Bryce or John McDonough or somebody what sort of input are we getting from Congressman Hoyer and the congressional delegation. I'll check. They checked. Come back.

We're not hearing much back from them So I got on the phone and reminded Congressman Hoyer that we have a constitutional— state [49] constitution—is it constitution? I'm not allowed to ask questions.—we have a deadline coming up. I said, do you guys have any sort of draft map, any ideas, any input? Because I'm on a deadline here. He said, yeah, I've been meaning to come and talk with you about that.

So he came in the next day, and, in essence, reported that, despite his best efforts, that some members of our own delegation refused to even discuss what they, you know, even discuss what redistricting might look like. They didn't want their district changed at all.

And so I had to kind of jump-start and go into a hurry-up offense, and I invited each of the members of Congress to come to Annapolis. I would have gone to them. We were not in session and the deadline all of a sudden upon us. And so I met with

each of them individually and kind of looked over the map, explained which way the population was moving, asked them for their thoughts, their input, if they felt there were communities of interest that were important to them to keep together. Some of those—and all of [50] those conversations ultimately informed the map some kind of way.

Roscoe Bartlett, who I came to really like and respect and in many ways admire, was—came prepared with three different maps and laid them out, and we had—we had a long conversation, and I looked at his map.

And others, Congresswoman Edwards was not willing to discuss anything about the map and felt that whatever we do in any other district is fine by her, but she did not want a single precinct of her district moved anywhere.

And then Andy Harris, who served—we served for a time together in Annapolis before he was elected to Congress out of the State Senate—I believe it was—was he minority leader of the Senate or deputy minority leader? He was in leadership in the Republican Party in the State Senate. Anyway, he came in and he was just—he really didn't have much input. He—except to reiterate what all of us already knew, which was the real growth was happening on the Western Shore and not the Eastern Shore. It [51] was moving in a westerly and northwesterly direction, and he was very happy to be—to have the Chesapeake Bay's borders, in essence, followed and respected where his congressional district is concerned.

So he didn't have a lot of input. Congressman Ruppersburger, because he serves on intelligence, though he represents the other side of the Patap-

sco mostly, very much wanted to continue to have NSA and its—the neighborhoods around NSA in his congressional district, which was not easy to accommodate. So those were some of the conversations I recall at this juncture.

Q. So Congressman Bartlett had three maps that he presented?

A. I think. He may even had more. He came prepared. He had a staff person with him too, I think.

Q. And as a result of his maps were any changes made in the maps that you ended up recommending?

A. Possibly.

Q. Do you recall any specific changes that [52] were made in response to presentations by Congressman Bartlett?

A. I don't—all of the presentations and the druthers of—of our congressional delegation, Democrats and Republicans alike, those were solicited before—before borders were drawn. So I don't mean to—I'm not evading your question, but what I can honestly say is, quite possibly, perhaps even probably, as all of that input came down and Joe Bryce and whoever the staffers were from the planning department had to sit down and actually reduce it to paper and decide this precinct there, that precinct there, and work the models and massage it, probably since Roscoe was one of the few that actually came in with a map, it probably did inform it in some kind of way.

John Delaney was irate after the eventual map came out and was absolutely positively convinced that we went out of our way to carve his million-dollar home out of the Sixth District. And I said, John, look, man, A, I had no idea you were even in-

terested in running for Congress, and, B, we're just not [53] capable of that degree of follow-through and awareness here. I mean, this is a big process with a lot of input and collaboration. I'm sure if John had gone to one of the meetings and said, hey, I really want my neighborhood in there, I'm sure that would have been something along with a mix of a million other factors that also informed the map, so...

Q. So you end up sending maps in your bill to the Maryland Legislature, correct?

A. Yes, sir.

Q. And who drew those maps?

A. To the—to the best of my knowledge, information and belief, I believe it would have ultimately—since Joe Bryce was the head of my legislative office, this was—had to be reduced to a bill in print with all of that indecipherable left by this mete and right of that bound and north and northwest and all of those things, he ultimately—it was his responsibility to make sure that the map was accurate, that it was done right, and that—and that it observed all of the constitutional and legal requirements and did not have a deviation from the One [54] Person, One Vote thing.

So, ultimately, it would have been Joe. I'm guessing, Mr. Ryan, that he probably had staff people, cartographers, mapmakers, from our department of planning, I think, and because the department of planning is also responsible for so many other things regarding census and that sort of stuff.

So, ultimately, in this hurry-up offense, after we listened to members of Congress—I believe I had Joe with me on those meetings with the Congress people. If not Joe, I had Jeanne Hitchcock. So there

was probably some—it was either Joe or Jeanne Hitchcock, probably both, with me in that sort of hurry-up solicitation of input from all the members of Congress.

Q. You were presented with proposed maps, correct?

A. Congressman Hoyer might have come in a map to which he confessed nobody supported. So when you say was I given a map, I was given a map with the caveat that—that there's no consensus supporting the congressional delegation for this map. So, in a [55] sense, yes, Congressman Hoyer I do believe or his staff person showed us a map, but it was not a map for which he had any support or consensus from anybody in the congressional delegation.

Q. Not to—not to cut you off, but your advisory committee provided you with maps, did it not?

A. Probably.

Q. Okay.

A. At some point, yeah. I mean, yeah, sure. I mean, by the end, everybody had a map because we had to reduce it to a bill and go with it.

Q. And did you know—did your advisory committee, the Governor's Redistricting Advisory Committee, rely on outside consultants in any way to come up with the maps that it presented to you?

A. I don't—I'm not aware of that. My guess is they probably got input from a lot of different people. I don't know in the hindsight of six and a half years whether we as a state paid for any sort of, you know, GIS work or math work. I thought it was mostly handled by the planning—by the Planning Department. I could be wrong on that. I don't [56] recall. I don't remember who the—who the professional help was in terms of the, you know, maps or

numbers or those sorts of things, but it's my—my best recollection is that it was staff people at the Department of Planning, but I could be wrong.

I didn't—I don't go to that level of the—it was in the middle of the legislative session. We were spinning plates. We had a lot of things we were trying to get done, including marriage equality and repealing the death penalty, and there was a lot of things going on. This was one of them, and I tended to it with actually more time than I might have liked to where the congressional map was concerned, but I did not—I was not in the room with the Department of Planning people or those that were drawing the maps. They would have come back to me at some point before we submitted, and at some point I told them, look, you can't let members of Congress read about this in the paper. You got to share with our whole delegation, Democrats and Republicans alike, the borders of the map that we—whenever we arrive at it, you got to share it with them ahead of time [57] because I'm not having them read it in the paper.

Q. Did you ever hear or were you ever told that there was a consulting firm that assisted with the drawing of the congressional district maps and that that congressional firm—I mean that that consulting firm was a firm that specialized in helping Democrats?

MS. KATZ: Objection, compound.

A. I don't recall having heard that, but it would not surprise me that—it would not surprise me that—that that would happen, nor would it surprise me that there is a consulting firm that specialized in helping Republicans that would have been helping the House Republicans with their effort to either

beat the map or prevent it from getting the requisite number of amount of support. So I know—so I don't recall that, but it would surprise me if that didn't happen at some level.

Q. Okay.

(Exhibit 144 marked for identification.)

Q. You've been handed what's been marked as [58] Exhibit 144, and if you could take a look at it.

A. Is it the talk I gave right at the beginning of Boston College that got your attention?

Q. Yes.

A. Yeah. I've seen it. I gave it. I wrote it—every word of it.

Q. And could you just confirm for me this is a speech that you wrote?

A. Every page? You didn't slip in a false one, did you?

Q. I did not.

MR. MEDLOCK: I'll represent I didn't either.

A. Okay. Accepting that this is what you printed out, this, I do believe, is a version of that talk, which I had posted on a Medium site. Yes, I hadn't—I actually hadn't seen the pictures on it. With some good pictures—yes.

Q. So you gave this—

A. I sure did. I was—I was asked to come to the Rappaport Center for Public Policy and the Law, which is at Boston College Law School. I taught a [59] course at Boston College this semester. I fly up on Sundays, come back Wednesday mornings. And the course to about 25 young, aspiring American lawyers was about performance management and leadership in the information age. They gave me the title of this sort of first talk they wanted me to

give there, which was an open forum. That's the Dean Rougeau behind there. So that was open to the entire school. And they asked me to address the topic of restoring the integrity of our Democracy, that is to say, improvements that we can make to perfect this union, especially when it comes to protecting the constitutional right to vote, which is not in the constitution, things like perhaps abandoning the Electoral College since we have now elected two presidents that lost the vote in just 16 years, public financing of elections. And one of them I also addressed was about congressional redistricting. It was a topic I have addressed many times before. I do believe, and I've left it up for your convenience, if you were to peruse my presidential campaign website, you would see—you would see similar positions and—laid out, namely [60] this, in the context of this deposition today.

That while allowing for a partisan motive in congressional redistricting is legal and constitutional, it's not what's best for our democracy. And I believe that we would be better as a country if we had nonpartisan redistricting commissions. I believe that that would—I believe that that would be the better way for our country to go. In my own state that was not the reality that I was dealing with during my time as governor, but, hopefully, another governor will be able to sign a bill that does that.

Q. So if you could turn to page 14 of 26. We're looking at the page numbers in the upper right-hand corner.

A. Yes, sir.

Q. And then at the bottom of the page where it says No. 4, there's bold language that says, "We must,

on a state-by-state basis, push for an end to gerrymandered congressional districts," and that's just the first sentence of that.

Let me just ask you: By "gerrymandered," do [61] you mean what?

A. By gerrymandered I mean districts that are drawn with a partisan motive—that are drawn, in part, with a partisan motive.

Q. And partisan in this context means to favor one political party over another; is that fair?

A. Correct.

Q. Okay.

A. Correct. And that's—which leads to the anomalous situation that you have in states like Florida, Michigan, Pennsylvania where a majority of people cast votes for Democratic Congress people, but a majority of their delegations are Republicans.

Q. And you attribute that to gerrymandering.

A. Yes, and by gerrymandering, again, I mean to—allowing for a partisan motive in the redistricting process provided one obeys the other constitutional and legal requirements. Some of those, although some of those have been—so yes.

Q. Okay. Now if you could turn to page 16 of 26, please.

A. You're skipping the North Carolina maps? [62]

Q. No, we can—

A. That's all right.

Q. So page 16 of 26 you say, at the top, "As a governor, I held that redistricting pen in my own Democratic hand," right?

A. Mm-hmm, right. I am a Democrat.

Q. Right. And you said, "I was convinced that we should use our political power to pass a map that was more favorable for the election of Democratic candidates," correct?

A. Mm-hmm.

Q. And—

A. Yes.

Q. And with respect to drawing a map that was more favorable to the election of Democratic candidates for the—for Congress, that was accomplished by redrawing the borders of the Sixth District, correct?

A. It was accomplished by redrawing virtually all of the borders except the first to accommodate the patterns of growth and population shift, and while at the same time abiding by the constitutional and legal [63] frameworks creating, yes, creating a—part of—one of the considerations I had was to create a district that was more favorable rather than less favorable to Democratic nominees, and that was true both at the—not only at the Congressional level, but in the House and the Senate map as well.

Q. Right, but focusing on the Congressional level, and when you say more favorable to Democratic candidates than Republican candidates, how do you determine that favorability? What are the criteria that you look at? What I'm driving at, of course, party registration might be one.

A. Right.

Q. What in addition to party registration do you look at?

MS. KATZ: Objection, leading.

Q. Well, let me back up. Do you look at party registration?

A. Sure.

Q. And what else do you look at?

A. We look at—I mean, you look at so many factors when you put together the map. I mean, it's [64] not only party registration, it's also—I mean, there are many factors that go into—geography, the desires of municipalities. All of it has to also be done, mindful always, of One Person, One Vote. It's like a Rubik's Cube.

You know, Mr. Ryan, when you move one precinct here and one district, it changes—it ripples through all the others, let alone if you move an entire corridor or if you move, you know, half the city. If you accede to the desire of a mayor to only be represented within one district or two, I mean, that can—they're all connected, you know. They're all connected, so you can't really move one without the other.

So there are many factors that go into it, including party registration, but also there's other considerations as well. I mean, there's a lot of people in our state who register as Independents, and in this part of our state—we sit here in Baltimore, Maryland—in this part of our state, when people register as Independents, they have a greater propensity to actually vote Republican. In other [65] parts of the state people who register as Independents are federal employees fearful of being whacked or unfairly targeted by a Republican administration, and so they register as Independents for deniability, but they're inclined to be Democrats, and they have given their life's work to building up our country's government, not to wrecking it or tearing

it apart, or, as Mr. Bannon said, what was the phrase, "dismantling The Administrative State."

Q. Right. So in looking at—in looking at precincts, neighborhoods, sections of congressional districts, you look at voting histories in addition to voting registration—party affiliation, correct?

MS. KATZ: Objection, leading.

A. Yes. I say yes, and by "you" I understand you to mean one. I mean, I didn't get to a level of—I did not—yes, one would look at all of those things when one puts together a map. Whether that one is a staffer, a member of Congress, a governor, a member of the Commission, these are all factors that come into the redistricting map.

Q. Right. [66]

A. To be entirely truthful, I never sat down at that level of granularity that you would suggest. I relied on—I relied on really capable staff people to do that—

Q. Right.

A. —and they knew that my order was clear. You had better make sure that we obey every constitutional and legal requirement in putting this map forward because it will be challenged, as, indeed, almost all of them are everywhere in the United States.

Q. Okay.

A. We also kind of expected it to go to referendum too, I think, just because that had been made so much easier by the judicial—by the judicial decision that electronic signatures work as well as paper signatures for petitioning things to referendum. And it did go to referendum, and it passed, I think, with—was it 69% of the vote? I think it was 69%.

Q. And what do you conclude from that, that 69% of the people—of the voters approved it?

A. I don't know how frequently these things go [67] to referendum. That was the first time I can remember it go to referendum. And it was certainly—The Washington Post's editorial powers, I think, printed three lead editorials with, you know, pictures of the map and urged everyone to vote against it because this wasn't, in their opinion, good government.

So it was—it was not a referendum question that—how do I say this positively—it was certainly a topic of conversation among the public.

Q. And was—was the map that was drawn ultimately, the congressional map, was that good government in your view?

A. Yes.

Q. Okay. And was the Sixth—

A. It's not the best government, though.

Q. Was the Sixth—

A. The best government, as I've said many times before, as I said on the campaign, as I said in this talk at Boston College, the best way to do it would be to have nonpartisan redistricting commissions, but, yes, from the standpoint of—and keeping in mind—keeping in mind that the estuary [68] that runs through the center of our state, yes, we did our very best with the process that we had and the map from which we began.

It's easy for people to look at our—at our—at the unique shape of our state and then look at the congressional districts within it and conclude that these are not squares, but should also look at the

map that we began with, which was also not squares.

Q. So on page 16 of your speech, Exhibit 144, there's a paragraph that says in the middle of the page, quote:

"But that doesn't mean that the antiquated partisan redistricting process—now combined with big data, geographic information systems, and micro-targeting of precinct by precinct voting trends—is good for our country as a whole, or for our country's future," end quote.

A. Right.

Q. And so in the 2011 redistricting process, [69] was—did big data, Geographic Information Systems, and micro-targeting of precinct by precinct voting trends play a role in the recommendations or the bill that you sent to the Maryland Legislature?

A. I'm sure that and many other things did, yes.

Q. Okay. And who—who was it that compiled and examined the big data, the Geographic Information Systems, and the micro-targeting of precinct by precinct voting trend, who did all that?

A. I imagine it was done at a staff level and the refining of these maps and with the staff at the Department of Planning and my own legislative director, Joe Bryce, and the input of all of those that were on the Congressional Redistricting Commission, and taking into account other factors as well, sort of historically where had a neighborhood or a county, you know, what district had they been in, what are the natural borders. I've mentioned several times about our desire not to cross the Chesapeake Bay. All of those things informed it. And I'm also—yeah, so all of those things, all of those [70] things informed the process.

Q. And how granular were you able to get with respect to where the Republican voters are? When I say "Republican voters," I mean voters who vote for Republican candidates as opposed to registration.

A. Yeah, I mean, the map had to go down to a precinct-by-precinct level.

Q. Right.

A. So we at least went down to the precinct level. I mean, that's in the metes and bounds in the language of the map. So I don't think we ran through a precinct. I could be wrong in that. I didn't get to that level of detail myself in my involvement with this.

Q. When you split Frederick County in two—

A. Well, we definitely split many counties in different congressional districts, especially the big ones where all the people live.

Q. Right. Well, of course, Montgomery County has more people than one congressional district would permit, right?

A. Right. It's the largest—I think it's [71] the largest—I think it's the most populous county in the state.

Q. Frederick County does not, though. You could put Frederick County in—keep it in the same congressional district, correct?

A. Technically perhaps you could.

Q. Right.

A. Perhaps. Perhaps.

Q. And the decision to split it was principally driven by denying Republicans that Sixth Congressional District seat, correct?

MS. KATZ: Objection, leading.

A. No, I wouldn't say primarily, but I would say, as I've said many times before, that our primary motive was to abide by our duty in statute and within the metes and bounds of the constitution—or maybe I should say constitutions—to do redistricting, but among the motives we had was, yes, drawing a map that would be more favorable rather than less favorable to potential Democratic nominees at the House level, at the Senate level, and at the Congressional level.

Your question—the call of your question [72] about Frederick, if you look at the counties that have grown by the greatest in terms of population, I do believe Frederick would be way up there, certainly—in percentage, I mean, the population growth in Frederick has been pretty big, so the population move, since, again, remembering we had decided not to go east jumping the Chesapeake Bay and going over the Bay Bridge with a little sliver, as once happened in a congressional district map—Tom McMillen could tell you about it—you know, the movement of population—the movement of congressional borders would follow the movement of population and the growth in population, and that was west, and it was west up through Frederick, out of Montgomery County and into Frederick, like-minded corridors of people in many respects, especially when it, you know, you hug that east side of the 270 Corridor.

Q. Okay. So if you turn to page 15 of your speech, the one with the North Carolina map—maps—on it, okay, and you say—you say here—there's a paragraph, "a system that digs ideological trenches around incumbents—incumbents whose approval [73] ratings, as a group, have hovered below 20%

for nearly a decade," and then immediately below that you have two examples of how gerrymandering can swing elections, correct?

A. Yes. I think three—no, two.

Q. Right. The third is—

A. Hypothetical.

Q. —nonpartisan, a non-gerrymandered map, I take it, correct?

A. I guess so. I'm not sure. I didn't—I don't think I—

Q. But your point here is that the first two maps reflect how it's done today in the majority of states, correct, the gerrymandered process?

A. Well, you know, in a majority of states, yeah, in a majority of states it is a partisan exercise. I'm not sure how many; I think it's north of 40. My guess is probably 45 states. And some states are starting to move to nonpartisan redistricting commissions, and I think that would be a positive and healthy and good thing for our nation.

I didn't have the ability to get that done [74] while I was governor. There would not have been support in my chambers to do that. But maybe, as people come to understand and become rightly and more deeply concerned about the non—the unrepresentative nature of our House of Representatives, not to mention the unrepresentative nature of the Electoral College, I think that reforms are called for, and a better one on this, which I also advocated during my all-too-brief run for President was that we move to nonpartisan redistricting commissions, and I still believe that.

Q. So do I understand you, Governor, correctly, that, look, you would prefer nonpartisan over gerrymandered congressional districts, but during the

2011 process you had no choice, you had to do—you had to take the gerrymandered approach.

MS. KATZ: Objection, mischaracterizes testimony.

A. Yeah, you—and maybe—the process that we had in our state, I don't believe I would have had the ability—now I could be wrong. Sometimes issues move quickly than any of us can judge. [75]

Q. Right.

A. And part of the judgment of any leader is to pray for the wisdom to know when the seeds of change will actually take root and flourish. So we were way—we were ahead of the curve on marriage equality, we were the first state south of the Mason-Dixon to repeal the death penalty, one of the first states to pass the DREAM Act, you know, in-state tuition for kids of undocumented parents. So on a lot of those we were able to get that done.

It was my judgment on this one that I wasn't going to be able to change this one in my time, and so we had—our process was the process that had been in place for long preceding me that allows for whoever the executive is to drive this. And I did it as best I could with as much respect for all of the stakeholders as I could. And that's why I met with each member of the congressional delegation as well.

None of us—nobody ever likes the redistricting process, but we—the—certainly as a nation, especially when we lost all of those Democratic state legislatures and all of those [76] Democratic governorships, it has had—it has had a debilitating effect on our—on our Congress. And I did the very best, given where we were, with the map we had, to accommodate growth patterns, to—and also to respect the constitutional guidelines and the legal

parameters and to have a process where we solicited a lot of input from a lot of people.

I don't think there's anybody that says we didn't return their call if they had input. Lots of people had lots of input. And then we did our very best to put forward a map. And, yes, that map, I hope, because this was part of our intent, was more favorable to Democrats rather than—rather than less favorable to Democrats. I suppose the reason why the staff person put North Carolina there is because, you know, that's another case in point of a—of a huge swing.

MR. RYAN: Why don't we take a five-minute break.

* * *

BY MR. RYAN:

Q. Governor—

A. Yes, sir.

Q. —did Congressman Stoyer provide you with maps?

A. Hoyer?

Q. Yes.

A. Probably. He probably had some. As I recall, it was a rough map, and he—and he didn't have any—any consensus support really from the congressional delegation for it, so—I believe, though, that he did—I did see some map that he had roughly laid out.

Q. Did you ask Congressman Hoyer to provide you with maps?

A. I asked him to talk to the congressional and come back to us with some input on—on how we might—on how we might do the congressional district borders as part of this process. [78]

So, yes, I was hoping he would have been a little further along, and I was hoping that he would

have had more success in getting other members of the congressional delegation on board as to at least some—some—at least some parameters of what the redistricting map might look like.

Q. And did you speak—

A. But he didn't. It was very rough.

Q. Sorry.

A. I don't know that we even—yeah, it was very rough. It felt like we were starting from scratch, honestly.

Q. Did you talk with Congressman Hoyer about particular districts, congressional districts?

A. Yes, I certainly went through feedback, asked him for the feedback he had received from other members of Congress on this, and he—and he went through that, as I—yeah, he went through where—what the input was from the various members of the congressional districts.

Q. Did you talk to him about the Sixth Congressional District? [79]

A. I talked to him about each one, including the Sixth.

Q. And what, if anything, did Congressman Hoyer say about redrawing the boundaries of the Sixth District?

A. He agreed that jumping over the Chesapeake Bay didn't make a lot of sense considering that the population shift was out the 270 Corridor, out through Montgomery County and into Frederick. I don't remember any other details of it. I remember—Here's what I remember most: I remember being profoundly disappointed that there wasn't a better—that he—that there wasn't a consensus from our congressional delegation on the metes

and bounds of this, because we had all kind of known that the population shift in our state was out that 270 Corridor, and—and that that's where the congressional lines would change the most.

Q. But just so—just so the record's clear, there was no discussion of jumping the boundaries of the Sixth District over the Chesapeake.

A. You'd be surprised at how many crazy-ass [80] ideas people came up with in the course of this.

Q. That was not an idea that was seriously considered by anyone?

A. Oh, there were many crazy-ass ideas that were not seriously considered, but there were many crazy-ass ideas.

Q. Okay. Let me ask it a better way. Your reference to jumping across the Chesapeake, that doesn't have to do with the boundaries of the Sixth Congressional District, does it?

A. It could potentially.

Q. Okay.

A. It could, but we weren't going to do that.

Q. And was—

A. I wasn't going to do that.

Q. In your discussions with Congressman Hoyer about the boundaries and—about the congressional boundaries, would it be fair to say he was not looking out for the interests of Republican voters?

MS. KATZ: Objection.

A. We—I was—as the dean of the Maryland delegation and the—and he too is a lifelong [81] Democrat, so, yes, we all—those of us in leadership positions in our party, the Speaker, the Senate President, the Democratic Dean of the Delegation, my-

self, Lieutenant Governor, we all understood that, while our—while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also—part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many modus. And Congressman Hoyer also had the additional—I mean, he was a member of one of those districts too, although I guess he said the same thing to the Senate President and the Speaker.

Q. He was a member of what districts?

A. I mean he was an individual member of Congress.

Q. Oh, right.

A. So he had his, I'm sure, relationships and people he had been honored to serve for many years from towns and cities and places that are very well [82] known to him in his own district.

Q. When the district—when the new boundaries were approved and with respect to the Sixth District in—the Sixth Congressional District— did you have a view at that time of the likelihood that that district would shift to the Democratic column?

A. That was my hope.

Q. Right.

A. It depends—look, nobody has a crystal ball. That was certainly my hope, and it was part of my intent, in addition, and primarily to fulfilling my constitutional responsibilities, respecting the law, and doing all of this within the parameters of the law and the appropriate case law, as so developed, it was also my intent to create a map that would be more likely to elect or create—create a district

where the people would be more likely to elect a Democrat than a Republican, yes, this was clearly my intent.

Q. Did you have—and I guess I'm asking about degree of confidence, if you're able to describe it—that that would be the case after the lines were redrawn in the Sixth District? [83]

A. You know, the degree of confidence...honestly, Mr. Ryan, everything I thought I knew about politics I no longer know.

Q. Okay.

A. It's all piled high on my dining room table waiting for the yard sale. I might keep a couple pieces out of sentimental value, but it's hard to say. I mean, we elected a president that's not a Republican. So it's hard to say, and it's also dependent on how our Democratic primary rolled. I mean, a lot of—there were a lot of people in Annapolis—Senate President, Speaker and other people in the state legislative circles— who believed that the nominee would be Senator Garagiola, but people had a different idea, and they elected a very conservative Democratic Congressman who is outspoken in his defense of Wall Street interests and didn't even live in the district. So how confident was I? I don't know. Maybe Garagiola wouldn't have beaten Roscoe Bartlett—maybe.

Congressman Bartlett, who, as I said, you know, I actually—I came to greatly admire Roscoe [84] Bartlett. He was one of the few members who went to all of the line-of-duty funerals for our soldiers who came home in boxes from Iraq and Afghanistan, and I actually came to greatly admire him. In fact—so he had—he had various maps, and he said—in fact he said, this is a map, he said, I'm an

older guy, so you got to give me at least a couple percentage points head start on Garagiola. And so he—he had various maps and—he thought his opponent would be Garagiola too. He didn't think it would be Delaney. Nobody even knew Delaney was considering running for Congress.

Q. So did you ever—in connection with the redistricting—become familiar or hear about a metric called "Democratic performance"?

A. I am long familiar with that, because when I went to law school here back in the day I was very involved in campaigns. I was Barbara Mikulski's field director for her United States Senate race. First woman to ever be elected without succeeding her husband, I do believe, to the United States Senate.

And so I was very familiar then with a group called [85] NCEC, National Committee for an Effective Congress is what they were called then, and as a field director in a campaign, I certainly, you know, a statewide campaign, you know, was familiar with the concept of Democratic performance, which is where they take an amalgam of various candidates over the years and come up with some sort of mathematical number that they attach, which—which they believe has some sort of predictive value. In this day and age, like I said before, I'm not sure—I'm not sure—I'm not sure how much predictive value anything has.

Q. And so—

A. In other words, they look at past performance of various Democratic candidates, take an average, and I think that's what you're referring to when you say Democratic performance. And the Republicans, I mean, do the same thing, Republican per-

formance, whatever the index is. It's something that I think the members of Congress were much more cognizant of than perhaps I was.

Q. Right. And so you mentioned an outfit called NCEC? [86]

A. That's what they were called then.

Q. Who—who were they?

A. Back—back in 1986 it was some sort of, I assume, Democratic group called the National Committee for an Effective Congress. I don't know if they still exist or if they have gone through a different iteration or have a different name, but when I was—when I was a field director, when I was running campaigns, when I was in law school, that was the name of the group that was doing it.

Q. And did NCEC have any role in the 2011 congressional redistricting in Maryland as far as you know?

A. I don't know. I don't know if they still exist. If they still exist or if they exist under a different name, I'm sure they probably sent in numbers or sent in a map, or made data available to us. And I'm sure whoever their Republican counterpart is made the same sort of analysis and numbers available to our Republican brothers and sisters in the House and the Senate and in Congress.

Q. So you would expect that in a congressional [87] redistricting process, not just in Maryland but generally, there are firms that—consulting firms—that work with Democrats and consulting firms that work with Republicans—

A. Right.

Q. —to try to come up with the best possible boundaries for their respective parties.

A. Correct.

Q. All right. And if—are you aware whether the Maryland Democratic Congressional Delegation in 2011 relied on such a consulting firm, be it NCEC or some other firm?

A. I would be—I would certainly hope so and think so. For all I know it might be something done out of the DNC now, I don't know, but every member of Congress can tell you off the top of their head whatever their—Democrat or Republican—would tell you what their performance index is for their—for their congressional district.

So I would—I would imagine. I mean, I would be shocked if whoever—yeah, certainly they fired in numbers to us or shared those books. When I was [88] looking at them—this was before the Internet and stuff—it was like a giant three-ring binder of numbers and tabulations, and you had to kind of go make your own map. I'm sure—I'm sure they're better at it now.

Q. And during the 2011 process were you presented with information or data that, on its face, or you were told this was prepared by this consultant or that consultant?

A. No, I was not, that I recall.

Q. Right.

A. I was not, but we were—but my staff would have been cognizant of the number of Democratic registrants or Democratic performance, Republican performance, likely down to a precinct level. Where the information came from, I don't know.

From my involvement in the process, it was more—from my involvement in the process, I would be—I would ask a question like that, like,

what's the Democratic registration, Republican registration, but I don't—I don't ever recall seeing that big three-ring binder, and I wouldn't have at my— at [89] my—at my point of involvement, it would have been different iterations especially in the hurry-up offense of the congressional district map, and then—and then Joe Bryce would have to go back and double-check and triple-check with the bill drafters and everybody else to make sure that they got the right math right, that it didn't deviate from the One Person, One Vote mathematical, you know, whatever that deviation is, which I forget right now, but I would not have gotten involved to that level. I would—when we called our Congressional members back, we would, you know, we would certainly apprise them, and I do believe we called them back before we released the map—at least I hope so. That was my intent anyway.

Q. So just refresh my memory, if you would, please. Joe Bryce is who?

A. Joseph Bryce is the head of my—I believe we call him Director of Legislative Affairs in the Governor's office. So he would be the person, the lawyer, primarily responsible for shepherding, not only the Governor's priority bills through the House, [90] but also the budget and everything else. He was a man who would work on a daily basis with his counterparts in the Speaker's office and the Senate President's office, if we needed to deploy him to a committee chairman or to monitor hearings. Joe had to manage probably a staff of five or six. This is even in a non-congressional—I mean non-redistricting year. He would have to manage a staff of five or six spread over various subject matters that would be responsible for articulating the Governor's position on various bills that the legis-

lature would put up, the vast majority of which we don't originate, but we would—there are some things that would be a priority for the administration, like our budget or passing marriage equality, banning assault weapons, repealing the death penalty, those things would be Governor's priorities, as, indeed, this redistricting map would have been in this particular year.

Q. And Brian Remick, do you recognize that name?

A. No.

Q. R-E-M-I-C-K. [91]

A. No.

Q. Jason Gleason, is that a name that you recognize?

A. No. Did they work for me?

Q. I don't think so, or else you'd recognize them, I'm sure. Just names I've seen and I wanted to—

A. I don't—I don't remember their names. Now we would sometimes have interns come through just for the legislative—

Q. These aren't interns.

A. Okay. No, I don't remember—neither of those names rings any bell with me.

Q. Does Eric Hawkins ring any bells? And this would be in connection with the redistricting process.

A. No.

Q. Okay. Now just in terms of what you would expect your staff to do in the redistricting—in the process of coming up with the new districts or redistricting process, it would be—it would be okay for the staff to meet with the congressional delegation or the staff of the congressional [92] delegation, right—

A. They should meet with everybody they possibly could—

Q. —to collect information?

A. —and return—and also return all phone calls, yep. Yes, sir.

Q. Would that include consultants for the—for the Congressional, Democratic Congressional Delegation or the Republican Delegation?

MS. KATZ: Objection, lack of foundation.

A. Sure, I guess.

Q. Not whether they did. I'm not asking whether they did, but would that be okay?

A. Yeah, we were pretty open.

Q. No limits on their ability to gather information?

A. No. I mean, my understanding of the statute and the reason for having the public hearings was to solicit as much input as possible and not as little as possible.

Q. So I'm trying to distinguish between—sure, at public hearings—[93]

A. Mm-hmm.

Q. —but what about—by the way, I'm not saying this happened and I'm not saying there would be anything wrong if it did happen. I'm just trying to figure out what sort of the boundaries are for how information is gathered.

Suppose there's a Democratic consulting firm that's operating out of Capitol Hill that provides information to Democratic Congressional Delegations about Democratic performance or other metrics. Just assume that.

A. Right.

Q. Would it be okay for your staff to go meet with those folk?

A. Yes.

Q. Did they?

A. Don't know. I would be surprised if they didn't.

Q. You would be surprised if they did not?

A. Yeah, but I don't know. I would think most of that information is publicly available or posted on a DNC website, isn't it, by now? I mean, that's why [94] I'm not even sure if NCEC exists anymore. At the time it was considered like state-of-the-art stuff, but ...

Q. Have you ever—are you familiar with a computer program that is used in redistricting called Maptitude? Have you ever heard of that?

A. No, sir.

Q. Are you a computer guy?

A. You know, I'm not a digital native. Dag Hammarskjöld said, "time goes on, reputation increases, ability declines." I have a reputation for being a map guy, but I always relied on smart, young people around me to generate the maps of, you know, whether it was crime patterns or potholes or the Chesapeake Bay, we used GIS maps to great effect, but, no, I don't—I don't recall—I don't believe I've heard or ever played with a map called whatever—map—

Q. Maptitude.

A. Maptitude.

Q. Okay. Give me just a second.

THE WITNESS: The coffee is cold.

MS. KATZ: Yeah. [95]

THE WITNESS: It's probably bad for me.

VIDEO SPECIALIST: Keep in mind we're still rolling.

(Exhibit 145 marked for identification.)

Q. So just showing you what appears to be an email chain marked as Exhibit 145, and I asked you earlier about Brian Romick—and that's a name I think you said is not familiar to you, correct?

A. Right.

Q. Okay. And then sort of in the middle of the page there's an email that says, "Brian: OK. Have to come back to NCEC after meeting with the Governor, as I have much to do on the first day with everyone returning," and then "C," the letter C. Do you know who that is?

A. No.

Q. So nobody comes to mind that would sign their emails "C"?

A. No.

Q. Okay.

A. Nope. I don't know anybody named C. [96]

Q. And just looking at that email, does it refresh—I know you did a lot of meetings—does it refresh your recollection about any particular meeting?

A. No.

Q. Does it refresh your memory as to whether in any of the meetings you had on redistricting NCEC came up?

A. I don't have any—I don't have any particular recollection of that. I know—I know from my involvement in 1986 of NCEC. I actually didn't even recall that they still exist, but I guess by showing me this email they do still exist and they still call themselves NCEC.

It is entirely possible I might have met with them. I have no recollection of it. And sometimes—yeah, I have no recollection of ever meeting with them, but everything—everything I did was scheduled,

and they loaded me up and would give me an hour break in the middle of the day, and, other than that, I did a ton of meetings.

I don't recall meeting with them. I think if I [97] had—I don't know—I would probably remember to this day that NCEC still exists, so my guess is that—no, I don't have any recollection of that, and I don't—nor do I know who MG2590 is.

MR. RYAN: Why don't we take two minutes and see if we have anything else.

THE WITNESS: Okay.

MS. KATZ: Okay.

VIDEO SPECIALIST: The time is 12:30 p.m. We're going off the record.

(Proceedings recessed.)

VIDEO SPECIALIST: The time is 12:37 p.m., and we're back on the record.

MR. RYAN: Governor, we appreciate your time. We don't have any other questions.

THE WITNESS: Sure. Cool. Thank you, Mr. Ryan. Thank you all. Appreciate it.

MR. RYAN: Do you have any questions?

MS. KATZ: We do not. Thank you.

Q. How does—when you say analysts, what do you mean by that? What are you analyzing at NCEC Services? [17]

A. Well, we collect election data and census data, and analyze it.

Q. Can you give me an idea of some of the methods you use to analyze it? Without getting into anything proprietary. Just, generally, how you analyze it.

A. Well, we take—we collect data, historically, through different election cycles. And look for certain types of trends within the data.

Q. Can you give me an example of trends that you would look for in the data?

A. You look for voter turnout. You look to see how it's fallen off between presidential and midterm years. You look to see how different units of geography vote. Things like that.

Q. You say units of geography, could that be census blocks, precincts, congressional districts. What level are you talking about with the—

A. Well, the lowest level that's reported is the precinct level. So precincts, towns, counties, media markets. [18]

Q. Okay. And we'll get back to that in a bit. What—what's the highest level of education that you finished?

A. I attended University of Colorado, but didn't graduate, so it's high school.

Q. Okay. And how many years were you at University of Colorado?

A. Three years.

Q. And what were you majoring in, in your three years?

A. International affairs.

Q. Fair enough. I did that at Georgetown as well. And it's funny, neither of us are in international affairs currently.

A. No, we are not.

Q. Yeah. So after you left University of Colorado, what year did you leave?

A. 1985.

Q. Okay. And when you left University of Colorado in 1985, did you go into some form of employment?

A. I did. [19]

Q. Okay. Where were you employed after you left University of Colorado in 1985?

A. Immediately after that, I was employed at Clyde's of Georgetown.

Q. Nice.

A. It wasn't so nice. It was a lot of work.

Q. I worked at The Tombs. I know how you carry the plates and everything.

A. Yeah.

Q. Where—at—after you were done working at Clyde's, what was the next job you went to?

A. I worked for Senator Gary Hart in Colorado.

Q. Okay. And when did you move to work for Senator Gary Hart?

A. That would have been in 1985 right at sometime, during that time.

Q. What did you do for Senator Hart?

A. I was a staff assistant who worked the front desk, and did some constituent work.

Q. Were you in Senator Hart's D.C. office or [20] in his—one of his Colorado constituent offices?

A. His D.C. office.

Q. And how long were you in Senator Hart's—working in Senator Hart's D.C. office?

A. Through '90—or through '86, when he retired and began his second presidential run.

Q. What did you do after Senator Hart retired in 1986, where did you go to work?

A. I went to go work on his presidential campaign.

Q. Okay. And so that would be from 1986 until what, 1987, '88?

A. Right. Until he had that issue.

Q. Yes. Fair enough.

A. All right.

Q. And shortly thereafter, I suppose?

A. Right. Yes.

Q. And after Senator Hart's campaign ended, where did you go work?

A. I went—excuse me, I went to work for the Michael Dukakis campaign.

Q. And so you had that job up until the 1988 [21] election, is that right?

A. No. I was working both campaigns in Iowa, so I left the Dukakis campaign before the election.

Q. Before or after the tank?

A. Before.

Q. Good move. So after you left the Dukakis campaign, would that be 1988, to your recollection?

A. It could have been '80—it was before the Iowa caucus, so it was '87, probably.

Q. So it would be '87, yeah.

A. Yes.

Q. So after you left the Dukakis campaign, where did you go work next?

A. NCEC.

* * *

Q. You said you have a series of indices. Is one of those called the Democratic Performance Index or DPI?

A. It's—yes, Democratic performance.

Q. What does Democratic performance mean, just generally. I don't need to know anything that's proprietary about it.

A. Okay. Democratic performance is an average of how statewide candidates perform over time in competitive elections, weighted for different—weighted differently for different election years. So it's an average.

Q. So it will take into account past voting history in a state or a district, is that right?

A. That's correct.

Q. Okay. Can you sometimes have sort of species, I guess I would say, of Democratic performance, one being federal Democratic [25] performance and the other being state Democratic performance?

A. In some states, we do that, yes.

Q. What's the difference between federal Democratic performance and state Democratic performance?

A. So Democratic performance, as I said, is an average of statewide elections. The federal performance only uses federal races. State performance only us-

es state races—statewide, like constitutional offices, gubernatorial races.

Q. Why would you make that distinction? Is it sometimes the case that the federal Democratic performance is different than the state Democratic performance in a particular district?

A. Yes.

Q. What does that mean? Why would they be different?

A. Well, sometimes people vote differently at the state level for state offices than they do for federal candidates.

Q. So like ticket splitting, essentially? [26]

A. It's—it's—yeah, I mean, yeah, it's ticket splitting.

Q. Is it sometimes the case that the make-up of the electorate for a state election is different than the makeup of the electorate for a federal election?

A. Well, yeah, I mean, it depends on what the election is, but sometimes a federal election is a higher profile election, and it gets more attention. Sometimes a state election, or gubernatorial election is a higher profile election. And if a Senate race, for example, is not competitive, it doesn't get as much attention. So they can be different.

Q. Okay. And then in that hypothetical you were building out, where the Senate election is not competitive, in that case, the gubernatorial election could be driving turnout in that instance, is that right?

A. That's correct, yeah.

Q. Okay. All right. Let's mark—oh, I'm sorry. Go ahead. [27]

A. And then certainly, a federal election would include presidential elections, which are the highest profile.

Q. Certainly.

A. Yeah.

Q. Okay. Let's mark the first exhibit. I think this will be 52.

(Hawkins Exhibit No. 52 was marked for identification.)

BY MR. MEDLOCK:

Q. All right, sir, I put in front of you what we've marked as Exhibit 52 to your deposition. It's a printout of a website, HTTP:/NCECServices.com. As for all exhibits that I give you today, take your time, read through it. This may be the one that takes the longest to read through. But once you're done, just let me know audibly when you're done reading the exhibit.

A. Okay.

Q. All right. So is this a copy of NCEC Services' website, as far as you understand?

A. As far as I understand. I mean, NCEC [28] Services doesn't really have much of a website presence.

Q. It's just sort of this landing page, is that right?

A. Yes.

Q. And this says that—the website says NCEC Services "specializes in electoral analysis, campaign strategy, political targeting, and GIS services." Do you see that, sir?

A. Yes.

Q. What does political targeting mean in this sentence?

A. That's the electoral targeting that I was discussing earlier.

Q. Okay. So NCEC Services does do some electoral targeting work?

A. Well, yeah, for non-federal races.

Q. I see. What does GIS services mean?

A. Geographic information systems.

Q. Can you give me an explanation of what a geographic information system is?

A. Sure. It could be anything from a [29] program that does thematic mapping to display data geographically. It could be—I mean, that's generally what it is. It could do some sort of spatial analysis, based on—I mean, I don't use it for this, but that's what it could do. I mean, you could have a point and have a—expand a circle, a ring around a certain point, to collect what the data is, or underlying data within that radius of that point, so—it has several functions, but—

Q. Have you ever heard of a program called Maptitude?

A. Yes.

Q. Is that an example of GIS software?

A. Yes, it is.

Q. What sort of GIS software does NCEC Services use currently?

A. ArcGIS and Maptitude.

Q. In 2011, what type of GIS software was NCEC Services using?

A. Maptitude and ArcGIS.

Q. Do you recall what version of Maptitude you would have been using back then? [30]

A. I don't know what version they were on.

Q. Okay. So does NCEC—we talked a little bit about the client base for NCEC Services. Does NCEC Services provide consulting services to political parties?

A. Yes.

Q. Which political parties does NCEC Services provide service—its consulting services to?

A. The Democratic Party.

Q. Has it ever provided consulting services to the Republican Party?

A. Not to my knowledge.

* * *

Q. To your knowledge, has NCEC Services ever provided consulting services to the Maryland Democratic Party? [32]

A. I'm not sure.

Q. So you're just not sure one way or the other?

A. Right, yes.

Q. It could have happened, but you can't recall?

A. Yes.

Q. Okay. Has NCEC Services ever provided consulting services to Maryland—former Maryland Governor Martin O'Malley?

A. I don't know.

Q. And again, you just don't know one way or the other?

A. I don't know.

Q. It could have happened, but you don't know, is that right?

A. I don't know. I mean—

Q. Okay. How about the Office of the Governor of Maryland? Has NCEC Services ever provided

consulting services to the Office of the Governor of Maryland?

A. I don't know. [33]

Q. Has NCEC Services ever provided consulting services of any type to any member of the Maryland House of Delegates?

A. No, I don't think so. I don't know. I mean, I don't know.

Q. Okay. So is it a no, or is it an I don't know?

A. I don't know.

Q. Okay. How about the Maryland Senate? To your knowledge, has NCEC Services ever provided consulting services to any member of the Maryland Senate?

A. I don't know.

Q. Okay. Has NCEC Services ever provided consulting services to U.S. Congressman Dutch Ruppersberger?

A. No. Well, I don't know that. I mean, that would be unusual.

Q. What makes you say—what made you change your answer?

A. Because if we were providing him targeting, it would come through at National [34] Committee for an Effective Congress.

Q. I see. To your knowledge, is the National Committee for an Effective Congress ever provided U.S. Congressman Dutch Ruppersberger with consulting services?

A. We might have provided him targeting. I don't know.

Q. Okay. You don't know off the top of your head, as you sit here today?

A. No. Right.

Q. Okay. How about U.S. Congressman Steny Hoyer. Has NCEC Services ever provided any consulting services to Congressman Hoyer or his office?

A. Can you—I mean, what type of consulting services?

Q. Electoral analysis, campaign strategy, political targeting, or GIS services?

A. Again, the political targeting would have come through the National Committee for an Effective Congress. So I don't know if NCEC would have—I don't—I don't know. [35]

Q. Has the National Committee for an Effective Congress ever provided any consulting services to U.S. Congressman Steny Hoyer or any member of his office?

A. Yes.

Q. When did that occur?

A. I'm sure we would have provided him targeting, I don't know the exact dates.

Q. Did it occur on the 2011 redistricting cycle?

A. Well, that wouldn't have come through the PAC.

Q. I see. That would come through NCEC Services, is that correct?

A. Right. Right.

Q. And you don't know whether NCEC Services provided any consulting services to U.S. Congressman Hoyer's office or U.S. Congressman Hoyer during the 2011 redistricting cycle?

MS. FROST: Objection. Misstates his answer.

THE WITNESS: I'm a little confused by [36] what you're asking me, so I apologize.

BY MR. MEDLOCK:

Q. Okay.

A. NCEC Services did work for the delegation during the redistricting. But when—the way you're framing the question is confusing me, so I apologize.

Q. Okay. That's fine. When you said NCEC Services did work for the delegation.

A. Right.

Q. What do you mean by the delegation?

A. The Democratic members of the Maryland congressional delegation.

Q. Okay. And this occurred during the 2011 redistricting cycle, is that right?

A. That's correct.

Q. And what do you mean by, did work for?

A. We analyzed plans for the members of the delegation.

Q. What type of plans?

A. Congressional redistricting plans.

Q. When you say analyzed congressional [37] redistricting plans, what type of analysis were you doing for the Democratic members of the Maryland delegation?

A. Analyzing the plan, to tell them how different districts—different options would change their districts.

Q. Anything else that you did for—in terms of analysis?

A. We worked on some alternative plans with them.

Q. When you say worked on some alternative plans, did you actually draw actual maps using GIS software?

A. Yes.

Q. What software would you have used to draw those maps?

A. Maptitude.

Q. How many maps, to your knowledge, did you draw when working with the Democratic members of Maryland's U.S. House delegation?

A. I don't know.

Q. Was it more than one? [38]

A. Yes.

Q. More than five?

A. Yes.

Q. More than 10?

A. Yes.

Q. More than 20?

A. I don't know.

Q. Somewhere between 10 and 20?

A. That sounds right.

Q. What was the purpose of drawing these maps with the U.S.—the Democratic members of Maryland's U.S. House delegation?

A. Well, after the census, the populations change in the districts. You have to equalize the population, so the purpose is equalizing the population and reconfiguring the map of Maryland.

Q. Would these maps be provided to members of Maryland's State government after they were drawn?

MS. RICE: Objection.

THE WITNESS: I don't remember doing that, no. [39]

BY MR. MEDLOCK:

Q. Do you know if anyone that you—so you—let me back up for a second. So you have a meeting with

members of Maryland's U.S. House delegation in which you draw a map on Maptitude, okay?

A. Uh-huh.

Q. What happens with that map, once it's drawn? Do you print it out and provide it to the members? Is it sent to their staff? What happens after it's drawn?

MS. FROST: Objection.

THE WITNESS: It might have been—at times, might have been printed out. It, at times, might have been sent to them. At times, it might have not gone to—gone anywhere.

BY MR. MEDLOCK:

Q. Okay. Do you have any idea what—in instances where you did send a draft map on to members of the—Maryland's U.S.—Democratic members of Maryland's U.S. House delegation, do you know what happened to that map after—that draft [40] map after you sent it on?

A. No.

MS. FROST: Objection.

THE WITNESS: No.

BY MR. MEDLOCK:

Q. So it's possible that your draft maps could have ended up in the hands of Maryland's state government, but you just don't know?

MS. FROST: Objection.

THE WITNESS: I don't know where they would have—where it would have gone.

BY MR. MEDLOCK:

Q. Okay.

A. Or if they did.

Q. What was—did the members of Maryland's U.S.—the Democratic members of Maryland's U.S. House delegation have any particular purpose in mind when you were sitting down with them to draw draft maps in Maptitude?

MS. FROST: Objection.

THE WITNESS: Yes, I mean, they wanted to get re-elected. [41]

BY MR. MEDLOCK:

Q. Did they—so they wanted their districts to improve in Democratic performance, in other words?

A. If possible, but yes.

Q. Did they have any other goals in mind, that you know of?

MS. FROST: Objection.

THE WITNESS: The main goal that they had was incumbent protection.

BY MR. MEDLOCK:

Q. Was there another subsidiary goal?

MS. FROST: Objection.

THE WITNESS: Well, Maryland is a very Democratic state, and it was felt that it was—the number of districts that were held by Democrats was underrepresented by how Democratic the state was.

BY MR. MEDLOCK:

Q. I see. And when you say the number of Democratic districts was underrepresented by how Democratic the state was, was one of the goals that you understood behind this map making process that [42] you were involved in with the Democratic members of the U.S. House delegation, to increase the number of congressional seats held by Democrats in Maryland?

MS. RICE: Objection. I'm sorry, Steve. Objection, speculation.

THE WITNESS: The goal was, first and foremost, incumbent protection. We certainly looked at the possibility, because the state is so Democratic.

BY MR. MEDLOCK:

Q. Right. Did you look at the possibility of changing the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican?

A. Yes, we did. And again, because it's so Democratic, we—yes, we did that. We even looked at, it's so Democratic—the state is so Democratic, if you didn't have to worry about incumbent protection, you possibly could create eight districts there, it's so Democratic.

Q. So it was possible, with the information you had, to draw an 8-0 map, is that right? [43]

A. Well, not really in reality, because incumbent protection is the major focus of the—was the major focus of this.

Q. When you say incumbent protection, are you talking about protecting all incumbents, or just Maryland—members of Maryland's Democratic U.S. House delegation?

A. We were looking—we were working with the members of the Democratic House delegation.

Q. Okay. So when you were talking about incumbent protection, did you consider protecting U.S. Congressman Roscoe Bartlett, who was an incumbent?

A. No.

Q. Did you consider protecting U.S. Congressman Andy Harris, who was an incumbent?

A. Well, no. I guess not straight off, no.

Q. No. Okay. Did you ever—when you were working with the members of Maryland's U.S. House delegation, ever hear of something referred to as a 7-1 map?

A. Yes. [44]

Q. What does 7-1 map mean?

A. That would be seven Democrats, one Republican.

Q. And in the versions of the 7-1 map that you drew, was Maryland's 6th Congressional District in western Maryland, was that changed from a Republican district to a Democratic district?

A. Can you say that—state that again?

Q. Sure. Fair enough. That might be a B plus question. So let me just break it down. You had versions of the map that were called 7-1 maps, is that right?

A. Right. Yes.

Q. And that means seven Democrats, one Republican?

A. Right.

Q. And there were, at the time, two—in Maryland's U.S. House delegation, two Republicans and six Democrats, correct?

A. Yes.

Q. And one of those Republicans was Roscoe Bartlett, who was in Maryland's 6th Congressional [45] District in western Maryland, correct?

A. Yes.

Q. And the other was Andy Harris, and he was in the 1st District, and sort of takes most of the Eastern Shore of Maryland, correct?

A. Yes.

Q. So if you were going to create a 7-1 map, you either had to create a map that was less favorable to Ros-

coe Bartlett or less favorable to Andy Harris, is that right?

A. Yes.

Q. So one option would be to improve the Democratic performance in Maryland's 1st Congressional District, which is the Eastern Shore district held by Andy Harris, is that right?

A. Yes, although we didn't rely totally on Democratic performance.

Q. Sure. Well, that's a good point. One option available to you and the Democratic members of Maryland's U.S. House delegation was to change the boundaries of Maryland's 1st Congressional District in such a way that it was unfavorable to [46] Andy Harris, is that right?

A. Well, I don't—I mean, it would be less—it would be more Democratic.

Q. Fair enough. And if it's more Democratic, it's less favorable to a Republican candidate, is that right?

A. I mean, it depends on how much territory he maintained. I mean, there are plenty of Republicans in—around the country that represent Democratic districts.

Q. Sure. Understood. But it would become less favorable to him if you brought in more Democratic territory?

A. Andy Harris probably wouldn't—would probably prefer that that not happen.

Q. Right.

A. But it depends, again, if he held a lot of his same territory.

Q. Right. Okay. And in the 6th District, the 6th Congressional District in western Maryland held by Roscoe Bartlett, one of the options to create the 7-1

map was to change the boundaries of [47] the 6th Congressional District in such a way that it was more favorable to a Democratic candidate winning that 6th Congressional seat?

A. It would become more Democratic.

Q. Right. And you would do that by changing the boundaries of the district, is that right?

A. It would become more Democratic over time anyway, because Frederick was growing so much, but yes, you would change the boundaries.

Q. And one of the ways you could change the boundaries is to extend the boundaries of the 6th Congressional District into Montgomery County, is that right? And that would improve the Democratic performance of the district?

A. Depending on what else—yes, I mean, Montgomery County is a very Democratic county.

Q. Right. At some point, did you understand one of the goals of your consulting arrangement with the U.S.—the Democratic members of Maryland's U.S. House delegation to be—to make the 6th Congressional District more favorable for a Democratic candidate? [48]

MS. RICE: Objection, speculation.

THE WITNESS: Again, the goal was incumbent protection. And if the state was so Democratic that there was another Democratic district someplace. So I mean, yes. I mean, I guess. I don't know if it was ever stated in that way, but—

BY MR. MEDLOCK:

Q. You understood that to be one of the goals?

A. That was one of the things we looked at.

Q. Okay. Was it not only one of the things you looked at, but one of the goals, as you understood them, of this consulting arrangement?

MS. RICE: Objection. Objection.

BY MR. MEDLOCK:

Q. That's all right.

A. Okay. Again, we were looking—one of the goals was, because the state was so Democratic, to see if there was a possibility for another Democratic district.

Q. So a seventh seat, regardless of where it [49] was, just to create a 7-1 split?

A. Yes.

Q. Sorry. You made me go way through my outline much faster.

A. Oh, no.

Q. So this is fine. When you were involved in this consulting arrangement with the Democratic members of Maryland's U.S. House delegation, did you hold any meetings with those Democratic members?

A. Yes.

Q. How many?

A. I don't know exactly.

Q. More than five?

A. Possibly.

Q. Where did those meetings occur? Were they in person or were they on the phone?

A. Are you talking—can you ask the question again?

Q. Sure.

A. Okay.

Q. Sure. Did you have meetings, any type of meetings on the phone or in person with members of [50] Maryland's U.S. House delegation during the 2011 redistricting cycle?

A. Yes.

Q. How many of those meetings were in-person meetings?

A. As a group or individually? That's what I'm—

Q. I see. How many meetings were there with the entire U.S.—Maryland Democratic U.S. House delegation?

A. I don't remember exactly.

Q. Are we talking more than one?

A. Yes.

Q. More than five?

A. I don't know if it was more than five.

Q. Okay. Somewhere between one and five, then?

A. Right.

Q. Okay. How about one-on-one meetings? Did you have any one-on-one meetings with members -- Democratic members of Maryland's U.S. House delegation? [51]

A. Yes.

Q. Can you name the Democratic members of Maryland's U.S. House delegation that you had one-on-one meetings with?

A. Yes. Congressman Sarbanes, Congressman Hoyer. Congressman Van Hollen. Maybe Congresswoman Edwards. I don't remember.

Q. How about Congressman Elijah Cummings. Did you have one-on-one meetings with him?

A. I don't remember having a one-on-one meeting with Congressman Cummings.

Q. Okay.

A. I mean, not to say that I didn't. I just don't remember.

Q. You just don't remember.

A. Right.

Q. Okay. Did you have any—when you had these one-on-one meetings, where did those meetings occur?

A. At the members' office or at our office or—yeah.

Q. What was the breakdown? Did it happen [52] more often at NCEC's offices, or did it happen more often at the members' offices?

A. I don't know.

Q. Okay. And the group meetings. Where did those meetings occur?

A. Those meetings took place at the Capitol.

Q. Whose offices?

A. In a meeting room at the Capitol.

Q. Okay. When you met with the full Democratic U.S. House delegation from Maryland, who from NCEC Services was present at those meetings?

A. I was there, and Mark Gersh was there.

Q. What's Mark Gersh's role at NCEC Services?

A. Mark is currently—we're so informal.

Q. That's fair.

A. I'm sorry. But we are. It's hard for me to—

Q. Do your best to describe it.

A. I mean, I would call him a consultant now.

Q. Okay. [53]

A. But that doesn't even seem right. It's just we're really informal there.

Q. Okay. Fair enough. And are you, in your find, distinguishing between consultant and analyst?

A. Well, he's an analyst as well.

Q. Oh, okay.

A. He just doesn't spend as much time in the office, that's all.

Q. Okay. We can seal certain parts of this of this transcript if you want.

A. No, he wouldn't mind that. I just—I don't—we are very informal.

Q. Fair enough.

A. Okay.

Q. Okay. When you had these meetings with the full Democratic U.S. House delegation from Maryland in the meeting rooms at the Capitol, were any congressional staffers present for those meetings?

A. I don't think so.

Q. To your knowledge, were congressional staffers barred from attending the meetings? [54]

A. I don't know.

Q. Were any individuals, other than the Democratic members of Maryland's U.S. House delegation, and employees of NCEC Services, invited to the meetings?

A. I'm sorry. Can you ask that again?

Q. Sure. Was anyone invited to these meetings with the full Maryland Democratic U.S. House delegation at NCEC Services that occurred at the Capitol besides NCEC Services and the members themselves?

A. I don't know if anybody else was. I don't remember anybody else being there.

Q. Were any attorneys there?

A. I don't remember, but I would say no.

Q. Did anyone take notes during the meeting?

A. No, I don't think so.

Q. Was an agenda—I'm sorry, go ahead. I didn't mean to step on your answer.

A. I don't think so, no.

Q. Was an agenda ever circulated at any of these meetings? [55]

A. No.

Q. Were any minutes ever circulated after the meetings?

A. No.

Q. Was there ever any sort of informal emails sent after the meetings summarizing what was discussed at the meetings?

A. I don't remember that. I don't remember there ever being one, but I don't remember.

Q. Did—were any sort of papers circulated during these meetings with the full Democratic U.S. House delegation from Maryland?

A. I don't remember.

Q. Did you bring any briefing books to the meetings?

A. No, not a briefing—no.

Q. Did you bring any sort of written materials to the meetings?

A. I don't remember.

Q. Okay. Did you bring your computer to the meetings?

A. Yes. [56]

Q. Did you run Maptitude during the meetings?

A. Yes.

Q. Did you actually manipulate the boundaries of congressional districts during—on Maptitude during these meetings?

A. Rarely, I'd say.

Q. Okay. Why do you say rarely?

A. It was more just to show plans—plan options.

Q. I see. So you're sort of presenting the different plan options?

A. Right. Right.

Q. And how many plan options would you present during these meetings?

A. I don't know.

Q. Are we talking dozens or less than 10?

A. Oh, no. Less than 10. Less than five—I don't know. Not many.

* * *

Q. All right, sir. I've put in front of you what we've marked as Exhibit 56 to your deposition. It's a one-page document bearing the Bates label HOY000123. And it's more of a map than it really is a document, but when you're done reviewing it, please tell me audibly on the record that you're done. [91]

A. I'm done, yes.

Q. Okay. All right. So this is a document that has the NCEC Services logo at the bottom left corner, if you're looking at it sort of portrait view?

A. Right.

Q. And it's titled Maryland Democratic performance—sorry. Go ahead.

A. Landscape view?

Q. Oh, landscape, yes. Thank you.

A. Sorry. I mean, it doesn't matter, but we know what we are talking about.

Q. Yes. That's fine.

A. Right.

Q. At the top of the document, it's titled Maryland Democratic performance by County, State Dem Performance Equals 58.2 Percent. Do you see that?

A. Yes.

Q. When you said earlier that Maryland is such a Democratic state, were you referring to the statewide Democratic performance number that's shown in this document? [92]

A. No, not—actually, no. I mean, that represents it as well. I mean, I just know that—

Q. Just generally?

A. Yes. From individual race results, yeah.

Q. All right. So there is some—there is red and there is varying levels of red and blue on this map, correct?

A. Yes.

Q. And that corresponds to better Republican performance and better Democratic performance, correct?

A. That's correct.

Q. So the deeper blue it is, the better the Democratic performance, right?

A. Yes.

Q. And the deeper red it is, the better the Republican performance, correct?

A. Yes.

Q. All right. So it's a little hard to read, but in the far left corner of the panhandle, do you see Garrett

County, which is next to Allegheny. Should be the very far-most left? [93]

A. Yeah, I know where Garrett is, but that's hard for me to see.

Q. Okay. So safe to say that the entire panhandle of Maryland is red, right?

A. Varying shades of red. Yes.

Q. And then Frederick County is also red?

A. The county itself is red.

Q. And as is Carroll, to the right of Frederick?

A. Yes. Yes.

Q. So it's red. Okay. And if you look at Montgomery County, which is the blue county beneath Frederick, that is a deep blue, correct?

A. Yes.

Q. Okay. All right. So there is a box to the left of the state that's titled Democratic district performance. Do you see that?

A. Yes.

Q. All right. And there is sort of a table, and on the left side, there is numbers ranging from MD01 to MD08. Do you see that?

A. Yes. [94]

Q. And then there is various percentages to the right of that, correct?

A. Yes.

Q. Do you see a row that begins with MD06?

A. Yes.

Q. Does that refer to Maryland's 6th Congressional District?

A. Yes.

Q. All right. And the Democratic performance for the 6th Congressional District is 37.6 percent, correct?

A. That's correct.

Q. Just based on the numbers that you're seeing here for Democratic performance, is it your understanding that this is a representation of Democratic performance in Maryland's eight congressional districts prior to the 2011 redistricting process?

A. Do you mind if I look at this?

Q. Sure. You can refer to Exhibit 55, if you like. I'll tell you that the numbers don't quite add up. [95]

A. Yeah, that's—so can you ask the question again? I'm sorry.

Q. Sure. My question was, just based on the numbers you're seeing in this table, the Democratic district performance table, does that indicate to you that this—that this map shows the Democratic performance of Maryland's eight congressional districts prior to the 2011 redistricting process?

MS. FROST: Objection.

THE WITNESS: Well, it shows the state, it shows the—it appears so, yes. I think so, yes.

BY MR. MEDLOCK:

Q. Okay. All right. Put 56 aside. We'll mark Exhibit 57 to your deposition.

(Hawkins Exhibit No. 57 was marked for identification.)

BY MR. MEDLOCK:

Q. All right, sir. Exhibit 57 is a series of tables bearing the Bates numbers HOY000001 through HOY000018. Take a second to review it, there is a lot of information here. I'll direct you [96] to particular pages when I'm questioning you, but when

you're done looking at it, just let me know audibly that you've reviewed it.

A. That's a lot.

Q. I know it is. So—but let me start with the first page, which is HOY001. Have you seen documents in this format before, in your work at NCEC Services?

A. This is not familiar to me, the way this is laid out. And some of the column headings, I don't even understand. I see our data on here, but I didn't—I don't think I put this together.

Q. I see. When you say, I see our data on here, what are you referring to?

A. Well, federal DEM performance and state DEM performance.

Q. Okay. Do you know who created this document? Was it anyone at NCEC Services?

MS. RICE: Objection, form of the question.

THE WITNESS: It does not look like something that we would do. It's not laid out [97] like—so I would say, I don't know, but I don't think we did it there.

BY MR. MEDLOCK:

Q. Okay. And let me flip in to page 3, which is HOY003. The title of this page, this page of the spreadsheet is, drawn during delegation meeting. Do you see that?

A. Yes.

Q. Do you—and you recall drawing maps in Maptitude during meetings with Maryland's U.S. House, the Democratic members of Maryland's U.S. House delegation, correct?

A. On occasion, yeah.

Q. Okay. And if you look at the fed Democratic performance column here, FEDDPFM. Do you see that?

A. Yes.

Q. And if you look at the 6th Congressional District, FED Democratic performance, it's 51 percent, correct?

A. Yes.

Q. And the state Democratic performance for [98] the 6th Congressional District is 47.8 percent, correct?

A. Yes.

Q. Okay. So if you compare that to the Democratic performance listed on Exhibit 56, the Democratic performance listed on Exhibit 56, for the 6th Congressional District, was 37.6 percent, correct?

A. That's what is listed on this map. Here is the thing. I don't know what moment in time this came from, and the formulas change, so—

Q. Oh, you mean the formula that underlies federal Democratic performance?

A. Right, yes.

Q. Okay. But nevertheless, in one document, it's 37.6 percent in Exhibit 56?

A. Right.

Q. And in the next document, Exhibit 57, it's listed as 51 percent, correct?

A. Right. The other thing I would say, and I don't know what that Democratic performance is an average performance or a federal performance on this [99] one, because this one is a federal one, but it's higher, yes.

Q. Okay. Well, let's compare it from 55. Do you have 55 in front of you?

A. Yes.

Q. All right. In Exhibit 55, second page, the six districts total federal Democratic performance is listed as 37.4 percent, correct?

A. Yes.

Q. And that's on a document that NCEC Services created?

A. Yes.

Q. Okay. And if you look at HOY0003 on Exhibit 57, the federal Democratic performance for the 6th Congressional District is listed as 51 percent, correct?

A. Correct.

Q. Okay. So it increased from 37.4 percent to 51.0 percent, correct?

A. Between these two documents, yes. And I'm not trying to be difficult.

Q. No, I understand. [100]

A. I don't know—okay, what—this does have a date on it. Okay. So that was probably the same formula. I don't know where this data came from. It looks—I don't know who put this together. I'm not trying to be—

Q. No, I understand.

A. I'm sorry, I'm trying to be precise.

Q. That's fine.

A. And those two numbers are—yes. Are different. I mean, yes. All right? And I'm not trying to be—

Q. No, that's fine, I understand. Could a formula change have caused a 14 percent, or thereabouts, change in federal Democratic performance?

A. No, no, no.

Q. Okay. So it had to be some sort of boundary change that would have created the change from 37.4 percent to 51 percent, correct?

A. Yes.

Q. And I mean, that's not a mistake, those lines were drawn intentionally to increase the [101] Democratic performance, correct?

MS. FROST: Objection.

MS. RICE: Objection.

BY MR. MEDLOCK:

Q. Let me back up. You were the person—you said you did most of the work on this?

A. Right.

Q. All right. And you were the one who, during these meetings with the Democratic delegation to the U.S. House of Representatives, had Maptitude running on your computer, correct?

A. Yes.

Q. And you would occasionally manipulate the boundaries of the congressional districts during those meetings, correct?

A. On rare occasions.

Q. On some occasions, you would?

A. Yes.

Q. And when you did that, it would change the Democratic performance of the districts, correct?

A. Well, any boundary change is going to [102] change the numbers.

Q. Right. So when you changed the boundaries during these meetings, the numbers would change, correct?

A. Yes.

Q. And one of the reasons that the boundaries were changed in the draft maps that were created during these meetings was to increase Democratic performance in the 6th Congressional District?

MS. RICE: Objection.

THE WITNESS: Well, one of the goals, yeah—or one of the—I mean, because there were—that Maryland is so Democratic, we were trying to figure out another way to see if there was another Democratic district possible, because it was so Democratic.

BY MR. MEDLOCK:

Q. So one of the goals when manipulating the boundaries of the 6th Congressional District was to increase the Democratic performance of that district? [103]

A. Well, we would have looked at that, and we would have—yeah. I mean, because that was -first and foremost, again, it was the incumbent protection. And the members were most concerned about that, as you can imagine. And then secondarily, we were just looking to see if it was possible to do something else.

Q. When you say do something else—

A. Well, find another—because, again, state is so Democratic, and that—that number actually is—I mean, the state's Democratic, so we were looking to see if there was a way to create another Democratic district to reflect the Democratic voting behavior in the state.

Q. Did you do any analysis of voting behavior in the 6th Congressional District itself?

A. I don't remember doing that.

Q. Did you do any analysis to determine whether the 6th Congressional District has voted for Democrats or Republicans?

A. Well, not specifically.

Q. Okay. Do you do that generally? [104]

A. Well, the Democratic performance in this document right here would indicate that it—that—I mean, when you say an analysis, I don't -that's not a thorough analysis.

Q. Okay. When you say this document right here, you're pointing at Exhibit 55, right?

A. Right.

Q. Okay. And in that document, that's the one with the 37.4 percent—

A. Right. I wouldn't—

Q. —performance.

A. I wouldn't classify that as a thorough analysis.

Q. Okay. But it would be some analysis?

A. Well, it demonstrates the voting behavior in these congressional districts.

Q. Okay. And one of the goals was to change the voting behavior in the 6th Congressional District?

MS. FROST: Objection.

MS. RICE: Objection.

THE WITNESS: Well, the goal was to match [105] up the districts in the state with the actual voting behavior statewide, and reflect how Democratic the state is.

BY MR. MEDLOCK:

Q. So you wanted to match the voting behavior in the 6th Congressional District with the overall Democratic voting behavior in the state, is that right?

MS. RICE: Objection.

THE WITNESS: Well, we wanted to reflect in a map how Democratic the state was. And to accurately—through the districts, to accurately represent how Democratic the state is as a whole.

BY MR. MEDLOCK:

Q. Okay. And to do that, you were—one of the things you were attempting to do was to increase the Democratic performance in the 6th Congressional District?

A. Well, we would increase—yeah, in one of the—somewhere. I mean, to represent how Democratic the district is—or state is, pardon me. [106]

Q. Fair enough.

A. Yes.

Q. And to do that, you'd either have to increase Democratic performance in the 1st Congressional District, Andy Harris's district, or the 6th Congressional District, Roscoe Bartlett's district?

A. Those are the only two Republican districts.

Q. Okay. And in this map, if you look at it—or, sorry, this table on HOY0003, Exhibit 57, the 1st Congressional District has 37 percent Democratic performance, correct?

A. The—yes.

Q. And federal—

A. Thank you. I appreciate that.

Q. It helped me, too, to be honest. And that would imply that there is 63 percent Republican performance in that 1st Congressional District in this—

A. Federal performance.

Q. Federal performance, yes. [107]

A. Yes.

Q. And the federal Democratic performance in the 2nd Congressional District is 58.7 percent?

A. Yes.

Q. The federal Democratic performance in the 3rd District is 58.8 percent correct?

A. Yes.

Q. And in the 4th District, the federal Democratic performance is 75.7 percent?

A. Yes.

Q. In the 5th Congressional District, the federal Democratic performance is 60 percent correct?

A. Yes.

Q. And we already talked about the 6th, that's 51 percent federal Democratic performance?

A. That's correct.

Q. In the 7th, it's 73.7 percent Democratic—federal Democratic performance, correct?

A. Yes.

Q. And finally, in the 8th, it's 62.5 [108] percent federal Democratic performance, correct?

A. Yes.

Q. All right. So seven of those eight congressional districts had 51 percent or more federal Democratic performance, correct?

A. That's correct.

Q. And it's only the 1st Congressional District, Andy Harris's district, that has lower than 50 percent federal Democratic performance, right?

A. Yes.

Q. So in this map, the way that you were -in this table, the way that the—you were getting the seventh Democratic congressional seat was changing

the Democratic performance in the 6th Congressional District?

MS. FROST: Objection.

THE WITNESS: Well, I mean, the Democratic performance goes up in the 6th Congressional District under whatever map this is, yes.

BY MR. MEDLOCK: [109]

Q. Okay. And that's how the seventh seat would have been created to reflect Maryland's Democratic—overall Democratic nature?

MS. FROST: Objection.

THE WITNESS: Well, that's where the—I mean, there is seven seats over 51 percent, so you know, that's—that's a 50/50 district any way, so—

BY MR. MEDLOCK:

Q. But 51 is not 50, right?

A. Well, not exactly, but—

Q. Right.

A. It's not—not super strong either.

Q. Certainly different than 37.4, though?

A. Yes, it is. Yeah, it is.

Q. Okay. All right. Let's turn to the next page, HOY0004. Oh, actually, let's turn forward, I should say. HOY0002.

A. Okay.

Q. This is a map—or this isn't a map. This is a table entitled post meeting delegation option. Do you see that? [110]

A. Yes.

Q. Do you know what post meeting delegation option means?

A. I don't know what that means. I don't -again, this is not something I put together.

Q. Okay. I understand. But the data for FED Democratic performance and state Democratic performance would have come from NCEC Services, correct?

A. That's what we call it. I mean, I don't know where else they would have gotten it.

Q. Right. And that's sort of a proprietary performance metric that you have?

A. Right, yes.

Q. So it couldn't have come from anywhere else than NCEC Services?

A. I—

MS. RICE: Objection, speculation.

THE WITNESS: I don't know for sure. I wouldn't think so. Okay.

BY MR. MEDLOCK:

Q. So you would doubt that this was coming [111] from a third party, not NCEC Services?

A. Right, right.

MS. FROST: Objection, "this," to your use of "this." It's not clear.

BY MR. MEDLOCK:

Q. Okay. I'll back up. The columns, federal Democratic performance and state Democratic performance, you would doubt that the information displayed in those columns came from any third party source other than NCEC Services, correct?

A. Correct.

Q. Okay. All right. The—if you look at the federal Democratic performance column, I'm not going to read through them again with you again, but there

are seven congressional districts that have 51 percent or more federal Democratic performance, correct?

A. That's correct.

Q. And the only congressional district that has below 51 percent federal Democratic performance is the 1st Congressional District, Andy Harris's district, correct? [112]

A. That's correct.

Q. And if you look at the 6th Congressional District, it has 51 percent federal Democratic performance, correct?

A. That's correct.

Q. And 47.7 percent federal Democratic performance?

MS. FROST: Objection.

THE WITNESS: State.

BY MR. MEDLOCK:

Q. State. Sorry.

A. That's okay. Don't—

Q. But 47.7 percent state Democratic performance is listed for the 6th Congressional District in this chart, correct?

A. That's correct.

Q. Okay. Would the difference between 51 percent federal Democratic performance and 47.7 percent state Democratic performance imply to you that there could be situations in which a Democrat carried the 6th Congressional District in a federal election, but a gubernatorial candidate would have [113] carried the 6th Congressional District in a statewide election?

A. Not exactly.

Q. Why not exactly?

A. Well, it depends on what kind of election year it was. If it was a presidential or a midterm. So it depends on what the turnout is. I mean, this goes—just—it's what we would call- -I mean, can you ask the question again? Just so that I'm clear on it.

Q. Oh, sure.

A. I—

Q. So you have 47.7 percent state Democratic performance and 51 percent federal Democratic performance in the 6th District?

A. Right.

Q. Under this particular table. Would that imply that there could be a situation in which a -a U.S. House candidate wins—a Democratic U.S. House candidate wins the 6th Congressional District but a Republican gubernatorial candidate would carry the 6th Congressional District? [114]

A. I don't think it exclusively implies that.

Q. Sure.

A. I mean, you can look across—you know, Democratic performance wasn't the only—

Q. Sure. Absolutely.

A. —factor that we used. And then, I mean, you look at the 2004 presidential, and that's 47.4. So that's another federal race. So it doesn't necessarily imply specifically what you're saying.

Q. I see. I see. So if you look at the Governor '06 D percentage column?

A. Right.

Q. That's—for the 6th Congressional District, that's 47.1 percent, correct?

A. Right.

Q. And the Governor '10 D percentage column, that's 48 percent, correct?

A. That's correct.

Q. And you already mentioned the presidential '04 Democratic percentage. The [115] presidential '08 Democratic percentage is 54.5 percent, correct?

A. I'm sorry. Say that last one?

Q. The PRS08D percentage column. Do you see that?

A. Right.

Q. For the 6th Congressional District, that's listed as 54.5 percent, correct?

A. That's correct.

Q. So in this congressional district, in 2008, President Obama got 54.5 percent of the vote, correct?

A. That's correct.

Q. But in 2010, the gubernatorial candidate, I think that would have been Martin O'Malley only got 48 percent of the vote, correct?

A. That's correct.

Q. Okay. So there is—there could be a situation, like in 2010 and 2008, where a nationwide Democratic candidate could carry the 6th District, but two years later, a Republican gubernatorial candidate could win it. [116]

A. Yes. But I'd also point you to the second to the furthest right-hand column, the second to the furthest right-hand, the House '08 percentage.

Q. Yes.

A. So that's 48.4 percent. So this is why I'm having—

Q. I see.

A. I'm being—I'm not trying to be difficult, it's just—I've worked with these numbers all the time. And to me, that says that a House candidate, a Repub-

lican House candidate can still win that district, and would have under -using the 2008 House result.

Q. By using the 2010 House result?

A. Exactly. See, it depends on the year.

Q. I see.

A. This is the kind of—yeah. The district—

Q. I see. So 51 percent doesn't really indicate much to you?

A. No, the district is—it's—it [117] improved, but it's a marginal district. It's like it could go either way.

Q. Okay. Let's move to HOY0004. This is -this is a table entitled, delegation proposal, correct?

A. Yes.

Q. Okay. And do you understand that at some point, the Maryland U.S. House—Democrats in the Maryland U.S. House delegation actually made a proposal to the redistricting commission regarding the boundaries it should draw?

MS. RICE: Objection, misstates—

THE WITNESS: I don't know that for sure.

BY MR. MEDLOCK:

Q. You say you don't know it for sure. Do you have any evidence that that occurred?

A. I don't know how the process was done.

Q. Okay. Did anyone indicate to you that that happened?

A. I don't—

MS. RICE: Objection.

THE WITNESS: I don't remember exactly. [118] I just don't remember.

BY MR. MEDLOCK:

Q. Okay. All right. And in this delegation proposal table, the federal Democratic performance is 51 percent again for the 6th Congressional District, right?

A. Right.

Q. Okay. And then the next page, HOY0005, do you see that?

A. Yes.

Q. That is titled, Van Hollen proposal?

A. Right.

Q. Do you see that?

A. Yes.

Q. Do you know what that means?

A. Well, again, this isn't my—

Q. Uh-huh.

A. Whoever put this together, there is—my understanding, from reading the title, is it would be something that Congressman Van Hollen proposed, but I don't know to whom.

Q. To whom? [119]

A. Yes.

Q. All right. And in that Van Hollen proposal table, if you look at the federal Democratic performance for the 6th Congressional District, it's 51.3 percent, correct?

A. Right.

Q. So we've added three-tenths of a point to the Democratic performance in this proposal?

A. The federal performance, yes.

Q. Okay. Let's move to the next page, HOY0006. That's titled, Edwards proposal. Do you see that?

A. Yes.

Q. And again, you don't know—it's a proposal from Donna Edwards to whom?

A. I mean, it doesn't say Donna Edwards. You have to presume that it's Donna Edwards. And I don't know to whom.

Q. Okay. All right. Flip in to page HOY0009.

A. All right.

Q. This is a table entitled 6-2. Do you see [120] that? The top left corner.

A. Yes.

Q. Do you know what 6-2 refers to?

MS. FROST: Objection.

THE WITNESS: I mean, again, I didn't do this.

BY MR. MEDLOCK:

Q. Right. I understand.

A. I didn't do this. I—I mean, I have difficulty, because I didn't do it, but it's -there are eight congressional districts.

Q. Right.

A. Six of them, it appears to be Democratic on here, or lean Democrat. I don't know, you know—

Q. Okay.

A. —okay?

Q. So in this column, in this table, I should say, federal Democratic performance for the 6th Congressional District is 34.5 percent, correct?

A. Right.

Q. And for the 1st Congressional District, [121] the federal Democratic performance is 39.4 percent, correct?

A. Right, so there is—

Q. Those could be the two, and then it could be the six that are Democratic leaning?

A. Right. But again, this is not my document.

Q. Okay. I just want to get your understanding from looking at it.

A. No, and I appreciate that.

Q. Okay. So the next pages from HOY00010 through HOY00015, they are titled MDLEG_Plan A through MDLEG_Plan F. Do you see that?

A. Yes.

Q. Okay. Do you have any understanding as to what MDLEG_Plan A through MDLEG_Plan F means?
MS. RICE: Objection.

THE WITNESS: I don't know what A, B, C, D, E, F refers to.

BY MR. MEDLOCK:

Q. Okay. What about the rest of it?

A. Well, again, not being—my document, MD [122] clearly is the abbreviation for Maryland. And I -- you know, I would presume it's something from the legislature, but I don't know.

Q. Okay. So if you look at the—I'm on MDLEG_Plan A, which is HOY00010. Looking at the federal Democratic performance column?

A. Right.

Q. It's the 6th District, federal Democratic performance is 53.1 percent, correct?

A. That's correct.

Q. Okay. So that's up 3 percent from the -or up 2.1 percent, I should say, from the 51 percent we saw in earlier versions of this table, correct?

A. Up—yes.

Q. Okay. All right. MDLEG_Plan B, the next page, HOY00011. Federal Democratic performance for the 6th Congressional District is 52.1 percent on this table, correct?

A. That's correct.

Q. Okay. And if you flip through to Plan C, the federal Democratic performance for the 6th Congressional District is 53.1 percent again? [123]

A. Yes.

Q. Plan D, the federal Democratic performance for the 6th Congressional District is 52.1 percent?

A. Yes.

Q. Plan E, the federal Democratic performance for the 6th Congressional District is 53.1 percent, right?

A. Right.

Q. And then Plan F, the federal Democratic performance for the 6th Congressional District is 53.1 percent, correct?

A. Yes.

Q. Okay. Do you see a column in Plan F titled, current?

A. Yes.

Q. Do you know what—do you have an understanding as to what that means?

A. That's probably the amount of the current district that's retained.

Q. Okay. And for Plan F, for the 6th Congressional District, the amount of the current [124] district that's retained is 50.6 percent correct?

MS. FROST: Objection.

THE WITNESS: Can you restate that?

BY MR. MEDLOCK:

Q. Sure. Sure. So if you look at the current column for the 6th Congressional District, it lists 50.6, right?

A. Right.

MR. MEDLOCK: Okay. All right. I think we're almost out of tape, so why don't we stop here.

* * *

BY MR. MEDLOCK:

Q. Welcome back from lunch, sir.

A. Thank you.

Q. Do you understand what the term compactness means in the redistricting process?

A. Yes.

Q. What does it mean to you?

A. Well, there are different ways to measure how compact a district is, and whether or not it's—I mean, that means a condensed shape or—I mean, well, not necessarily that either. It [126] depends. There are different measurements.

Q. Does NCEC Services use a particular measure of compactness?

A. Maptitude includes like five different, six different—maybe even eight different measurements. But I don't—we don't have it settled on one, I don't think. We usually look at all of them.

Q. When you were involved in your consulting engagement with the Democratic members of Maryland's U.S. House delegation, and looking at different versions of congressional maps, did you consider any measure of compactness when analyzing those maps?

A. I don't believe that we did in Maryland. I don't remember.

Q. Okay. Did you consider—let me back up. When analyzing the potential maps that were drawn for the 2011 redistricting process in Maryland, did you consider whether those maps would protect all incumbents, not just Democratic incumbents?

MS. RICE: Objection, asked and answered. [127]

THE WITNESS: Well, yeah, I mean, we were certainly looking at—we were working for the Democratic House delegation. We were looking at that. But I—you know, certainly when you look at—when you look at a map, you can determine that as well. So I would say that we were mainly focused on the Democratic House members.

BY MR. MEDLOCK:

Q. Do you have an understanding of what the term, communities of interest means as it relates to redistricting?

A. Yes.

Q. What does it mean to you?

A. Well, generally, when we're looking at communities of interest, we're looking at it in terms of majority-minority districts.

Q. When you were analyzing potential congressional maps for the State of Maryland in the 2011 redistricting process, did you consider communities of interest?

A. We considered—I wouldn't say specifically communities of interest. We considered [128] whether or not a minority population could elect the candidate of their choice.

Q. Beyond whether a minority population could elect a candidate of their choice, did you make any other inquiry into communities of interest as it related to the 2011 Maryland redistricting process?

A. I don't remember doing so. I don't remember that.

Q. Did you ever—do you know where Interstate 270 is?

A. Yes.

Q. And where is it?

A. It runs from Montgomery County into Frederick, I believe.

Q. Okay. And that's in Maryland?

A. Yes.

Q. Counties in Maryland? Did you at all consider whether the—there was a community of interest related to the I-270 corridor when analyzing potential maps in the 2011 Maryland congressional redistricting process? [129]

A. No, I don't remember doing so.

Q. Okay. Did you analyze any data related to commuting patterns on Interstate 270 when you were looking at potential congressional maps for the 2011 Maryland congressional redistricting process?

A. No, I didn't.

Q. Do you know if anybody at NCEC Services did?

A. No, I don't—I don't recall anybody doing that.

* * *

Q. I see. How long have you been using Maptitude?

A. I think we started using it—it may have been in the—after the 2000 cycle. The 2000—I don't remember specifically. And I know we used a different software product at one time, certainly in the '90s. I don't remember if we were [148] using that again in 2000, in which case we would have moved to Maptitude. But I'm sorry, I don't remember specifically when we did.

Q. In your experience as a Maptitude user, has the product changed over time?

A. Yes, I mean, it's gotten a little faster and yes, it's changed.

Q. Has it improved, in your mind?

A. Well, sure. I mean, like any software product, yeah, it's improved.

Q. Can you give me examples of how Maptitude has improved over—since you started using it?

A. I think the reporting functions have improved.

Q. What do you mean by the reporting functions?

A. Well, you can generate reports on any number of things, but you know, how—where the donor district is coming from. All sorts of things.

Q. Since you started using Maptitude as the product actually—the software, does it actually move faster than it used to when you first started [149] using it?

A. I think it moves faster. I mean, I can't quantify that. But I—it feels like it moves faster. Maybe I've just gotten better.

Q. One or the another, right?

A. Yeah. I'm sure it's the software, not me.

Q. Is Maptitude able to handle more data now than it used to, when you first started using it?

A. I don't know. I don't know if it has or not. I don't remember.

Q. Okay. Let's mark the next exhibit.

(Hawkins Exhibit No. 61 was marked for identification.)

* * *

Q. Gmail emails are not the easiest for depositions, I'll tell you that. Okay. The text of that—of the

body of that email reads, the 2nd is helping in a small way by taking some bad Harford from the 1st, so it can grow further into Carroll, thus improving the 6th. Did I read that correctly?

A. Yes.

Q. What do you mean by "improving the 6th" in this email?

A. Well, I mean, Carroll County is very Republican, so it probably means that the 6th becomes a little bit more Democratic by moving out of Carroll County.

Q. Okay. All right. You can put 63 aside.

(Hawkins Exhibit No. 64 was marked for identification.)

BY MR. MEDLOCK:

Q. All right, sir. Showing you Exhibit 64, which is a one-page email exchange bearing the Bates number HOY000347. Please take a moment to review [163] it. And when you're done reviewing it, please let me know.

A. Okay.

Q. Okay. This is an email exchange between Brian Romick and Mark Gersh, correct?

A. Yes.

Q. And it's—it all occurs on September 1st, 2011, is that right?

A. That's correct.

Q. All right. I'm looking at the September 1st, 2011 email sent at 2:31 p.m., by Mark Gersh. Are you there with me?

A. At 2:31, yes.

Q. Yes. And he writes, okay, have to come back to NCEC after meeting with the Governor. Do you see that?

A. Yes.

Q. Do you recall ever going to a meeting with Mr. Gersh and Governor O'Malley?

A. I never went to a meeting with the Governor.

Q. Do you recall Mr. Gersh ever going to a [164] meeting with the Governor?

A. I don't recall, but I mean, it's written here.

Q. Do you—do you have any reason to doubt that Mr. Gersh met with the Governor as stated in the email?

A. No, I just don't remember that happening. But I'm not saying it didn't. It just—it says it did here.

Q. Okay. If you move up in the email, there is an email sent on September 1st, at 2:43 p.m., by Brian Romick. Do you see that?

A. Yes.

Q. Okay. And in the second sentence of that email, he writes, "we need to do three meetings if Miller and Busch are in Annapolis." Did I read that correctly?

A. Yes.

Q. What is your understanding of what—who Miller refers to?

MS. RICE: Objection.

THE WITNESS: Was he the—I don't—[165] he's either the leader of the Senate or the House of Delegates.

BY MR. MEDLOCK:

Q. Does it refer to Senate President Thomas V. "Mike" Miller?

A. Yes.

Q. And Busch, does that refer to House of Delegates Speaker Michael E. Busch?

MS. RICE: Objection.

THE WITNESS: I—if you say so, yes. I'm sorry, I just didn't work with the legislature at all, and I can't remember the names and who was—who were the people there.

Q. Fair enough. Do you recall whether Mr. Gersh met with Senate President Miller, as stated in the email?

MS. RICE: Objection.

THE WITNESS: I don't recall that. It's stated here, so I assume that happened.

BY MR. MEDLOCK:

Q. Do you recall whether Mr. Gersh met with House of Delegates Speaker Michael Busch, as stated [166] in the email?

MS. RICE: Objection.

THE WITNESS: I don't recall that. Again, it's in the email, so—

BY MR. MEDLOCK:

Q. Do you have any reason to doubt that Mr. Gersh met with either of those individuals?

MS. RICE: Objection.

THE WITNESS: I have no reason to doubt it. I have no independent knowledge of it.

BY MR. MEDLOCK:

Q. Understood. Did Mr. Gersh ever discuss meeting with Governor O'Malley, Senate President Miller, or Speaker Busch with you?

A. I don't remember him doing so.

Q. So you can't tell me one way or the other if he ever discussed it with you?

A. No. I mean, no, I wasn't in D.C. this entire time, so I don't know. I mean, I spent most of my time in the frozen north.

Q. When you say frozen north, you mean Maine, right? [167]

A. Yes.

Q. That's America's vacation land?

A. Right. True.

Q. It's not the frozen north?

A. It is a little bit now, but okay. You don't—

Q. Yes. Okay. You can put 64 aside.

(Hawkins Exhibit No. 65 was marked for identification.)

BY MR. MEDLOCK:

Q. All right, sir. I'm showing you Exhibit 65, which is a one-page email exchange, bearing the Bates number HOY000334. Please read through it, and once you're done, let me know you have.

A. Okay.

Q. All right. So this is an email exchange between Mark Gersh and Brian Romick, correct?

A. That's correct.

Q. And if you look at the dates on the emails, the first one was sent on September 8th, 2011, but the remainder of them are on September 12th, 2011, is that right? [168]

A. That's right.

Q. Okay. I want to focus on the top email, September 12th, 2011, 8:41 a.m. email from Brian Romick to Mark Gersh. Do you see that?

A. Yes.

Q. That—the body of that email reads, and there is a couple of redactions in here, but the unredacted body of the email reads, "the only thing I wanted to check with you on was getting the African-American members electronically for current CBC districts and newly drawn ones. The guys in Annapolis are asking about it. Are you coming up for the meeting tomorrow?"

MS. RICE: Objection.

BY MR. MEDLOCK:

Q. Did I read that correctly?

A. Yes.

Q. Okay. Do you have an understanding, beyond what you're reading in this email, of what the phrase "the guys in Annapolis" means?

A. I mean, that's where the state capital is, so I guess it's—I don't know who it refers [169] to, but—I don't know specifically who it refers to, but it's—I mean, it's got to be somebody in the legislature, I guess. I don't know.

Q. Did anyone from the Maryland Legislature ever request any data from you or Mr. Gersh related to the 2011 congressional redistricting in Maryland?

MS. FROST: Objection.

THE WITNESS: I don't remember that specifically happening from them directly. I do not. And I don't know if it came indirectly from them.

BY MR. MEDLOCK:

Q. Okay. Did anyone from the Maryland State Government ever ask you any questions related to the 2011 Maryland redistricting process?

A. Can you ask that again?

Q. Sure. Did anyone from the Maryland State Government ever ask you any questions related to the 2011 Maryland redistricting process?

A. From the state government?

Q. Yes.

A. I don't think any elected officials asked [170] me any questions.

Q. Okay. Let's put elected officials aside. How about unelected officials?

A. Well, I did have—and I don't know if it's this—what this is referring to here, because I don't think it is, but I did have—I did go to Annapolis one time myself, in which I talked to staff.

Q. When did you go to Annapolis to talk to staff?

A. I don't know. It was late—it was -it would have been very late in this process.

Q. Would it have been in September 2011, October 2011? Do you have any recollection of when it was?

A. I don't know.

Q. Was it in the fall of 2011?

A. It must have been in the fall, because that's the end of the process.

Q. Okay. And when you say you went to Annapolis to meet with staff, who was the staff you met with? [171]

A. I don't know. I don't remember.

Q. Do you remember what office they were working with?

A. I don't remember.

Q. Were they in the legislature?

A. I believe so, yes.

Q. Do you remember if they worked for a particular—did they work in the House of Delegates or the Maryland Senate?

A. I don't know.

Q. Do you recall any of their first names?

A. I don't.

Q. How about Yaakov Weissman. Does that sound familiar? He would also go by Jake Weissman?

A. That sounds familiar.

Q. Do you think he is one of the people you met with?

A. I can't be sure.

Q. How about Patrick Murray? Does that name sound familiar?

A. I'm sorry, it doesn't. Yaakov is easier to remember. [172]

Q. That's very fair. How about Alexandra M. Hughes. Does that sound familiar?

A. No.

Q. Do you think she was at the meeting?

A. I don't know.

Q. Do you think that Jason Weintraub was at the meeting?

A. I don't know.

Q. How about Jeremy Baker? Was he at the meeting?

A. There was a—I don't know. There was a Jeremy in another state I worked in. That's why I'm like—

Q. Are you getting your states mixed up?

A. Right.

Q. How about Pamela Johnson. Was she someone you met with?

A. I don't know. I mean, I don't know.

Q. How about Nancy Ernest? Was she someone you met with?

A. I don't remember. I don't know.

Q. How about Carl Aro, last name A-R-O? Did [173] you meet with him?

A. Again, I just don't remember. I don't know who—I don't remember the names.

Q. How about Jean Hitchcock? Did you meet with Ms. Hitchcock?

A. Well, the name is familiar simply because of the Hitchcock, but again, I don't remember.

Q. What about Richard Stewart? Did you meet with Richard Stewart?

A. I'm sorry. I just don't remember.

Q. How about Victoria Gruber, last name G-R-U-B-E-R? Did you meet with her?

A. Again, I don't remember.

Q. And how about Joy Walker? Do you recall meeting with Joy Walker when you went up to Annapolis?

A. I don't remember.

Q. When you went up to Annapolis to this meeting, where did the meeting take place?

A. It was a large meeting room on the first floor of the building up there. I don't know the capital that well at all. [174]

Q. Was it in a state government office building?

A. Again, I don't know the capital, I don't know if that was an official building or not. I don't know.

Q. Was anyone else from NCEC Services at this meeting?

A. That meeting, no.

Q. Did you bring anything with you to that meeting?

A. I would have brought my notebook with me.

Q. And anything else besides your notebook that you brought with you?

A. I don't remember.

Q. Did you take notes during the meeting?

A. I don't remember.

Q. Do you recall anyone else that was at the meeting taking any notes?

A. I don't remember that.

Q. How many people were at the meeting besides you?

A. I don't know exactly. More than half [175] dozen—dozen. I don't know. Not—I have no idea.

Q. So somewhere between 6 and 12 is your best guess?

A. I don't even—12 might be too many. I don't even know.

Q. Well, what did you discuss at the meeting?

A. Pardon me?

Q. What was discussed at this meeting?

A. The congressional map.

Q. Can you be more specific?

A. The reconfigured congressional map. I mean, whatever map was going to take place, and be put in—I don't even—I mean, it was a map of the—I don't know which map it was or what.

Q. When you were discussing this congressional map with the other people at the meeting in Annapolis, were you presenting the map to them, or were they presenting the map to you?

A. I would have been presenting the map to them. [176]

Q. Did they give you any feedback regarding the map?

A. There was feedback, yes.

Q. Can you recall any specific feedback about the map?

A. I can't recall any specific changes.

Q. Were you presenting it to them in Maptitude, or did you have a presentation software besides that, that you were using?

A. No, it was Maptitude.

Q. So did you have your computer with you as well?

A. Yes. That was when I said my notebook, that's what I was referring to.

Q. Oh, that's your—okay, got it.

A. I apologize.

Q. Understood. Understood. And did you have it on a projector, or did you just have it open and showing it to them?

A. No, it was projected.

Q. And were you, during this meeting, actually changing the boundaries of any of the [177] congressional districts, or were you just sort of presenting the map and showing them the data that underlied the map?

A. There were changes made, yes.

Q. Can you recall any changes, specifically?

A. I can't specifically recall what the specific—the changes.

Q. Can you recall whether you discussed the 6th Congressional District at all during that meeting?

A. We discussed every district in that meeting, I'm sure.

Q. Do you have any specific recollection of talking about the 6th Congressional District during that meeting?

A. We would have talked about every district.

Q. Okay. Do you recall anything that you said regarding the 6th Congressional District during that meeting?

A. No.

Q. Do you recall anything that—[178]

A. I mean, I would have said something about every single district. I'm sorry, I talked over you. I apologize. I apologize.

Q. Okay. Don't worry about it. It just happens.

A. Okay.

Q. Do you recall anything that any of the people attending the meeting told you about the 6th Congressional District?

A. I can't recall anything specific, no.

Q. How long did the meeting last?

A. I don't know exactly. It feels like a few hours, I guess.

Q. Okay. Who invited you to the meeting?

A. I don't remember.

Q. Who—did Mr. Gersh or anyone else at NCEC Services tell you that you should attend the meeting?

A. I don't—I don't remember how that—the meeting was set up or arranged, and who would have told me about it.

Q. Were there any attorneys in the room [179] during the meeting?

A. I don't remember.

Q. Did you send any emails as a result of the meeting?

A. I don't remember that.

Q. Did you discuss the meeting with Mr. Gersh or anyone at NCEC Services after the meeting was over?

A. I don't remember specifically.

Q. Would it have been your practice to discuss it with them?

A. I mean, possibly. I don't remember.

Q. Did you discuss the meeting you had in Annapolis with anyone on—any member of Maryland's U.S. House delegation?

A. I don't remember discussing it with any member.

Q. Did you discuss it with any of their staffers?

A. Well, I would have—I don't remember who I would have discussed it with, but I'm sure I would have discussed it with somebody, one of the [180] staffers, yeah.

Q. Okay. And can you recall anything that was discussed during the meeting, besides sort of just generally discussing the map, and each of the districts that were in the map?

A. I'm sorry. Can you ask that again?

Q. Oh, sure. Can you recall anything that was discussed at this meeting in Annapolis, besides the congressional districts and a general discussion of each congressional district?

A. No.

Q. And do you have any notes or documents in your possession, that you're aware of, regarding this meeting?

A. No.

Q. Are you aware of any notes or documents in NCEC Services' possession regarding this meeting?

A. No, there aren't any.

Q. Can you tell me, beyond it occurring in the fall of 2011, with any specificity, which month in 2011 the meeting occurred?

A. I'm sorry. I just—I can't remember [181] exactly. It just would have been the end of this process.

* * *

Q. I'm on the first page of Exhibit 69, and I'm starting with the second sentence. It reads, "some observers have suggested that campaigns should give less consideration to data and metrics going forward. We would caution against this conclusion. In many cases, existing metrics like NCEC's Democratic Performance Index, DPI, accurately depicted the competitive nature of marginal congressional seats." Did I read that correctly?

A. Yes.

Q. Do you believe that statement to be true?

A. Yes.

Q. Do you believe that NCEC's Democratic Performance Index is accurate?

A. Yes, I mean, it depends on how it's used, but—and what—

Q. Certainly. [203]

A. In what context.

Q. When used properly, do you believe that it's accurate?

A. Oh, sure, because this article was a push back against people that want to use modeling and other things, rather than actual election results.

Q. These are people who said that Nate Silver got it wrong, so everybody must be wrong, correct?

A. Yeah, and there are other—there are people that think that the wrong districts were targeted in this last race. And I'm sorry, I'm going to—the wrong districts were targeted, and that the—I'm going into another area. I'll end that.

Q. Okay. Fair enough.

A. It has caused a little bit of a—there was some anger at NCEC over—that generated this.

Q. I can imagine.

A. Okay.

Q. So on the second page, there is a chart that is titled—on the second page of Exhibit 69, [204] I should say, there is a chart that's titled, November 8th, 2016 general election results, Democratic major party vote share for U.S. House versus NCEC Democratic performance in 35 targeted districts. Do you see that?

A. Yes.

Q. Okay. And then if you look at Exhibit 70, that's a blow-up of that chart, correct?

A. Yes, absolutely.

Q. Okay. So because my eyes aren't good, let's look at Exhibit 70.

A. Please.

Q. So the X axis of this chart, that's Democratic—the Democratic Performance Index, correct?

A. Yes.

Q. All right. Do you see, on the X axis, Democratic performance of 52.5 percent?

A. Yes.

Q. Okay. And to the right of that, there are elections that were held in districts that had greater than 52.5 percent Democratic performance, [205] correct?

A. That's right.

Q. Okay. And in those elections, there is only one Republican in these targeted—35 targeted races who won an election in a district with 52.5 percent Democratic performance or more, correct?

A. On this chart, but these are targeted races.

Q. Sure.

A. So—

Q. My question is just about the chart.

A. I mean, as we both know, there are 400 other districts.

Q. Right.

A. Okay.

Q. As you sit here today, can you give me an example of a Republican who won in a House district that had 52.5 percent Democratic performance or more?

A. Maybe Peter King in New York. I'm not sure what his Democratic performance is, but it's over 50, I know that. There are others. I can't [206] think of them straight off the top of my head, though.

Q. But beyond Peter King, you can't think of anybody right now?

A. Right.

Q. Okay. All right. I'm sorry. Go ahead.

A. No, you know what? I actually appreciate that you're putting this into the record. Thank you.

Q. Oh, no problem. So you can tell people that it matters.

A. Yeah, absolutely. I appreciate it.

* * *

Q. So was one of the purposes of redrawing the boundaries of Maryland's 6th Congressional District, to make it more difficult for a Republican to achieve electoral success in the 6th [228] Congressional District?

MS. RICE: Objection.

THE WITNESS: Again, I just—the purpose of the—of what we were doing was, number one, incumbent protection. And number two, trying to see if there was a way that there was another Democrat district in the state. So if there was another more Democratic district in the state that became more Democratic, that doesn't necessarily mean that a Republican wouldn't win there, but I suppose it would—that isn't—any time a district changes, it makes it more difficult for the incumbent.

BY MR. MEDLOCK:

Q. Was one of the goals of redrawing the boundaries of Maryland's congressional districts in 2011, when you did that, to reallocate Democratic voters to the 6th Congressional District?

MS. RICE: Objection.

THE WITNESS: Well, it was a distribution of Democrats throughout the entire state. There are—that's what happens when you redraw the map. [229]

It's—all the districts are involved. So again, we were trying to see if there was a way in which

you could actually have another Democratic district because the state is so Democratic.

BY MR. MEDLOCK:

Q. And to make another district more Democratic—well, let me back up. To make the 6th District more Democratic, when redrawing the boundaries of Maryland's congressional districts, would you have needed to allocate more Democrats into the 6th Congressional District to achieve that result?

MS. RICE: Objection.

THE WITNESS: Well, I mean, you can—I mean, putting more Democrats into another district makes it more Democratic.

BY MR. MEDLOCK:

Q. Right.

A. Yeah.

Q. When you say that one of the goals was to see if there was a way to make another Democratic district, did you succeed in making another [230] Democratic district?

A. Well, that district became more Democratic, and a Democrat won there. I would still, at that time, have called that district a marginal district, because it wasn't overwhelmingly Democratic.

Q. Can you name me a district-wide election that a Republican has won in that district since redistricting?

A. Well, I haven't looked at it or researched it, because, again, I don't do a lot of work in Maryland, because it's not really—it's so Democratic, and I focus on—I do most of my work in other states, so I don't know that.

Q. When you redrew the boundaries of Maryland's congressional districts, did you intend to make the 6th Congressional District more Democratic?

A. The intent was to see if there was a way to get another Democratic district in the state, to reflect the state's voting behavior. So there were two districts you could look at, based on what [231] was—what the lineup was.

Q. Do you feel that, in 2011, before redistricting, Republicans were overrepresented in Maryland's U.S. House delegation?

A. Well, based on the voting behavior, yes. I mean, the statewide voting behavior is the district—the tate is very Democratic. And it could easy support another Democratic district, and possibly if you weren't worried about incumbent protection, you could support eight Democratic districts.

Q. You used the phrase incumbent protection a few times in your last few answers. When you refer to incumbent protection, are you talking about protecting all incumbents or protecting Democratic incumbents?

MS. FROST: Objection. Asked and answered.

THE WITNESS: We were working for the Democratic House delegation, so we did have—I did answer that. And we did look at Democrats.

A. Do you want to talk about the 270 corridor?

Q. If you want. I mean, I don't know what you're—

A. That's what I remember, okay? I can [59] only tell you what I remember vaguely or not vaguely.

Q. You mentioned the 270 corridor. You're talking about Interstate 270?

A. Is that the corridor that goes up Western Maryland? Yes.

Q. And you believe that Interstate 270 goes up Western Maryland, right?

A. I think.

Q. Okay. Why, if at all, was Interstate 270 relevant to your work on the GRAC?

A. What was relevant to my work on the GRAC was because there was a population issue there that I remember hearing about in the hearings.

Q. What was the population issue you remember hearing about?

A. I get a little confused. Either people in Washington were working in Washington and living in Western Maryland or—

Q. Vice versa?

A. Vice versa, yeah. I can't remember.

* * *

[83] * * *

Q. I should say not the public hearings, but your private meetings of the GRAC. Do you recall that district being discussed?

A. I remember discussing population trends, the Western Maryland population trend. I told you

this before, the two things I remember. The Western Maryland 270 population trend I remember, and I remember the increase in the Hispanic population, which could be merged with the state thing.

* * *

Q. Can you recall anything else regarding the maps and presentations that Mr. Weissman and Mr. Baker made during the GRAC meetings?

A. I remember the—yes.

Q. Okay, please go ahead.

A. I remember the Prince George's County [92] and Montgomery County issue with Donna Edwards.

Q. What was that issue?

A. That issue was that she wanted to have her district cross jurisdictional lines, and I remember that because, in the hearings, people didn't want to do that. I remember the Prince George's County people—

Q. They didn't want to be lumped with Montgomery County?

A. They didn't want to be lumped with Montgomery County.

* * *

Q. Do you see the reference to 58 percent Democratic performance.

A. I sure do.

Q. What does that mean?

MS. KATZ: Objection, foundation.

THE WITNESS: What do I remember that that meant? My recollection—I don't have a real recollection, except I do have sort of a common sense interpretation of it.

BY MR. MEDLOCK:

Q. Okay. What's your common sense interpretation of it?

A. That if you have more Republicans than Democrats, then maybe you'll have a Republican seat. If you have more Democrats than Republicans, you might have a Democratic seat.

Q. Got it. [131]

A Yeah, I'm sure you do.

Q. Do you know where the 58 percent Democratic performance metric came from?

A. No, but I—

MS. KATZ: Objection.

THE WITNESS: I think the guys probably do.

BY MR. MEDLOCK:

Q. Who do you mean by "the guys"?

A. Jake and Jeremy and Joe.

Q. Just so I've got it real clear, Jake Weissman, Jeremy Baker and Joe Bryce?

A. Correct.

Q. What makes you believe that Jake Weissman, Jeremy Baker and Joe Bryce would know where this Democratic performance number came from?

A. Because I was not focusing on statistics. I assumed that they were.

Q. Okay.

A. And numbers. You know, they had to look at all the—they were looking at numbers. [132]

Q. To your mind, they were focused on numbers and statistics?

A. To my mind.

Q. Okay. Did you ever hear them use the term "Democratic performance" when you were speaking with them?

A I have heard that term, yes.

Q. Did you ever hear it when you were speaking with Mr. Bryce, Mr. Weissman or Mr. Baker?

A. Yeah, they would have mentioned that, yes.

Q. Do you remember in what context they would have mentioned it?

A. I can't visualize a meeting or conversation, but I can remember that there was that discussion, or that I've heard that or I'm familiar with that.

Q. Uh-hmm.

A. I was focused on race.

Q. I understand.

A. Okay. [133]

Q. I understand.

A. So if you refresh my recollection, it would be sharper on the issue of minority representation than it would be on this issue.

Q. Okay. So you were more focused on minority representation than you were on the Democratic performance issue?

A. I will say this: My recollection is sharper on those issues because those are issues that resonate in the mind of Jeanne Hitchcock.

Q. Okay.

A. Okay? All right. That's what I mean when I say that.

Q. How many times did you hear Mr. Baker, Mr. Weissman or Mr. Bryce mention the term "Democratic performance"?

MS. KATZ: Objection.

THE WITNESS: I don't know. Maybe in—sort of like at the end where you're sort of—where I'm being briefed about the elements of the map would be what I would speculate would be when I would hear that. [134]

BY MR. MEDLOCK:

Q. So you said when you were being briefed about the elements of the map at the end.

Was there a briefing towards the end of the GRAC process where you were actually briefed about certain elements?

A. Yes, that would have been true.

Q. When did that briefing occur, to your knowledge?

A. Well, obviously at the end of all the hearings, and obviously before I would have to say anything in public, and I would think it was before the principals saw it.

Q. Who gave you that briefing?

A. It would have been Jeremy, Jake, Joe, I would think.

Q. Where did that briefing take place?

A. It would have been in that same office.

Q. How long did the briefing last?

A. I don't remember that specifically, but it would have been an hour. I would have—[135] an hour. I mean, not long.

Q. Were any other members of the GRAC present for this briefing?

A. First, I can't actually remember the briefing, okay?

Q. Okay.

A. I am speculating that a briefing would have taken place because somebody would have shown me a briefing, a map, before I was finished.

So what is your question?

Q. My question is, to the extent you recall the briefing, were any other members of the GRAC present for that briefing?

A. I actually can visualize a meeting with us in that meeting seeing a final map.

Q. When you say "us," who do you mean?

A. Miller, Busch, I think—what's the other guy's name?

Q. Mr. Stewart?

A. No.

Q. Mr. King?

A. King, Mr. King. I have a vague [136] recollection of such a briefing.

Q. And do you have a recollection of the term "Democratic performance" being mentioned during that briefing?

A. No, I would not have a recollection of that being mentioned at that meeting.

Q. Okay. But you just have a general recollection of having heard the term "Democratic performance" from either Mr. Weissman, Mr. Baker or Mr. Bryce?

A. Correct.

Q. So you can't tell me when you actually heard that?

A. Yeah, I cannot tell you that.

* * *

Q. All right, I'm showing you what we've marked as Exhibit 104.

A. Okay.

Q. It is a document that is several hundred pages long entitled "Governor's Redistricting Advisory Committee Briefing Book 2011." Do you see that?

A. Yes, I do.

Q. And at the bottom of the first page it says, "Prepared by: Maryland Department of Planning."

A. Yes.

Q. Do you recall receiving a briefing book from the Maryland Department of Planning as a member of the Redistricting Advisory Committee?

A. No.

Q. Do you recall ever asking for such a briefing book?

A. No.

Q. Okay. Do you recall our conversation earlier today about the I-270 corridor? [167]

A. Yes.

Q. Here's what I'd like to do. I'll give you the next 15 minutes to look through this. Show me where you can find information about the I-270 corridor in it.

A. Is it in there?

Q. I'll let you find it if it's in there.

A. You want me to—

Q. Sure.

A. Okay, I will do that. I don't know what I'm looking at, actually. Okay, we'll be here for a minute.

Okay, so is there an easier way to do this? Because if it's about District 5, then it wouldn't be there, right?

Q. I'm not really sure how this is put together.

A. Never mind. Okay, I'll do it.

(Witness reviewing Exhibit 104.)

I think this is put together by—Why is he smiling? He's smiling.

MS. KATZ: Steve, can I speak to you? [168]

MR. MEDLOCK: Sure.

(Pause in the proceedings for counsel to confer.)

MS. KATZ: I'm just going to object to this—I don't even know if it's a question that's been posed.

Ms. Hitchcock has testified that she didn't recall seeing this document. This is inappropriate and borders on harassment to have her do this.

MR. MEDLOCK: Are you done with your objection?

MS. KATZ: Yes.

MR. MEDLOCK: Okay. I'll make my response now.

First, there was a question, and she's trying to answer it.

Second, this is not harassment. This is a question that goes to the exact heart of this case, which is what evidence the GRAC received, what evidence the GRAC looked at, and what evidence the GRAC considered. This is a document [169] titled "Governor's Redistricting Advisory Committee Briefing Book 2011."

And then, third, I'll add that speaking objections are not allowed in this district, and this is exactly why, because people end up putting their briefs on the record.

So with that said, I'd still like an answer to my question.

THE WITNESS: Repeat your question.

BY MR. MEDLOCK:

Q. Sure. You've had a chance to review the entirety of the briefing book, correct?

A. Briefly, briefly, briefly.

Q. You've flipped through it?

A. Yes.

Q. Okay. When you flipped through it, could you find any information regarding the I-270 corridor in the briefing book?

A. I did not see it.

Q. Did you ever request a briefing book from the Maryland Department of Planning regarding the I-270 corridor? [170]

A No.

Q. Did anyone else on the GRAC ever request a briefing book or any information—let me back up.

Did anyone else on the GRAC request a briefing book from the Maryland Department of Planning regarding the I-270 corridor?

MS. KATZ: Objection.

THE WITNESS: I don't know.

BY MR. MEDLOCK:

Q. Do you know whether anyone on the GRAC requested any information regarding the I-270 corridor from the Maryland Department of Legislative Services?

A. I don't know.

Q. Do you know whether anyone on the GRAC requested any information from any outside group regarding the I-270 corridor?

A. I don't know.

Q. Did you do so?

A. Request it?

Q. Yes, make that request. [171]

A. No, I did not.

Q. Do you recall making any request at any point in time that you were on the GRAC for any information regarding the I-270 corridor?

A. Not that I recall, no.

Q. Do you recall anyone else—

A. Wait a minute, say that question.

Q. Sure.

A. Do I remember making a request for data?

Q. Any sort of information regarding the I-270 corridor.

A. Did I make a request for it?

Q. Yes.

A. No.

Q. Do you recall ever receiving any information regarding the I-270 corridor?

A. At the hearing.

Q. Besides the hearing, do you recall receiving any information?

A. No, no.

Q. Okay. When you gave feedback on [172] proposed congressional maps in Mr. Weissman or Mr. Baker's office, did you ever indicate to them that the maps did not reflect the public comments that you had received?

A. Possibly on the state side with that La Plata/Charles County stuff. That's the only thing I remember.

Q. Besides that, you can't remember ever doing that?

A. No, I can't remember doing that.

Q. And that's because you don't recall doing it; is that right?

A. I don't recall doing it.

Q. You just don't remember one way or the other whether you did or didn't?

A. I don't recall one way or the other.

Q. Okay. Do you recall Mr. Weissman or Mr. Baker ever changing the lines of the congressional map during your meetings with them?

A. No.

Q. Do you recall Mr. Baker or Mr. Weissman ever saying that they would change [173] the lines of the draft congressional map based on the feedback that you gave them?

A. I don't know. I don't remember. Possibly Baltimore City.

Q. With the exception of Baltimore City, do you recall Mr. Baker or Mr. Weissman ever saying that they would change the lines of any other part of the draft congressional map based on the feedback you gave them?

A. Not that I recall, no.

Q. Do you ever recall discussing former Congressman Frank Kratovil with Mr. Weissman or Mr. Baker?

A. No.

Q. Do you recall ever speaking to Mr. Weissman or Mr. Baker during these meetings where you were shown the maps about Roscoe Bartlett?

A. No.

Q. You just don't recall one way or the other?

A. What's your question about Roscoe [174] Bartlett?

Q. Yeah. Do you recall one way or the other whether you actually discussed Roscoe Bartlett during these meetings?

A. I don't recall. I do not recall discussing Roscoe Bartlett with staff.

Maryland Department of Planning
Interagency Memorandum

MARYLAND DEPARTMENT OF PLANNING
INTERAGENCY MEMORANDUM

TO: The Honorable Martin O'Malley, Governor

FROM: Richard E. Hall, Secretary

DATE: July 30, 2010

CC: Matt Gallagher, Chief of Staff
Joe Bryce, Chief Legislative Officer
Ted Dallas, Deputy Chief of Staff
John McDonough, Secretary of State
Brian Hammock, Special Assistant
Matt Power, Deputy Secretary

RE: Redistricting—Timeline, Key Issues, Discussion

I. Executive Summary

Now that the Census outreach effort is behind us, its primary purpose of redistricting is approaching. This memorandum provides background on state and congressional redistricting and outlines related issues and timelines of note. While redistricting may seem a long time off, we have already had several meetings with Karl Aro at DLS about the issue, and the general chatter level has increased. We have already begun some of the background work with the data, looking at which redistricting software to purchase, etc. The first key visible steps for the Governor associated with redistricting is appointing the advisory committee. Customarily this would occur in January 2011 which means the discussion of possible candidates should begin now. We get the data from the Census Bureau in

late February 2011. During the next few months it may be helpful to remind legislators and congressmen that the next Governor draws the legislative boundaries and that we are preparing to do this now. Maryland is the only state where the redistricting plan is the Governor's plan.

MDP has been the primary staff to the Governor in preparing the redistricting maps and related work since the early 1970's. Therefore much of this information is based on the agency's past experience. Obviously DLS puts significant resources into the effort as well. This memorandum also outlines recommended preparations, including budget and staffing.

II. Decisions and Recommendation Actions

The primary purpose of this memorandum is to provide an update on redistricting, outline a proposed schedule, and to highlight key issues. The only action I suggest now is to direct me to work with John McDonough, Joe Bryce, Matt Gallagher et al. to move forward. In addition, we will be working with DBM on a deficiency request to support some of the redistricting costs.

III. Background, Process and Timeline

Outlined below is the redistricting process and major milestones that will occur during the next two years. This timeframe, much of which is driven by Federal and state requirements, needs to be kept in mind so that the budgetary and staff preparations can be in place as the work proceeds during these two years.

- January 2011—Governor appoints redistricting advisory committee.
- February or March 2011—MDP receives census data.

- May to August 2011—Public hearings held by advisory committee around the state.
- May to Fall 2011—State and Congressional plans developed.
- Early Fall 2011—Public hearing on draft Congressional plan.
- Fall 2011—Governor calls special legislative session for congressional redistricting due to the early primary election date (February 14, 2012).
- November 2011—Redistricting advisory committee submits state plan to the Governor.
- December 2011—Governor holds public hearings on state plan.
- January 11, 2012—Governor submits state redistricting plan to General Assembly as Joint Resolution.
- February 24, 2012—45th day, General Assembly must enact plan by end of this day or the Governor's plan takes effect.
- Anytime after February 24, 2012—Go to Court of Appeals to defend the plan.

IV. Governor's Advisory Committee on Redistricting

A. Background

For the past three rounds of redistricting, 1981, 1991 and 2001, the Governor has appointed an Advisory Committee on Redistricting (Committee). Neither the State Constitution nor State law requires the appointment of such a Committee. The idea to appoint a Committee stemmed from the Court of Appeals invalidation of the 1972 redistricting plan submitted by the Governor and adopted by the General Assembly because the Governor failed to hold public hearings on the plan. The Committee should hold hearings across the state to receive public input on the plan to ensure

that a plan was not invalidated by the court. When the 1981 redistricting plan was challenged in court, the Court of Appeals rejected a lack of public hearings claim noting that the record showed that numerous public hearings were conducted by the Governor's Committee throughout the state as well two hearings that were personally conducted by the Governor to receive comment on the recommended legislative districting plan before its final adoption.

The creation of a Committee also served an important secondary purpose of allowing the President and the Speaker to engage in the creation of the Governor's plan early on in the process thus preventing a major attempt by the General Assembly to pass its own redistricting plan. The Commission has provided a useful vehicle for this collaboration to occur. To date, the General Assembly has never passed its own redistricting plan and the Governor's plan has always gone into effect on the 45th day of Session. Maryland is a unique State regarding redistricting, no other state gives the governor this much power in the effort.

The Committee has always consisted of five members: a designee of the Governor, the President of the Senate, the Speaker of the House, and two citizen members. Of the two citizen members, one has been a republican. One member of the committee has also been an African-American. The following lists the make-up of the last three advisory committees.

- **1981 Committee**—William S. James, State Treasurer and chairman (Governor's designee), Senate President James Clark, Jr., Speaker Benjamin L. Cardin, Dr. C. Vernon Gray, a Democrat from Howard County and a professor at Morgan State University, and Barbara Fetterhoff, from Washington County and a

member of the League of Women Voters (republican).

- **1991 Committee**—Benjamin L. Brown, an attorney from Baltimore, chairman (Governor's designee and African-American), President Mike Miller, Speaker Clayton Mitchell Jr., Norman Glasgow Sr., an attorney from Montgomery County (republican), and Donna M. Felling, a former member of the House of Delegates from Baltimore County.
- **2001 Committee**—John T. Willis, Secretary of State and chairman (Governor's designee), President Mike Miller, Speaker Casper R. Taylor, Isiah Leggett, Montgomery County Councilman, and Louis L. Gulyas, Worcester County Commissioner (republican).

B. Process

The Committee is appointed by the Governor just before MDP receives the census data from the US Census Bureau (January 2011). Appointment of the Committee prior to receiving the data allows the Committee to hold at least one organizational meeting to establish the rules and procedures that will govern the meetings of the Committee. It also allows staff to begin the difficult process of scheduling at least 12 public hearings across the State since the President of Senate and the Speaker of the House attend each of the public hearings. While the Committees in the past have consisted of 5 members with one African-American member, an expansion of the Committee to 7 members may need to be considered to ensure that other emerging minority groups (Hispanics, Asians, etc.) are included. This may be particularly important in the light of the fact that a majority minority Hispanic district may (depending on the census data and other factors) have to be created

pursuant to the Voting Rights Act. *See* Part V. Trends & Issues below.

The approximately 12 public hearings are held across the state beginning in the spring of 2011 through the summer in order to allow the public to testify on redistricting and to present to the Committee redistricting plans drawn by the public and various interest groups. All of the hearings are transcribed and become part of the record of the creation of the plan which is ultimately presented to the Court of Appeals (or the Federal District Court for the Congressional Plan) when the Plans are challenged.

Concurrently with the public hearing process, the Committee begins the process of developing both the state and congressional redistricting plans. Plans developed during this time are informed by the public input. They are initially kept internal to the Committee and serve as the key work product for the Committee as they move towards final plans to present to the Governor.

The early congressional primary requires a special session of the General Assembly for a congressional redistricting plan that will occur in February 2012. Given this timing, it is likely that the Committee will need to finish the congressional plan first. The state legislative districts will not take effect until the 2014 elections. It is important to note that unlike the state plan, the Governor has no constitutional or statutory responsibility for the congressional plan and it is introduced like a regular bill and subject to the Governor's veto.

After the state plan is developed and adopted by the Committee, the Governor will hold at least one public hearing to take testimony from the General Assembly and the public on the plan adopted by the Committee. The Governor is not bound to submit the

plan adopted by the Committee. In the last round of redistricting, after the state plan was presented, Governor Glendenning received last minute appeals, from several legislators and he made several small changes to the plan before he submitted it to the General Assembly on the first day of the session. Thus, the Committee's plan was not the plan that was ultimately submitted by the Governor.

C. Role of MDP

MDP has served as the primary staff on redistricting since the early 1970's. Since the creation of the Committee in 1981, MDP has served as primary staff to the Committee representing the interests of the executive branch along with the Governor's designee. The Department of Legislative Services ("DLS") also serves as the staff to the Committee to represent the interests of the legislative branch. MDP staff works with the Governor's staff and the Governor's designee on the Committee to prepare the maps for both the Congressional and state plans. MDP also prepares the maps requested by the Committee. On the other hand, DLS only prepares the maps requested by members of the General Assembly that occurs during the Committee process and during the legislative sessions.

During the process of preparing the maps for the Governor to review as well as officially for the Committee, a consultant is necessary to advise the Committee on the various legal requirements (US Constitution, Federal Voting Rights Act, and Maryland Constitution) and whether the plan meets those requirements. This same consultant then becomes the necessary expert witness for the Administration and General Assembly when the plans are challenged in court. Some states are hiring such consultants now in order to get the best consultants for redistricting and to prevent those that may challenge a redistricting plan in court from hiring

a consultant that we may want to use. Karl Aro is working on funding what he sees as his half of the consultant's work and the Administration will be expected to pay for its share of the consultant.

In addition to preparing the maps for the Governor and the Committee, MDP historically provided staffing to the committee including staffing all of the public hearings that are held across the State by the Committee. MDP is traditionally responsible for scheduling and organizing the public hearing. Because the Speaker and the President attend all of the public hearings, the process of scheduling them is very difficult. MDP also is responsible for compiling the public record from these hearings, including the taping and transcription of the testimony, because the public record becomes part of the eventual court submissions. While we are always striving to limit funding requests and to share expenses with DLS, we need to work with you to secure a budget for these efforts.

V. Other Roles of MDP

In addition to staffing the Governor and Committee, MDP duties are as follows:

- Compile election data obtained from the State Administrative Board of Election Laws (SABEL) and local Boards of Supervisors of Elections, including voter registration, voter turnout and election results compiled by precinct for primary and general elections for President, U.S. Senate, Congress, State Senate and House of Delegates so that the redistricting software links to the precinct level polygons used in redistricting.
- Preparing, using our GIS staff, all of the Congressional and State redistricting plans, requested by the Governor, the advisory commit-

tee, and the publically submitted plans. These plans must be composed of districts and subdistricts (2000 maximum allowable) using a seamless statewide map and assigning any combination of contiguous counties, election districts, voting districts (precincts) or census tabulation blocks to a district/subdistrict.

- Analyze the census data, in conjunction with the redistricting consultant, to determine the majority minority districts that may need to be created as required by the US Constitution and the Voting Rights Act and the Maryland Constitutional requirements.
- Design and develop redistricting website that will inform the public of the activities of the advisory committee, display plans being considered by the committee and submitted to the Governor, allow public to submit comments to the advisory committee.
- Procure the software needed to create the redistricting plan.
- Work with others in the Administration to develop a redistricting plan that is defensible, is based on the data and analysis, and achieves the Governor's objectives.
- Handle inquires on the activities of the Committee.
- Assist the Attorney General's Office in preparing for a court challenge.

VI. Budget Requests

Historically, it has been MDP's budget that has housed the funds necessary to carry out redistricting, including the consultant. DLS will have the staff and funds to perform their activities for the General Assembly and for the Committee. However, if DLS is ul-

timately providing all of the redistricting funds and services and the Administration funds none of these activities, such as engaging the consultant, it may affect the ability of the Governor to adequately formulate his plan.

MDP's budget requests have been consistent with the submission of resources allocated in FY 2001. One of the primary factors in requesting some of the equipment, such as computers and plotters for the maps, is security. Obviously, given the extremely sensitive nature of the maps that we will be producing, we need to have dedicated computers and plotters in Baltimore and Annapolis that are only accessible to our redistricting staff.

MDP's over-the-target budget request for FY 2011 was $472,000 and it was not funded. This request consisted of the follow:

- Contractual database to hold election data;
- Contractual planner for redistricting technical assistance;
- Contractual PIO to handle public hearings and public inquiries (6 months)
- Interns for public hearings;
- Equipment—laptops and plotters and map reproduction;
- Redistricting software and training for software;
- Website upgrades for plan publication;
- Public hearing expenses including publication of notices, room fees, audio visual equipment, travel, and stenographer for hearing transcripts; and
- Expert/consultant to advise Governor/Committee (consultant also becomes expert witness in court challenge; this component represents $250,000 of the request.

VII. Preliminary Trends and Issues

Until we see the actual census data, it is difficult to predict exactly what the State will be facing in terms of redistricting. However, here are some potential issues we are likely to face:

- *Creation of a majority minority Hispanic district in Montgomery or Prince George's Counties.* In the last redistricting the Hispanic population numbers did not require the creation of such a district. Whether a district must be created will depend in large part on whether the minority group is likely to result in a compact district. In these two countries, the Hispanic community is fairly dispersed which may cause difficulty in creating a district that would withstand a "compactness" legal challenge.
- *Loss of a district in Baltimore City.* If the census data show continued loss of population in Baltimore City, either the City loses a district or one of those districts will need to cross the City lines into Baltimore or Anne Arundel counties. The crossing of the district into a county raises significant legal issues in light of the Court of Appeals' decision in 2002 that the cross City/county districts violated the Maryland Constitution's mandate that "due regard" be given to political boundaries. While Governor Schaefer's 1991 plan did cross the City line, this 2002 decision raises the legal bar in doing it again.
- *New legislation regarding how the prison population is counted.* Ultimately this will help Baltimore City and somewhat affect the lower Eastern Shore and Western Maryland (i.e. Somerset, Allegany and Washington counties). Senate Bill 400 requires incarcerated individu-

als be counted as residents of their last known address before being incarcerated. This means that a prisoner from Baltimore City housed in Hagerstown will be counted in Baltimore City rather than Washington County. MDP is currently working with DPSCS to get the prisoner address database to implement this new law. We are also requesting the same prisoner database from the federal prison in Cumberland since this law also applies to prisoners from Maryland in the federal prison.

- *Congressional Reapportionment.* Maryland's population has not grown enough to result in an additional congressional seat, nor has it lost population to lose a seat.
- *Changes in mapping software.* Some of the redistricting software out there now (currently it is changing every few months as the companies firm up their final versions in time for the redistricting work to begin) not only pushes draft maps out to the web for review and comment, others allow on line submittal of draft plans, and some even allow users to create plans on line and submit them. This may be in keeping with the Governor's priorities of providing online maps for Marylanders to review and use; however, it will potentially generate a huge number of draft submittals with limited backing.

VIII. **Next Steps**

We will schedule a meeting with Matt, John, and Joe to discuss these issues and outline next steps for the Administration.

Q. So you could—so going back to my—where I started my line of questioning, if you're a mapmaker and you're coming out of—drawing the Sixth Congressional District, coming out of the panhandle of Maryland, you can either go south along the Potomac to an area where you describe in your book liberalism is a given, or you can go east along the Mason-Dixon Line. Those are your two basic options, correct?

A. Right. And over the—well, there's been a—remember, up until 1964 it always went south. So when you—it was only in 1966 did it go further east, and then, based on population pressures and changes over the last five census, there have been [121] adjustments on that eastern boundary line, you know.

Q. So for the last 50 years the way the mapmakers did this was they went east more than they went south, correct?

A. Well, they also went south—

Q. Correct.

A. —during that time.

Q. But they picked up areas in the east like Carroll County—

A. Correct.

Q. —and other areas along the Mason-Dixon Line when they were drawing the Sixth Congressional District.

A. Correct. That's been done in some of the decades. It's all spelled out in the maps here.

Q. Right. Right. But that's traditionally the way it's been done from 1966 until 2011 was that Carroll—

A. Being a real traditionalist, I don't like the word traditional because historical that's not accurate.

Q. Okay. From 1966 to 2011, isn't it the [122] case that all of Carroll County was included in the Sixth Congressional District?

A. Since '66, correct, until 2000—

Q. '11.

A. Right.

Q. Is that right?

A. Correct.

Q. Okay. And from 1966 until 2011 all of Frederick County was also part of the Sixth Congressional District.

A. Correct.

Q. In fact you'd actually have to go back to—let me find one—to 1840 to find—

A. Yeah.

Q. —a congressional map—

A. And that was—those early 19th centuries were strange because we actually had a two-member district, which then the Congress outlawed—

Q. Right.

A. —so it put different pressures. But Frederick and Carroll and Montgomery—Frederick, Carroll and Montgomery were together in 1840, a [123] portion of Carroll was together. That's what that little note says on the map that you have your finger on.

Q. Right. Exactly.

A. Because Carroll was—actually came out of part of Baltimore County and part of Frederick County.

Q. Right. So just to make sure because I think we stepped on each other in talking.

A. That's fine.

Q. That's okay.

A. No, I love some of your analysis. I like it. It's great.

Q. Thank you. I try.

It's correct, right, that from 1840 onwards, 1840 until 2011, Frederick County was always in the same congressional district.

A. Correct.

Q. Okay.

A. Ever since that split that was caused, again, by apportionment decisions made at the federal level and creation of a new district. [124]

Q. Right. Okay. Let's turn back to your book, page 16.

A. I like this paper too.

Q. Thank you. Are you with me there on page 16?

A. Yeah.

Q. You have a section there called "Two Marylands," right, and you state, politically, quote:

Politically there are two Marylands today. Democratic Maryland is multiracial and multiethnic and spans all socioeconomic classes. This Maryland straddles the I-95 corridor that transects the most heavily populated and racially integrated sections and connects the Baltimore and Washington metropolitan areas.

Did I read that correctly?

A. Correct.

Q. Okay. And then you go on in the next paragraph to state, quote: [125]

Republican Maryland is predominantly rural or suburban, predominantly white, and increasingly conservative. Much of the Maryland Tidewater and Western Maryland counties now fall within this

category in statewide elections. In Central Maryland, Carroll County and Harford County are virtual citadels of Republican strength in county, state and federal elections.

Did I read that correctly?

A. That's correct.

Q. Okay. So to go back to this fundamental decision that a mapmaker has to make, if they go south, they go into an area that you describe in your book as an area where liberalism is a given. If they go east, they're going into Carroll and Harford counties into an area where you state is a citadel of Republican voters, correct?

A. That's correct. There's one complicating factor to your thesis, however, and that's Frederick. [126]

Q. Right.

A. Because Frederick has moderated over the last 20 years, and since this book has been written, you know, Frederick elected—has elected Democratic members of the General Assembly, elected a Democratic woman county exec. The marginal differences between Democratic vote performance have changed over the last decade or so.

And so Frederick's—that corridor that runs from Rockville to Frederick votes—Frederick is voting a lot more—Frederick City, in that environs, are voting a lot more like northern Montgomery votes.

So Frederick interrupts that scenario that you describe and query whether or not Frederick is becoming part of the core. And you see an expansion of that on the southern side of Maryland too with Charles County and Northern Anne Arundel County changing their patterns and behavior. So maps change all the time—

Q. Sure.

A. —and—but what you stated is correct, [127] except that you've got this big Frederick node in the middle that kind of interrupts that, that analysis that you—that you posited.

Q. Let's talk about the Frederick node then.

(Exhibit 168 marked for identification.)

Q. So I've put in front of what you we've marked as Exhibit 168 to your deposition. It's another portion of Professional McDonald's opening report.

A. Right. It's in color. I saw it in black and white.

Q. Oh, okay. So the version you saw—

A. The version I saw—

Q. —previously was in black and white.

A. I have it maybe on an electronic version in color.

Q. Okay. So I want to focus on page 22 first. This is a depiction in Professor McDonald's report showing the Frederick County and Frederick City area as it relates to the lines of the Sixth Congressional District and the Eighth Congressional [128] District, correct?

A. Correct.

Q. And as you noted, Frederick City sort of has a cut-out going around it. That Frederick City is in the Sixth Congressional District, correct?

A. Correct.

Q. While suburban areas around Frederick City such as Walkersville are in the Eighth Congressional District, correct?

A. Correct.

Q. All right. Flip to the next page, page 23. Page 23 shows a zoomed-in area around Frederick City this

time with the Democratic registration share in a two-party vote, correct?

A. Correct.

Q. And if you look at the areas that were in this Frederick City cutout that are in the Sixth Congressional District, those have Democratic registration share in many areas of 50% or greater, correct?

A. Correct.

Q. And is that what you meant earlier when [129] you said—when you look at the performance of Frederick City, it's starting to look like the performance of Rockville and other areas; is that what you were getting at?

A. Yes. Yeah. In other words, you just can't say Frederick is this. No. Frederick is becoming, as a county, is becoming a very competitive area, and you see that in all kinds of levels of results.

And the other thing that you got—I think you should be careful about when you look at these VTTs, these precinct lines here is to look at the municipal boundary lines, because the Frederick—this probably—I don't know if it tracks exactly, but I would want to look at where the municipal boundary lines are, and it may be that they included—

Q. So the city of Frederick on this map is represented by a dark green line.

A. Okay. So it looks like they included—not quite—maybe one—one precinct on this east side I see maybe outside the District, right... [130]

Q. Right. That's correct.

A. But the majority of Frederick City is in here. Okay.

Q. Right. So can you explain to me why specifically the GRAC in 2011 decided to put the Democratic-

leaning areas of Frederick City into the Sixth Congressional District but kept Republican-leaning suburbs, like Walkersville, out of the Sixth Congressional District?

A. Well, again—

MS. KATZ: Objection.

A. I don't know what's in anybody's mind, but attaching the city of Frederick would—in its entirety—would be consistent with what the practice had been particularly at the—when you do state legislative lines, you know, we try to keep municipalities—incorporated municipalities intact which are different in places—and the other pressure on the exact nature of this line is going to be population-based pressure to try to achieve population equality.

And so if you have to borrow—try to get to [131] the number, you have a couple options. You either trade precincts back and forth along the line of a boundary to get to population equality, or you have to split a precinct, but splitting a precinct, you try to avoid splitting a precinct, but if you have to split it to get—you could. The local governments and everybody likes if you can avoid splitting precincts. And so you get swaps with the VTDs going on.

* * *

[174] * * *

Q. Understood.

A. Because the way, historically, all the 50 years that I'm aware of that this process goes on, the Congressman tend to caucus and tend to then endeavor tc come upon some consensus to present to the Governor, you know, what their ideas are. And so there weren't any Congressmen present, you know.

Q. Okay.

A. And there may have been conversations or communications between Hoyer's staff saying, here, we've set this meeting up for you and here's the place to go and here's who to call and contact. And so it was not an unfamiliar—

Q. Sure.

A. —thing for me.

* * *

Q. Right. So you could see, as you were making changes to this map on the wall, changes in Democratic performance—

A. Correct.

Q. —as you made differences—different changes to it.

A. Correct.

Q. And as you were making changes to the map, were the changes—

A. And you could see—I don't—I'd have to look again to see what they put into their performance index because I—

Q. I think that's sort of a state secret there, right? How they weight it I guess is, right?

A. Yeah.

Q. Right.

A. It's ...

Q. Because Democratic performance is a proprietary number that NCEC Services has, correct? [180]

A. Well, I don't know how they handle it. I mean, you know, most people generate something like that, that inputs results from a level—a variety of different races, and they come up with a number whatever way they do it.

Q. Sure. I know there's a lot of consultants out there who have different measurements—

A. Right.

Q. —but DPI is the NCEC Services one.

A. Correct. Right.

Q. And—

A. So whatever it was they were using in 2011, 2010.

Q. Right. So if I see someone talking about DPI, they're talking about something they got from NCEC Services, right?

A. Right.

Q. Is that right?

A. Correct.

Q. Okay. And if I saw someone talking about Democratic performance, that would be data information from NCEC Services as well, correct? [181]

MS. KATZ: Objection.

A. Maybe.

Q. Okay. It could be; is that right?

A. (Nodding head up and down.)

Q. Okay. I'm sorry. She can't take down shakes of the head. Is that a yes that it could be data from NCEC Services?

A. It could be.

Q. Okay. So let's get back to the map on the wall. So you were saying that, as there were changes being made to the map, you could see changes in the demographic information and in Democratic performance, correct?

A. Correct.

Q. And as you were making the changes, were those changes designed to increase or decrease Democratic performance?

A. They were designed to increase performance that would assist Congressman Kratovil –

Q. Okay. Understood.

A. —which is not necessarily the same because Congressman—every—every political [182] person has their own basis of support, and Congressman Kratovil grew up in Prince George's County, his, you know, family is from there, so some places were more familiar to him than others, you know. I think he went to Dematha too.

Q. Now we're getting into basketball talk. We can talk about this afterwards.

A. No, Frank was a soccer player.

Q. All right.

A. Yeah. So you look at that, but that's not always, you know, because it depends on your own career. And Frank was a prosecutor in Prince George's County, so he had his own basis of support, and being a former prosecutor in Queen Anne's County he had relationships.

* * *

Q. You can put that aside.

So you said historically what's happened is that the Democratic members of the House in Maryland would get together and come to a consensus, and however they would do that—[186]

A. Endeavor to come to a consensus.

Q. Endeavor to come to a consensus. Well put. And then that consensus and whatever—however close they have gotten to it will be somehow shared with state legislators, correct?

A. Well, the governor—both, probably legislators and the governor.

Q. Okay.

A. And in years past Republican members of Congress as well would convey their perspective to their leadership in the state legislature and to the governor—

Q. Right.

A. —so—

Q. That's the way it's always historically been done, correct?

A. Right.

Q. The process starts with the members of Congress, and then it flows to the governor and legislators, correct?

A. Right. Correct.

Q. And do you have any reason to doubt that [187] that's how it worked in 2011 based on how you were seeing it?

A. No, I would—that's—some of them have been there since reapportionment started, so ....

Q. So they have always been doing it that way.

A. I mean, they've been there—not reapportionment—since the—since the reapportionment decisions.

Q. Since the—since One Person, One Vote.

A. Steny has been there for every—every one.

Q. Okay.

A. Not in Congress. He was in the legislature in '70.

Q. So that's just kind of how it's been done in Maryland, correct?

A. Correct.

Q. Okay.

A. That doesn't mean that the governor always listens to the Congressmen—

Q. Sure. [188]

A. —or the legislators always follow every suggestion and every neighborhood, every precinct, whatever, but, you know, I would say there is, you know, there is—that communication line has always been there.

Q. And it's an important communication line.

A. Absolutely.

Q. And in your experience do governors and legislators try to do their best to respect the wishes of the—of the congressional delegation in redistricting?

A. For the last—since 1980, yes.

Q. Do you believe that Democrats should attempt to maximize the number of Democrats elected to the U.S. House of Representatives?

A. No.

Q. Why not?

A. I—I think that the—I think there are many factors drawing lines, and—well, communities of interest, corridors, municipalities, county lines, demographic groups.

You know, there's a lot of factors that enter into—

Q. So I wasn't talking about drawing lines yet. I was just talking about do you think that Democrats should try and get as many [14] Democrats as possible into the—

A. No.

Q. —U.S. House?

A. No, no.

Q. Okay. Do you believe that state legislatures should draw congressional lines in a way that maximizes the number of Democratic representatives in the U.S. House of Representatives?

A. I think that state legislators should draw the lines fairly, reflecting both parties.

Q. When you say reflecting both parties, can you explain what you mean there?

A. Reflecting both parties, but mostly reflecting the—like I told you, the population, the communities of interest, the counties, the exact number of people in districts.

You know, it's—you know, for example, Southern Maryland should have representation, the Washington metropolitan area should have representa-

tion, Western Maryland should have representation. [15]

You know, those are important regardless of party.

Q. After the 2010 Census, did you personally want to maximize the number of Democrats elected to the U.S. House of Representatives from Maryland?

A. No.

Q. And is that because of the factors that you stated earlier?

A. I'm old school. I would believe the parties work together.

Q. Uh-hmm.

A. It's been stated in the papers that—publicly—that I'm not afraid of hiring—I've been drawing lines because I think he'd be a fair person. He's a nice Republican.

Q. As you define the term, was Maryland's 2011 congressional map the result of a partisan gerrymander?

A. No.

MR. FROSH: Objection.

THE WITNESS: No. [16]

BY MR. MEDLOCK:

Q. Why not?

A. I was there for the hearings, and I saw the maps, saw the areas that made sense, and the only areas that I was really concerned about, because they were my areas that I'm familiar with, was the area going from St. Mary's County on up to Cumberland.

I'm a product of the Washington metropolitan area. I know the area well. I know—my wife's from

Bethesda, I'm from Southern Maryland. I know both areas very well.

Q. Uh-hmm.

A. I'm very familiar with Western Maryland and Southern Maryland, and I was concerned particularly with those areas.

Q. What was your concern particularly with Western Maryland?

A. Well, 1962, I was the driver for the Republican candidate for governor, and we traveled all through Western Maryland: Frederick, Hagerstown, Cumberland. I enjoyed my stays there. [17]

And like I say, my wife is from Bethesda, and we traveled extensively in that area. We dated for almost five years. And I belong to the Congressional Country Club in northern Montgomery County, and I'm very familiar with those areas.

Q. What specifically concerned you regarding Western Maryland during the 2011 redistricting process?

A. Like I told you before, in 1962, Montgomery County was in the 6th Congressional District.

Q. Uh-hmm.

A. I was part of it, help elected people in that district. I'm familiar with the areas. And when I saw a map that looked like the area that I was mostly familiar with in 1962, I like that—like that area. Not for Democrats or Republicans, but it just made sense. It made sense.

Gilbert Gude used to be the congressman, and he used to walk the Potomac River [18] from—from the top of the District all the way to south.

Mac Mathias, I visited his home in Frederick, had my picture taken with Eisenhower and him, front page of the Baltimore Sun. That was part of that

district, and the district made sense then, it makes sense now.

Q. Why does it make sense to you now?

A. When you look at a map, you see the 270 Corridor is protected, the Potomac River area is protected—is together, just like you see in the southern part of the state. St. Mary's, Charles, Calvert, Prince George's, they're all together. It's traditionally been Southern Maryland.

And, for example, when I first started in the House of Delegates, the Montgomery County Caucus would caucus with Western Maryland group. Montgomery County—most of the Montgomery County delegates were Republicans at that time.

Q. Uh-hmm. And you first started in the legislature in what year? [19]

A. '67.

Q. Has Montgomery County changed at all since 1967?

A. Yes.

Q. Has Western Maryland changed since 1967?

A. The whole state has.

Q. You mentioned the I-270 Corridor.

A. Right.

Q. Do you recall that?

Did you review any data concerning commuting patterns on I-270 before you voted on the proposed congressional map in 2011?

A. I drive it every second week or so. I spoke to the people in Frederick last week. I was in traffic over an hour on 270, plus. Plus I'm familiar with economic development part of the state.

My job is to bring jobs to the state and improve economic development, and I-270 is very important to link areas that need economic development with the Washington metropolitan area, [20] where we get most of our jobs from.

Q. So I guess my question was did you review any data concerning commuting patterns on Interstate 270—

A. No, no.

Q. —prior to voting on the congressional map?

A. No, no.

Q. Was any data concerning commuting patterns on Interstate 270 made available before you voted on the 2011 congressional map?

MR. FROSH: Objection.

THE WITNESS: It might have been. I don't remember it.

BY MR. MEDLOCK:

Q. Do you recall asking for any such data?

A. No.

Q. Was that—

A. I knew—I knew—I just know the area. I don't go to Congressional Country Club because it's too—too—too far to travel and [21] too expensive once you get there.

Q. I was going to add the second part.

That's key. Besides driving on I-270, did you look at any data or demographic information to satisfy yourself that there was some sort of link between Montgomery County and Frederick County based on the I-270 Corridor?

A. I'm sure there was data available. I don't remember it.

Q. Do you recall looking at it?

A. I recall looking at every piece of data that was in front of us, including information from the State Planning Commission, but I don't remember what that data was at this present time.

Q. So you can't recall whether there was data made available to you regarding any link between Montgomery County and Frederick County based on the I-270 Corridor?

MR. FROSH: Objection. It's compound and complex. [22]

THE WITNESS: I don't recall.

* * *

Q. Okay. And when you say that you're sure it was from the Governor's Office—

A. I'm talking about the final map. The final map, I mean, just like you—this is the Governor's planning. The Governor's in charge of the congressional plan. Just like you said Glendening had something on his desk to help him, I'm sure that Governor O'Malley had people in his office helping him.

Q. Uh-hmm.

A. His—see—

MR. FROSH: Let him ask a question.

THE WITNESS: Okay. All right.

BY MR. MEDLOCK:

Q. So do you know with any certainty, besides saying that you're sure that someone in the Governor's Office drew that map, who [82] specifically drew that map?

A. Well, I said it's a compilation. So, for example, the congressional people would have had input to this. The Governor's job is to mediate among the con-

gressional people to try to listen to their concerns, who wants College Park, who wants Fort Meade, you know, who feels best representing areas.

Q. Uh-hmm.

A. Plus, you take into consideration all the testimony that the public puts in. You know, what do they need and what do they feel best?

Q. Uh-hmm.

A. You hear from both parties, and you make a decision after hearing all the evidence, all the communications, and it's a combination of voices that brings you to the final map.

Q. I see. You said that congressional people would have had input on this map. What makes you say they would have had input on the map?

A. They've always had input on the map.

* * *

[97] * * *

Q. Do you agree that the redistricting process itself is inherently political?

A. I have no idea.

Q. From your experience on the—in the redistricting process, do you believe it's—

A. Like I told you, it's drawn—it primarily was drawn by the congressional people, so in that sense, it will be political.

Q. Okay, understood.

* * *

Q. Okay. Do you recall receiving demographic information about draft congressional plans?

A. No, I don't remember, but I'm sure—

I'm sure everything we did involved demographics.

Q. Okay. Do you recall whether your [116] staff received demographic information?

A. I'm sure the committee did, but—I'm sure the GRAC committee got it.

Q. Okay. Do you have any reason to doubt that the GRAC received this document?

A. This document?

Q. Yes, this page.

A. I doubt it. This is from AFL-CIO.

Q. Sir, I'm looking at the last page, sir, and they're not necessarily attachments.

A. It's not?

Q. No.

A. This doesn't go with this?

Q. So if you look at the prior page, do you see any reference to an attachment?

A. I don't know. I don't know. I just assume it came together. I don't know.

Q. Okay. Assume for the moment they don't come together.

A. Okay.

Q. Do you have any reason to doubt that the GRAC received this sort of demographic [117] information regarding plans that were submitted to the GRAC?

A. I don't know.

MR. FROSH: Objection.

THE WITNESS: I don't know.

BY MR. MEDLOCK:

Q. You don't know one way or the other?

A. I don't remember. It was six years ago. I don't remember.

Q. So the GRAC could have received this information, but you just don't recall?

A. That's correct.

Q. Okay. And do you have any recollection of seeing documents in this format before?

A. I'm sure I have at some point in time.

* * *

Q. Uh-hmm. And how long did he work for you, do you recall?

A. Several years.

Q. Okay. Do you know what role Mr. Bryce played in the 2011 congressional redistricting process?

A. I don't.

Q. Okay. Did you ever talk to Mr. Bryce regarding the 2011 congressional—

A. I'm sure I did.

Q. Do you recall any specifics of those [137] conversations?

A. No.

Q. Do you recall Mr. Weissman holding meetings in your office to look at draft congressional maps?

A. I don't.

Q. Do you recall Mr. Baker ever holding meetings like that in Speaker Busch's office?

A. I don't know.

Q. Do you recall Jeanne Hitchcock ever coming to your office to look at draft congressional maps?

A. I don't remember.

Q. Do you ever recall looking at draft congressional maps with Ms. Hitchcock outside of GRAC meetings?

A. I don't think so, but I don't remember.

* * *

Q. Okay. And do you think you speak with more credibility than the plaintiffs in this case regarding whether the 6th Congressional District was subject to a partisan gerrymandering?

MR. FROSH: Objection. It's vague and ambiguous.

THE WITNESS: I don't know who the plaintiff is.

BY MR. MEDLOCK:

Q. Do you know who any of them are?

A. Who?

Q. Do you know who any of the plaintiffs are in this case?

A. No.

Q. Do you know who O. John Benisek is?

A. No.

Q. Do you know where he lives? [189]

A. No.

Q. Do you know who Ned Cueman is?

A. No.

Q. Do you know where he lives?

A. No.

Q. Do you know what John Benisek's political views are?

A. No.

Q. Do you know what Ned Cueman's political views are?

A. No.

Q. How about Sharon Strine, do you know her?

A. No.

Q. Do you know what her political views are?

A. No.

Q. Do you know whether any of them were harmed in this case?

A. I don't know them.

Q. Okay. Do you think it's—their political views are at all relevant? [190]

A. I think everybody's political views are relevant.

Deposition of William Cooper

Q. Did you ask to see any documents before you were retained?

A. No, because it was my understanding at the time that my role was simply to produce an 8-0 Plan.

Q. Can you explain to me how producing an 8-0 Plan is relevant to the plaintiffs' legal claims in this case?

A. No. I'm not a lawyer.

Q. Can you explain to me how producing an 8-0 [17] Plan is at all relevant in this case?

A. Well, because my knowledge of the case is very limited, frankly, I cannot other than clearly it would show that a more partisan plan could have been drawn quite easily, assuming this plan is partisan, which I really can't claim one way or the other given my limited role.

Q. How does being able to draw an 8-0 Plan shed any light on the claims at issue in this case?

A. I don't know.

* * *

Q. Am I correct that your expert report contains no analysis of whether the 2011 congressional map in Maryland was drawn with a specific intent to impose a burden on a particular group of voters?

A. It does not. That was not my task.

Q. Then am I also correct that your expert report contains no analysis of whether the 2011 congressional map in Maryland was the product of partisan gerrymandering?

A. It does not.

Q. Isn't it true that your expert report contains no analysis of whether the individuals that drew the

2011 Maryland congressional map took into [29] account data reflecting Maryland citizens' voting history?

A. I do not know that.

Q. And you didn't perform that sort of analysis in your report; is that correct?

A. The adopted plan?

Q. Yes.

A. No, I did not.

Q. And for the adopted plan—

A. Well, I mean, I did in a sense because I started with the adopted plan as I was developing the 8-0 Plan. I did have information about the democratic vote in 2008 election by congressional district. That was the extent of.

Q. Well, do you know whether the individuals at—do you have any opinion as to whether the individuals that drafted the 2011 adopted congressional plan took into account data reflecting voters' voting history?

A. I do not know.

Q. Do you have any opinion on whether the individuals that drew the 2011 adopted congressional [30] map took into account data reflecting party affiliation?

A. I do not know.

Q. Am I correct that your expert report contains no analysis of whether the Maryland legislature's mapmakers were motivated by a specific intent to burden supporters with a particular political party?

A. It does not. I was not asked to do that.

Q. Isn't it true that your expert report contains no analysis of vote dilution?

A. It does not, although I was careful to maintain two majority African-American congressional districts as I drew the 8-0 Plan.

Q. You express no opinions in your report regarding vote dilution with respect to the adopted congressional map, correct?

A. I do not.

Q. Did you do any analysis to determine whether Maryland's 2011 congressional map was consistent with historical congressional district lines? [31]

A. Not within the context of my report, no.

Q. When you say not within the context of your report, you're referencing the fact that outside the context of your report you looked at the 1972 map?

A. I looked at the 1972 map and I also looked at—it was a difficult map to really see on the website of the State, but it also showed the 1990 map, and I think in both instances Congressional District Six did not extend all the way across the state.

Q. Do you know in those two instances how far Congressional District Six extended into Montgomery County?

A. In the '70s I don't think it extended into—I don't think it extended into Montgomery County, but it did extend into Howard County.

Q. How about in the 1990 map?

A. I don't recall. I don't believe it did, though.

Q. As someone who is experienced consulting in redistricting litigation and consulting for [32] localities in redistricting matters, how often do you take into account the way the district, congressional district lines looked in the 1790s?

A. 1790s?

Q. Yes.

A. I—well, I don't ever recall looking at a plan going all the way back to the 1790s.

Q. Okay. In your professional experience how often do you look at a plan going back to the 1800s?

A. Probably never. I primarily rely on plans that go back no more than 30 years to the '70s or '80s.

Q. Okay. How often—

A. I think I did look at plans—I'm involved in a lawsuit working on behalf of the Navajo Nation in Utah, and in that instance I think I did look at districts that go back to the 1950s for the county board of commissioners.

Q. Okay. Outside of this one instance where you were consulting for the Navajo Nation, can you think of any other instance where you have gone back to look at maps as they existed before the One [33] Person, One Vote standard was adopted by the Supreme Court?

A. May have in Mississippi, for example—

Q. Okay.

A. —in some localities there, but it would be rare to go that far back in time.

Q. Why would it be rare?

A. Because it was a long time ago.

Q. Okay. And in congressional redistricting cases can you think of any instance where you've ever looked back at maps, congressional maps, as they existed before the One Person, One Vote standard as part of your work?

A. Well, first, let me stress that I focus primarily on local redistricting.

Q. Sure.

A. I've only been involved in maybe three congressional redistricting cases in my life. One of those was in the 2000s in Mississippi, and I don't think I went back past 1990 congressional plan there.

The other was just a brief declaration I filed in Miller v. Johnson in Georgia in the 1990s. And I [34] was also involved in Fletcher v. Lamone here in Maryland in 2011. And in that case I also played a very limited role, so I did not look at historical congressional districts.

Q. Okay. And so this is only your fourth congressional redistricting case that you've been involved with; is that correct?

A. In terms of litigation, yes.

Q. Okay. In the course of your work in this case did you look at—did you consider any data regarding educational attainment in Maryland?

A. In this case I did not. I routinely do it in all Section 2 cases. I look at a wide range of data reflecting socioeconomic status for a given jurisdiction. So I have that information available. I mean, I can crank it out real fast. But in this case my role was so limited that I just didn't go to that extent.

Q. So you routinely, as part of your consulting work, do access sort of socioeconomic data; is that correct?

A. Yes. I have all that information [35] downloaded from the Census Bureau of American Community Survey site for the 2015 one-year survey and the 2011 to 2015 five-year survey. And I can batch produce 50-page reports showing socioeconomic status comparing African Americans, whites and Latinos, but, of course, those charts are produced

primarily for the Section 2 lawsuits I'm involved in.

Q. So you have that socioeconomic data at your fingertips, it sounds like; is that right?

A. Basically, yeah.

Q. And you could have looked at that socioeconomic data in this case, but you did not.

A. Well, again, I had a very limited task to perform, and that was to demonstrate that I could create eight congressional districts that had a partisan democratic majority.

Q. Do you believe that that socioeconomic data is in any way relevant or has any bearing on your work in this case?

A. It's background information. I'm from Virginia, so Maryland is not far in territory, so I've been around the state a little bit. So, I mean, [36] I know—I know a little bit without even going to the data.

Q. In drafting your proposed 8-0 congressional map, did you do any analysis of existing communities of interest?

A. I did not—I did not perform an analysis of existing communities of interest, no, in a formal framework.

Q. Sure. Did you do any analysis in an informal framework of existing communities of analysis—existing communities of interest in your 8-0 Map?

A. Well, I guess, informally I noticed that in the adopted plan, as you know, in the 2000s adopted plan, District One extended into Annapolis and Anne Arundel County, crossing the 301 bridge. And in the 2011 plan that part of District One was removed.

So I was aware that, you know, Annapolis is really different from the Eastern Shore in some ways, even though they both border on the Chesapeake. So I understood perhaps the rationale as to why Annapolis [37] was removed from District One.

Q. Beyond this rationale that you've described for removing Annapolis from the First Congressional District in the adopted plan, did you do any other informal analysis of communities of interest when drafting your 8-0 Plan?

A. No, because it truly is a draft. It's not intended to be set in stone, and I suppose I could be requested to produce another one. These plans are not hard to do, and I could look further into existing communities of interest, if need be.

Q. Have you been asked to do that?

A. No, I have not.

Q. Did you do any formal Voting Rights Act analysis like you would do in Section 2 litigation regarding the 8-0 Map that you drafted?

A. Well, I'm a—I'm a Gingles 1 person. I don't—I'm not a political scientist, so I typically—I never actually try to determine what is an effective district and what is not an effective district, and how a minority group might perform given certain percentages. [38]

But I am cognizant of the fact that there have been for the past 30 years almost two majority black districts in Maryland, and I'm also aware that there's a significant Latino population in Maryland.

So it's clear to me that, given that reality, there would be no need to have districts that are much higher than around 50% black voting age majority,

if that high. Given yesterday's Supreme Court ruling in North Carolina, I suspect that in Maryland one could reduce the black VAT in those districts into the 40s and still have districts that perform.

Q. Did you perform any analysis—actually let me back up. When drafting your 8-0 Map, did you consider any measurement of compactness?

A. I did look at compactness scores for that plan.

Q. Where are those scores reported in your expert declaration?

A. They are not reported.

Q. Why did you not include them in your expert declaration? [39]

A. I wasn't really asked to.

Q. Okay.

A. But my assessment upon—upon running the compactness scores for the 8-0 Plan is that they are within the norm of congressional districts nationwide.

Q. Can you tell me what the—what compactness measurement you used?

A. I looked at Reock and Polsby-Popper scores.

Q. And what were—can you tell me what those scores were?

A. Don't have them memorized.

Q. Okay. So as you sit here today you can't actually tell me what the exact compactness scores were?

A. No, but all the plans scored—all the districts scored above .20 Reock, and I think maybe the lowest Polsby-Popper score was somewhere in the low teens for maybe District Two or Three. I don't recall. It's been a month.

Q. And for the ease of the court reporter, [40] could you spell the two measurements that you're using?

A. R-E-O-C-K, Reock, in the USA, and Polsby-Popper, P-O-L-S-B-Y dash P-O-P-P-E-R.

Q. Okay. Thank you. All right. You have your declaration in front of you still? Okay.

I'm on the first page. There's a—at the very top there's a reference to O. John Benisek, and he's a plaintiff; is that right?

A. Surely he is.

Q. Okay. How many other plaintiffs are there in this case?

A. I do not know.

Q. Can you name any other plaintiffs in this case?

A. I cannot name any other plaintiffs.

That's not that unusual, though.

Q. Okay. All right. Let's turn to page—I'm sorry—Section 5 of your report, which is on page 5 as well. In that section you state that populations shifted from Congressional District Six to Congressional District One under the adopted 2011 [41] plan; is that right?

A. Right.

Q. Did you do any analysis of why that population shift from Congressional District Six to Congressional District One occurred?

A. No. I just know it happened.

Q. So you simply compared the 2001 map with the 2011 map, and you were able to determine that part of Congressional District Six moved to Congressional District One; is that right?

A. That is correct. Again, this was a request that I received from the defendants' attorneys. It was not in the initial request from Alan Lichtman.

Q. Oh, okay. Anyone can go on the website—on the Maryland Department of Planning website—and compare the 2001 and 2011 maps, correct?

A. You can, at least from a hundred thousand feet. You can't take things down to the block or precinct level, I don't think, although it is a very good website in terms of the maps that they produce.

Q. Okay. So anyone can look at those two [42] maps and determine that part of Congressional District Six moved to Congressional District One, correct?

A. I think so. I believe there's sufficient detail.

Q. Okay. I mean, there's no—there's no real scientific analysis to it. You're just looking at the two maps; is that right?

A. Well, you're looking at the two maps and then looking at the underlying population data to calculate the number of people who were moved from one place to the other.

Q. Sure. But you don't even need to look at underlying population data to come to the conclusion that people—that there were people who were in Congressional District Six that were moved to Congressional District One, correct?

A. That's correct.

Q. And you don't need any sort of scientific background to come to that conclusion.

A. No. You have to understand how to use GIS software, presumably, to arrive at a calculated [43] bottom line total.

Q. Sure.

A. But, yes, you can see that people in Cecil and Harford Counties that were previously in District Six are no longer in District Six.

Q. So let's look at—

A. Previously meaning in the 2000 plan.

Q. Sure. Let's look at paragraph 18 of your report, which is on the next page.

In paragraph 18 you state—and I'm on the second sentence—"to compensate for this population loss, 106,562 persons in Harford, Baltimore and Carroll Counties were shifted from CD 6 under the 2002 plan into CD 1 under the 2011 plan."

Did I read that correctly?

A. Right. And I think I just misspoke when I said Cecil County. I think it was in—

Q. Carroll?

A. It was in District One, in both the 2011 and the 2002 plan. It was Carroll County that was shifted out.

Q. Okay. Understood. Thank you for the [44] clarification.

Did you do any analysis to determine whether the boundaries of Congressional District Six were in fact redrawn due to changes made to Congressional District One?

A. I'm sorry. What was the question?

Q. Did you do any analysis to determine whether the changes made to Congressional District One necessarily meant that there had to be changes to Congressional District Six?

A. Well, I mean, it stands to reason that, if you remove 106,000 people from Congressional District

Six, additional population had to be picked up from somewhere.

Q. Did you do any analysis as to whether it was necessary to move over 300,000 people out of Congressional District Six as it existed in the 2001 plan?

A. No.

Q. Did you look at any documents to do any analysis of why the boundaries of Congressional District Six were actually redrawn? [45]

A. No. As I've stated repeatedly, I did not see any documents that had been produced for this case other than the two expert reply responses from last—that I saw from yesterday that were filed yesterday.

Q. So you can't say, as you sit here today, with any degree of scientific certainty why the boundaries of the Sixth Congressional District were actually redrawn the way they were in the 2011 adopted plan.

A. No. I don't—again, it would have—to have that information, of course, would mean going beyond the experts' report and probably doing as you suggested earlier today, going back and looking at the contemporaneous accounts from declarations and depositions, which some of the legislators and others may have filed in this case, or just public statements from—from public hearings at that time.

Q. Sure.

A. That would have gone way beyond the scope of my agreed task for this case, though.

Q. I understand. [46]

MR. MEDLOCK: Why don't we take a quick five-minute break.

VIDEO SPECIALIST: Going off the record at 10:22.

(Proceedings recessed.)

VIDEO SPECIALIST: Back on the record at 10:24.

BY MR. MEDLOCK:

Q. All right. I'd like to move to page 2 of your report, and I'm looking at paragraph 6 under "Purpose of Declaration." Can you let me know when you get there?

A. Page 2.

Q. Yep.

A. Oh, here we are.

Q. All right. So in paragraph 6 you state that the defendants' attorneys asked you to, quote, develop a hypothetical congressional map for Maryland so that all eight districts have a democratic majority without changing current CD 6 using information that was available in 2011.

Did I read that correctly? [47]

A. Yes. That was my summary of the request, right. I'm not quoting them directly.

Q. Sure. Sure. Understood. In performing that analysis, you were able to obtain voting history information from publicly available sources, correct?

A. That's right, but, as part of my initial discussion with Alan Lichtman—my memory has been jogged a little bit—and I mentioned to him that I had been involved in the Fletcher v. Lamone case and that I already had a database with the results of the 2008 presidential primary, and his assessment was that would be sufficient for the task that he and the attorneys were requesting that I perform.

Q. Okay. And where did you get the data from the 2008—did you say presidential primary or president general election?

A. Presidential general election.

Q. Okay. Where did you get the data regarding the 2008 presidential general election for that database?

A. It's the same dataset I used in Fletcher v. Lamone, and it came from the Harvard Election Data [48] Archive.

Q. Okay.

A. I am aware after reading Professor McDonald's report that there may be some errors in that database. I don't know that to be a fact, though, so I'll have to check on that.

Q. So have you done—

A. Not his report, his reply report I received last night.

Q. Sure. Since receiving that reply report, have you done any analysis to determine whether there are in fact errors regarding how certain precincts in Montgomery County are calculated?

A. I have not looked at the data.

Q. Do you plan to do so?

A. I may, if the attorneys want me to.

Q. Okay. So sitting here today you just don't know one way or the other whether the Harvard dataset is sufficiently correct regarding Montgomery County to support your opinions?

A. I'm going to make the bold assessment that it is sufficiently correct. If there are errors, [49] they may or may not have affected the figures prepared in my report, but I'm sure I could make adjustments to still have 8-0 for a hypothetical plan.

Q. Do you know how, if at all, those errors in the Harvard data would affect your current 8-0 Map?

A. No, because I don't know which precincts were involved. I mean, it could be that those errors, if they exist, actually result in the democratic percentage in Districts Two or—what is it—Eight—some of the other—some of the other congressional districts in Montgomery County. It could turn out that it reduces the democratic percentage. I don't know. I have to check it out.

Q. So you just simply don't know one way or the other as you sit here today how the error in the Harvard data affects any of your analysis.

A. I do not, although I have strong suspicion that it wouldn't change things very much or Dr. McDonald would have made a bigger issue of it.

Q. Okay. So besides the amount of rhetoric [50] that Dr. McDonald addresses to this point, you don't have any sense of the size of any error, if any, that could be caused by using the Harvard data.

A. Correct, but I still stand by my belief that, even if it's fairly significant, I could probably still get an 8-0 Plan in Maryland.

Q. So you had—I'd like to take you back for a second. You said you had 2008 presidential data that you had in a database; is that correct?

A. Yes. It's just downloaded off of the Internet from the Harvard Election Data Archive that is precinct-level data, at least in the case of Maryland for the 2008 presidential election. Some of the other state datasets may have registered voters or other political contests, so it varies from state to state.

Q. If you wanted to, could you have gotten additional voter—voter history information regarding other political contests in Maryland and put that into your database?

A. If I wanted to, I assume that I could have obtained general information, other information [51] perhaps from the State of Maryland.

Q. Okay. How about in the Harvard dataset? Does the Harvard dataset contain data regarding elections other than presidential elections?

A. You know, I don't recall. It is possible that there is information in there about congressional races in 2008, but I don't know for a fact. I've looked—I've used the Harvard datasets in other states, and they really vary, but Dr. Lichtman agreed that the presidential election of '08 would be the best proxy, so that's the one I used—the best partisan proxy.

Q. Why did you believe that the presidential election of '08 was the best partisan proxy?

A. Because this is an attempt to show what might have been drawn in 2011, and that would have been very current data—

Q. Okay.

A. —as opposed to the 2012 election, which had not yet taken place.

Q. Can you use past election data to make inferences about how future elections will turn out [52] in particular congressional districts?

A. Well, that's certainly the procedure that is often used. It may not always turn out to be the case. I think in this instance the presidential contest of '08 tracked the 2012 election results pretty closely.

Q. Okay. So using the presidential election data of '08 was—in this case—was actually a very good predictor of how congressional elections would turn out in the congressional districts that you drew; is that right?

A. I think—just eyeballing—not—not the congressional districts that I drew necessarily.

Q. Okay.

A. But looking at the presidential contests of 2008 and comparing that to how Democrats fared in the 2012 congressional contests, it's pretty close. I mean, it's obviously not going to be exact, but the result was that you had seven Democrats elected, and the percentages by which they were elected, you know, reasonably tracked the 2008 presidential contest.

Q. Okay. So the next step in your analysis, [53] as I understand your report, is you took this data regarding the 2008 presidential election from your dataset and then you input it into Maptitude; is that correct?

A. Right.

Q. And you used Maptitude for redistricting, is that the name of the software?

A. Yes.

Q. What version did you use?

A. I used the version that was released in the 2000s. I have the 2016 vanilla Maptitude that's not got the redistricting component, but rather than forking out $2,000 a year, I still use the older version for my redistricting work, and then for some components of my redistricting work, like geocoding or other kinds of analysis, I use the 2016 Maptitude.

Q. Okay. So you go back and forth between the two?

A. Yeah, constantly.

Q. Okay. So using Maptitude and the publicly available 2008 presidential election data, you were able to redraw the boundaries of Maryland's [54] con-

gressional districts in such a way that you would get an 8-0 Map, correct?

A. Right. While at the same time maintaining two majority black congressional districts, which, arguably, may not need to be majority black to perform, and if didn't need to be majority black to perform, one could, of course, create stronger democratic partisan districts, I believe.

I also, of course, as part and parcel of this little task, protected all incumbents. Had I not protected all incumbents, it would be easier to maintain a stronger Democratic majority in those same districts. Because three of the incumbents at the time lived within a three-mile radius of one another, and Representative Cummings was only about six miles down the road. So basically you had four—four incumbents living in a straight line making it a little more problematic to draw the districts.

Q. When you say—

A. If you're going to protect incumbents.

Q. Sure. Sorry. I didn't mean to step on you there. [55] When you say you protected all incumbents, were you protecting all Democratic incumbents or all incumbents generally in your answer?

A. All of them. I mean, there's no incumbent that's paired with another.

Q. Okay. How were you protecting Republican incumbent Roscoe Bartlett in your 8-0 Map?

A. Well, he's in a Democratic majority district, but certainly he could run in that district and not—not impossible to think that he could have prevailed. Perhaps if he changed his policies, I don't know, but certainly didn't have to run against another

Republican or another Democrat. He would have been the incumbent in that district.

Q. I see.

A. And I didn't change District Six anyway. That was not my charge. Well, that was my charge not to change District Six, but to take the other seven districts and draw it.

Q. Right. So Congressional District One, Andy Harris's district, when you say you protected him as an incumbent, you didn't—what you mean by [56] that is you didn't pair him with another incumbent.

A. That's right.

Q. Okay. Do you know whether the individuals that were responsible for drawing Maryland's 2011 congressional map had a copy of Maptitude?

A. I do not know.

Q. Do you know whether the individuals that were responsible for drawing Maryland's 2011 congressional map had access to voter history data?

A. I don't know.

Q. Do you know whether they had access to party affiliation data?

A. I don't know. It would not surprise me if the answer to all three of those is yes, but I really don't know.

Q. Why wouldn't it surprise you?

A. Well, most legislatures have information available about voter history, as they're developing voting plans, and I'm sure well over half have copies of Maptitude.

Q. So—

A. But I don't know, again, I don't know the [57] facts in this instance.

Q. Sure. Let's move to actually looking at your map. So I am on the first page of your map that looks like this. It says 8-0 Plan 4-17-17 draft. It should be right after one of the blue dividers.

A. Got it.

Q. Are you with me?

A. Right.

Q. Okay. So just looking at your map, the Congressional District Five, that congressional district crosses the Chesapeake Bay; is that right?

A. It does. The 301 bridge and crosses the Chesapeake Bay to include part of Anne Arundel, Annapolis, and also all of Calvert and part of Prince George's.

Q. Okay. What are the major military installations in Maryland?

A. That I cannot tell you.

Q. Could you point to where they would be on this map?

A. No, I cannot. [58]

Q. Did you ensure whether—did you ensure that all of the major military installations in Maryland are in Congressional District Two?

A. I did not. And I assume they are not.

(Exhibit 158 marked for identification.)

Q. All right, sir. So I'll represent to you that Exhibit 158 is a corrected version of your Population Summary Report that appeared in your original report that was provided to us yesterday.

A. That is correct.

Q. Okay. Why did you amend this Population Summary Report?

A. Oh, I had a typo in the bottom line percentages. I had indicated that the unadjusted percent non-Hispanic whites statewide was, I think, 42.8%, and actually that's the minority population percentage. So I corrected that typo to reflect the actual unadjusted non-Hispanic white 18-plus population, which is 57.22.

Q. Was that a typo or a miscalculation?

A. It was not really a miscalculation. I [59] think it was maybe a copy-and-paste error is what it was.

Q. Okay.

A. I have, you know, I had other columns in there, one of which would have been percent minority, and I think I just accidentally copied that into this, this spreadsheet.

Q. Okay. Do you know—

A. I do want to make one other correction, though.

Q. Sure.

A. I found the percent unadjusted non-Hispanic 18-plus, it indicates—it should indicate that at the top of the—at the rows at the top, not just non-Hispanic white, but 18-plus non-Hispanic white.

Q. I see. So if I'm looking at the columns on this report and I'm working from the right to the left, that's the second column from the right.

A. Right.

Q. It currently says, percentage unadjusted NH, meaning non-Hispanic white. That should actually [60] read percentage unadjusted 18-plus non-Hispanic white.

A. Exactly.

Q. Is that correct?

A. Right, to be consistent with two columns to the left, which also report 18-plus—or actually across the board they're like, what, five columns, I guess, that show voting age population.

Q. Was that another copy-and-paste error?

A. No. That might be a failure to type in 18-plus. It's possible that it has something to do with the width of the column and that somehow or another 18-plus got squeezed out of that column as it was printed. I'll have to check.

Q. Okay. Besides those two corrections that you've made, are there any other corrections that you see that need to be made to this Population Summary Report as you sit here today?

A. No.

Q. Okay. I'd like to focus on the deviation column for a second. Do you see that? It's the third from the left. [61]

A. Yes.

Q. Okay. What does deviation mean in this instance?

A. Well, it just means the number of persons over or above what would be population equality, which is zero, that is a requirement in congressional redistricting. And since this is just sort of a hypothetical draft plan, I did not zero out the districts, which would have taken a little while to do, and involved some precinct splits. So I just reported this to make the point. I could always zero them out, if need be.

Q. Why did you not decide to split precincts in your draft 8-0 Map?

A. Well, there are some split precincts because I started with Congressional District Six, and I

think there were some precinct splits there, but it's generally good practice not to split precincts, if you can, when you're drawing a state-level plan. Usually you end up having to split precincts to comply with One Person, One Vet, particularly if you're working with congressional [62] plans, which ultimately require it seems zero deviation. So you're guaranteed to have—if you have an eight congressional district plan, you're probably going to have 20 to 30 split precincts just to get everything to equal zero.

Q. Okay. Let me unpack a little bit of your answer there. You said under One Person, One Vote, when you're working with congressional plans, that ultimately requires you to get as close to zero as possible, correct?

A. It does. Although there was a congressional plan adopted in West Virginia, and that case was litigated to the Supreme Court, I believe sometime in 2011, and I think the Supreme Court allowed West Virginia to have a deviation that was beyond zero percent because the issue related to splitting counties, and for whatever reason it was deemed okay for West Virginia to have a deviation that went over zero.

Q. Do you know whether Maryland has [63] historically attempted to get as close to arithmetic equality between its congressional districts as possible?

A. Probably in 2000, but I think prior to that time most likely no, particularly for state legislative plans.

Q. How about congressional plans?

A. I don't know, but I would be surprised if they were to hit zero percent deviation prior to the 2000 round of redistricting.

Q. After the 2000 round of redistricting, do you know whether it was the policy of Maryland to achieve as close to zero percent deviation as possible?

A. I think that's probably the case.

Q. Okay. Let's look—

A. Because the existing plan is zero deviation across the board, except for maybe one district, because you can't always balance it out just perfectly.

Q. Okay. Let's look at the first two districts in the deviation column. Congressional [64] District One has a deviation of—a positive deviation of 900, correct?

A. Correct.

Q. And Congressional District Two has a negative deviation of 1,064, correct?

A. Correct.

Q. So the delta between those two, the difference between those two districts, is 1,964 people, correct?

A. That's correct.

Q. Okay.

(Exhibit 159 marked for identification.)

Q. So I've put in front of you what we've marked as Exhibit 159 to your deposition. It's a court filing in the Supreme Court of the United States titled "Brief in Opposition to Petition for Writ of Certiorari," correct?

A. Yes.

Q. Okay. And if you look at the counsel of record underneath that, that was filed by the Office of the Attorney General in April of 2015, correct? [65]

A. That's correct.

Q. And the case caption reads Shapiro vs. Mack. Do you see that?

A. I do.

Q. Do you know if Shapiro vs. Mack is in any way related to this case?

A. I don't know, though I do think I recall that someone named Shapiro had a lawsuit filed regarding redistricting at the state level or congressional level in Maryland. I don't know why I remember that, but I do.

Q. Okay.

A. But I don't know the specifics.

Q. Okay.

A. I don't even know if it was for the congressional plan or for the state legislature.

Q. Okay. Got it. So I want to move to page 5 of the brief, and the page numbers are at the top. Are you with me on page 5?

A. I am.

Q. Okay. I'd like to direct your attention—do you see the sentence that begins with, "as [66] indicated by the district population"? It's about five lines down—actually six.

A. On page 5?

Q. Page 5.

A. I see as potential remedies ... but I don't see "as indicated." Where is as indicated? I see "as many."

MR. KIMBERLY: Line 6 from the top.

Q. Line 6 from the top. Do you see Resp—

A. Oh, I'm sorry, there it is. "As indicated," right.

Q. All right. That section reads, quote, "as indicated by the district population table appearing to the left of each proposed alternative map, the plans petitioners offered had districts deviating from the ideal equal population by as many as 760 persons,"

and then there's a citation, "and population variances between districts of as many as 1,103 persons," there's another citation. "Unlike Maryland's enacted plan, which achieved the maximum equality of district population mathematically possible, none of the district plans proposed by the [67] petitioners purported to come close to the, quote, precise mathematical equality that this Court has demanded of Congressional districts."

Did I read that section correctly?

A. I believe so.

Q. So in this brief the Office of the Attorney General criticized a proposed map that had deviations of as many as 760 persons and population variances between districts as many as 1,103 persons, correct?

A. That appears to be the case.

Q. Okay. In your proposed 8-0 Plan the largest deviation, as we already discussed, is 1,964 persons, correct?

A. Well, this is all apples and oranges.
This is a draft plan just to make a point. And, you know, if you want, when I get back to Virginia, I'll sit down and zero it out and send it to you. It might take a couple of hours, split a few more precincts, but it's not going to change the results at all.

Q. Okay. So do you believe that the [68] criticism contained on page 5 of this brief is valid when applied to your analysis?

A. No, it's not. It's probably valid when applied to work that was done in the Shapiro case, because, presumably, the plan that was presented in the Shapiro case was a plan that would have been proffered as a possible remedy. And what I am

proposing here is not being proffered as a possible remedy; it's being shown as a hypothetical plan and nothing more, which is why I didn't take the time to zero it out, but I could easily do so and it wouldn't change anything.

Q. In your 8-0 Map in its current form could it be adopted by the Maryland legislature?

A. After a couple hours' work when I get back to Virginia, yes.

Q. So it would need to be—

A. Arguably, it would be, yes, because it complies in every other way, setting aside your issue at hand, which is the First Amendment theory, as well as potential partisan gerrymandering, if you prevail on that claim, but clearly it would be something that [69] the State of Maryland could adopt, but I would need to zero it out.

Q. I just want to be clear about the answer to my question. Is it your testimony that this 8-0 Map that we're looking at in your expert submission could be adopted by the Maryland legislature without any further revisions?

A. It could be adopted, but presumably someone would challenge it on One Person, One Vote—

on a One Person, One Vote issue. But my point is simply that I did not produce this to demonstrate a plan that the State of Maryland would be adopting.

It's simply a hypothetical draft to demonstrate that one could have drawn an 8-0 Plan back in 2011.

DEMOCRATIC CAUCUS MEETING
MONDAY, OCTOBER 3 AT 7:00P.M.
MAJORITY CAUCUS ROOM IN JAMES
SENATE OFFICE BUILDING

OVERVIEW: The purpose of the meeting is to give Jeanne Hitchcock (in her role as Chair of the Governor's Redistricting Advisory Committee) and Joe Bryce an opportunity to present the Governor's congressional map to the members of your caucus *before* the map is released tomorrow. You will make introductory remarks, but you should allow Secretary Hitchcock to present and defend the map. Dan Friedman will make brief remarks explaining why we need to pass the map as emergency legislation.

TOPICS TO ADDRESS:

- *Thank your colleagues for attending, especially on short notice*. The letter that circulated within the caucus during session raised an issue of when and how meetings are called. Acknowledge that this meeting was called on short notice, and thank your colleagues for their patience. Emphasize that you felt it was important to bring this group together before the Governor releases his map publicly, because the Senate deserves an opportunity to be briefed about this issue instead of reading about it in the newspaper.
- *Speak briefly about the GRAC process*. While you are intimately familiar with the process, many of your colleagues are not. It's worth reminding them that the Governor's Redistricting Advisory Committee included five members, and held twelve meetings across the state at which it received public testimony from hundreds of

Marylanders who are watching this process. One of the challenges that we face in creating a map is balancing the agendas of our members of Congress against the expressed will of the people who testified during the GRAC process.

- *Specifically recognize Secretary Hitchcock for her leadership of GRAC*. Secretary Hitchcock took the public hearing process very seriously. She sat and listened through testimony—both polite and not so polite. It's not likely that she's going to spend any time in Harford County again anytime soon, after sitting through that hearing. In addition, she worked closely with the members of our congressional delegation and with many of your colleagues, including the Black Caucus, to make sure their concerns were heard. Secretary Hitchcock deserves our thanks for her work—and our support for her work product.
- *Speak briefly to the fundamental challenges of the map*. The Governor's map is *not* pretty, primarily because several Congressmen live in close proximity to each other and all of the Congressmen fought to keep what they currently represent. For example, Congressman Ruppersberger has to have Aberdeen Proving Ground and Fort Meade because he serves on the Intelligence Committee. Congressman Sarbanes has to have Pikesville and Annapolis, because those communities are important parts of his district. In other words, no one in this room would have drawn the map the way that it is drawn.
- *Acknowledge that the map does some good things*. Even though the map isn't pretty, it accomplishes a few important goals. Namely:

- It creates an opportunity for Montgomery County to control two congressional districts, an opportunity for Prince George's County to control two congressional districts, and an opportunity for the Baltimore region to preserve its existing representatives.
- It protects the interests of minority communities, preserving the two majority-minority districts and preserving a large African-American voting bloc in the 5th congressional district.
- It preserves all six incumbent Democrats in "safe" districts. Not one of our incumbents will be in a district with less than 58% Democratic performance. By way of comparison, 9 Democratic Senators represent districts where Barack Obama received less than 58% of the vote and 10 Democratic Senators represent districts where Martin O'Malley received less than 58% of the vote.
- It gives Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett. In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity.

➢ *Briefly discuss the process for special session*. We are expecting a brief special session, lasting two to three days. Here is how it is likely to work:

- On Monday, the Senate will convene in the morning. We will need to adopt a rule change in the morning to create a Senate

Committee on Redistricting, which will have jurisdiction over the bills.

- On Monday afternoon, the Senate and House Committees will hold a public hearing on the maps.
- On Monday evening, at least one chamber will likely be in session in order to begin moving the map. It will not be a late night, but everyone should be prepared to be in Annapolis on Monday evening.
- Ideally, we will be able to wrap up the maps during the day (or perhaps the early evening) the following day.

➢ *Warn of the challenges of passing the map as emergency legislation*. We *have* to pass all maps as emergency legislation, primarily so that they take effect in time for the primary—but secondarily in order to avoid them being petitioned to referendum. This is no small task—we need twenty-nine votes to pass a bill, and we are not going to receive a single Republican vote. It is therefore incumbent upon everyone in this room to come together around a map.

After your remarks, give the floor to Jeanne Hitchcock and Joe Bryce. Again, let them do the heavy lifting on this map—the more you interject, the more it will appear less like the Governor's map and more like your map.

THE WITNESS: So I would say that I think it was common knowledge that it was the goal to make it a more competitive district that a Democrat could prevail in, but I don't—I can't—I wouldn't characterize it necessarily as a definitive make it seven to one versus six to two.

BY MR. MEDLOCK:

Q. Did you ever hear any of your colleagues say that one of the goals of the proposed congressional map was to change the composition of the Maryland congressional delegation from six Democrats and two Republicans to seven Democrats and one Republican?

A. My recollection was that it was to make one of the other—make the [24] Sixth Congressional District more competitive.

Q. When you say "more competitive," how do you define the phrase "more competitive"?

A. More competitive that a Republican or a Democrat could prevail in.

Q. Isn't it true that one of the purposes of making the map was to actually make the Sixth Congressional District have 53 percent Democratic performance?

A. Having reviewed the documents again, I recall that. My recollection is that, until after the election, the result could have been that a Republican could have prevailed in it, and I think that's been evidenced by subsequent elections after the 2012 election where a Republican almost took the seat back.

Q. I see. So can you name me a single election in the Sixth Congressional District since redistricting

where a Republican actually won the Sixth Congressional District seat?

A. That has not happened to date. There have been 2012, 2014 and 2016 elections. [25]

I know that in the 2014 election, from my recollection, the candidate nearly defeated the then incumbent and current incumbent Democratic officeholder for that district.

Q. In the end, that candidate, Dan Bongino, lost the election, correct?

A. That's right, it was Dan Bongino.

Q. He lost the election?

A. He did lose the election.

Q. So the answer to my question is that there never has been a Republican who's won that seat since redistricting; is that right?

A. That's my understanding.

Q. Okay. I just want to make sure I get a clear answer to this question:

One of the purposes behind the 2011 congressional map was to make the Sixth Congressional District have 53 percent Democratic performance, correct?

MS. RICE: Asked and answered.

THE WITNESS: Okay, and now I answer. I'm getting the hang of this. [26]

The result of the redistricting was a district that was 53 percent Democratic performance.

BY MR. MEDLOCK:

Q. And that was one of the purposes, not just the result? That was one of the purposes of the redistricting?

MS. RICE: Objection, asked and answered.

MR. MEDLOCK: It hasn't been answered yet. Please answer.

THE WITNESS: So one of the purposes, because there were multiple parties involved, you know, again, I don't—it's hard for me to answer what the GRAC's thinking was or what other legislators' votes were, so it's hard.

I'm not sure how to answer that, because when you say "one of the purposes," it wasn't as if something was enumerated like these are the four reasons why you should vote for this, and this is one of them. I don't recall that. [27]

BY MR. MEDLOCK:

Q. Well, I'm not asking if it was written down in stone. I'm just asking, in your mind, was that one of the purposes, to make the Sixth Congressional District have 53 percent Democratic performance?

MS. RICE: Objection, asked and answered.

THE WITNESS: Yes.

BY MR. MEDLOCK:

Q. Okay. To your knowledge, did any other members of the Maryland General Assembly believe that the purpose of the 2011 congressional map was to make the Sixth Congressional District have 53 percent Democratic performance?

A. You would have to ask other members. I don't recall.

Q. To your knowledge, did other members of the General Assembly vote for the proposed congressional map because they believed that it would result in 53 percent Democratic performance in the Sixth Congressional District? [28]

A. I can't speak to their motivations.

Q. Did you even ask them?

A. I don't recall.

Q. Do you have any documents in your possession that would shed any light on their motivations?

A. No, other than what I've provided.

Q. So you can't tell me one way or the other whether other members of the General Assembly intended to turn the Sixth Congressional District into a Democratic seat?

MS. RICE: Objection, asked and answered. You can answer.

THE WITNESS: I can't address what their motivations were. I don't know what their motivations were.

* * *

Q. You know your district well. Will you describe the 15th Legislative District as generally affluent?

A. I would say that there are areas of it that are affluent, more so in the southern part of the district, but I often consider kind of Germantown to be more of a Main Street—you know, there were different issues in that community than in, say, certain areas of Potomac, but then there was a lot of agricultural areas of the district, and those issues were very different, and the socioeconomic was very different there as well.

Q. What are the agricultural areas of the 15th Legislative District?

A. Probably about 50 to 60 percent of the district, as it was then, because it has been redrawn, as you know, comprised the Montgomery County Ag Reserve. You had horse farms, but you also had corn, soy, pumpkin. I mean, just a range [43] of agricultural interests, peaches.

Q. Would you describe the community as—

A. Is this relevant?

Q. It is.

A. I'm sorry.

Q. No, no, it is.

A. I think there were blueberries and strawberries, some had Christmas trees, you know, is my recollection of the district.

Q. Okay.

A. I've been to many of those farms, got some awards from the Farm Bureau.

Q. Do a large percentage of the residents in the 15th Legislative District commute into D.C.?

A. I wouldn't say a majority. I think, you know, the further north you go, they were probably like me, commuting to Rockville or Bethesda or Silver Spring as much as they were commuting into D.C., or, you know, staying local in their communities.

Q. How about the percentage of residents [44] in the 15th Legislative District who commuted north to Frederick County or Carroll County? What percentage would you say that is?

A. There were probably a fair amount actually that did what many would call the reverse commute.

Q. Is that smaller than the number who were doing the normal commute into D.C.?

A. I would say—and this is not based on the district.

Q. Uh-hmm.

A. I would say based on going north and south on 270 in the mornings and in the evenings that there were probably more people traveling south, but that may be inclusive of people coming from Pennsylvania, Washington County, Frederick County. I know people who worked in Rockville that lived in Pennsylvania.

So, you know, by evidence of Interstate 270, I would say more people were probably heading south while I was serving than were heading north. That may have changed. [45]

Q. Do you know what percentage of the your—

A. I don't.

Q. —community was using I-270?

A. What percentage was using that? No, I don't.

Q. Do you know if it was even a majority of your community that was using I-270?

A. I'd be speculating.

Q. Okay. So you can't tell me one way or the other?

A. No, I never did an analysis of that.

Q. Did you look at any sort of analysis of commuting patterns on I-270 before you voted in the special legislative session in 2011?

A. No.

Q. Did you see any sort of analysis of commuting patterns on I-270 given to any other member of the General Assembly before they voted on the proposed congressional map in 2011?

A. I don't think so. I don't recall that. [46]

Q. Would you doubt that that data was made available?

A. Yes, actually. I mean, I would doubt that that data was made available. I mean, I just don't recall looking at commuting patterns.

Q. Do you recall anybody speaking on the floor of the senate when you were getting ready to vote on the proposed congressional map about commuting patterns on I-270?

A. No. In fact, I don't recall any debate on the senate floor about it.

Email from Brian Romick

Subject: Re: (No subject)

From: Brian Romick <brianromick@gmail.com>

Date: 8/31/2011 7:33 PM

To: Mark Gersh <mg2590@aol.com>

Still not set yet, but I think it is likely that we do go to Annapolis on Friday, if you can make it work, Hoyer would appreciate it.

On Wed, Aug 31, 2011 at 2:10 PM, Mark Gersh <mg2590@aol.com> wrote:

Sent from my iPhone

On Aug 31, 2011, at 1:24 PM, Brian Romick <brianromick@gmail.com> wrote:

Don't know. Morning.

On 8/31/11, Mark Gersh <mg2590@aol.com> wrote:

Wha time

Sent from my iPhone

On Aug 31, 2011, at 12:57 PM, Brian Romick <brianromick@gmail.com> wrote:

If Hoyer goes to Annapolis to meet with the governor on Friday, are you around to come along?

On 8/31/11, mg2590@aol.com <mg2590@aol.com> wrote:

Not in the office. Will be there tomorrow.

-----Original Message------

From: Brian Romick; brianromick@gmail.com;

To: MG2590@aol.com; mg2590@aol.com;

Sent: Wed, Aug 31, 2011 9:22 am

Are you around today?

Email from Brian Romick

Subject:

From: Brian Rornick <brianrornick@gmail.com>

Date: 6/7/2011 10:42 AM

To: "MG2590@aol.com" <mg2590@aol.com>

Donna is telling us we have to do the 6th district. We would need to get it north of 50 to win it this time, right?

Q. Okay. So when you say that Mr. Baker got information related to congressional redistricting from the Office of the Governor, what sort of information are you referring to?

A. Well, look, I—I think that the information was what the Governor had in mind as far as the congressional redistricting map was.

Q. Uh-hmm.

A. I mean, he ultimately brings it down—

Q. Uh-hmm.

A. —and then ultimately the President and Senate and myself have to pass a map.

Q. Okay. Did Mr. Baker, to your knowledge, receive any draft congressional maps [35] from the Office of the Governor?

A. Not to my knowledge.

Q. Did Mr. Baker ever receive a final map from the Office of the Governor that was relayed to you?

A. It's hard for me to remember. I mean, obviously, we saw the map before we voted on it.

Q. Okay. To your knowledge, who in the Maryland state government actually drew the 2011 congressional map?

A. Can I have that question again?

Q. Sure. To your knowledge, who in the Maryland state government actually drew the 2011 congressional map for the State of Maryland?

A. Well, obviously, it came out of the Governor's office.

Q. Do you know that to be true?

A. Well, I don't know where else it would have come from.

* * *

Q. Do you remember who presented the final 2011 congressional map to you that the GRAC voted on?

A. No.

Q. Okay. Did you ever ask Mr. Baker who drew the 2011 congressional map?

A. No.

Q. Did you ever ask Mr. Weissman that question?

A. No.

Q. Did you ever ask anyone in the Office of the Governor that question?

A. No.

Q. Did you think it was relevant who drew the 2011 congressional map?

A. Certainly. I—I think that relevance was the—the Governor, and his, you [39] know, constitutional responsibility was to draw the map.

* * *

Q. Okay. Did you at all consider when voting on the proposed congressional map commuting patterns on I-270?

A. The what?

Q. Are—you know Interstate 270—

A. Uh-hmm.

Q. —which comes off of the Capital Beltway—

A. Yeah.

Q. —and goes up into Frederick County?

A. Right.

Q. Did you at all consider commuting patterns on I-270 when you voted on the proposed congressional map?

A. No. It never—never crossed my mind.

Q. Did you receive any data regarding propo—regarding commuting patterns on I-270 when you were considering the proposed congressional map?

A. No.

Q. Did you ever ask for any such data? [101]

A. No.

Q. Do you know whether anyone else on the GRAC had any such data?

A. No. I don't think anybody asked such question.

* * *

[141] * * *

Q. Do you know whether the population shifted at all in the former 6th Congressional District in Maryland?

A. You know, I'm not an expert in this, so I believe that, you know, there was growth in the Montgomery and Frederick suburbs—

Q. Uh-hmm.

A. —and basically the population stayed the same in Western Maryland counties of Garrett, Allegany and—and Washington County.

Q. What evidence do you have to support that?

A. I think the census numbers will bear that out.

* * *

[146] * * *

Q. Okay. Do you know whether it was necessary to move 30 percent of Marylanders from one congressional district to another to accomplish the GRAC's goals in congressional reapportionment?

MS. KATZ: Objection, vague.

THE WITNESS: Ask the—ask the question again.

BY MR. MEDLOCK:

Q. Do you know whether it was necessary to move 30 percent of Marylanders from one congressional district to another in order to achieve the GRAC's goals with respect to congressional redistricting?

MS. KATZ: Objection, lack of foundation.

THE WITNESS: No. You know, I—I don't know that it was necessary.

* * *

Q. Okay. Can you point me to any specific change that was made to the boundaries of the 6th Congressional District based on any input that you received during those twelve meetings around the state?

A. Our—our first meeting was in Frederick, and there was very little discussion about Congressional District 6.

Q. Uh-hmm.

A. Most of the discussion came from people from Frederick that believed they were underserved because of the loss of population and different demographics in Washington, Garrett, and Allegany Counties.

Q. Uh-hmm. Can you propo—can you point me to any change that was made to the [170] boundaries of the 6th Congressional District based on that testimony that you received at the Frederick meeting?

A. I just did, I think.

Q. Can you—well, what—how were the boundaries changed based on what you—the input you received at the Frederick meeting?

A. Well, I think that they wanted to see the growth in Frederick addressed.

Q. Uh-hmm. When you say they wanted to see the growth in Frederick addressed, how did the 6th Congressional District's new boundaries address the growth in Frederick?

A. This is an assumption on my part—

Q. Uh-hmm.

A. —but I think it—there was a commonality more or less of the growth coming out of Montgomery County and Frederick that, you know, reflected the population demographics in that area.

Q. Did you receive any data that showed you that there was similar growth in Frederick and [171] Montgomery Counties?

A. I saw the census numbers.

Q. Okay. Did the census numbers show you that there was similar growth in Frederick and Montgomery Counties?

A. To the best of my memory, there was growth in both areas, yes.

Q. Was it the—was it at a similar rate?

A. Not exactly sure how close the rate was, but they put, you know, on the census what each county's growth rate was, what's—what's the minority representation in those areas, and it goes through every minority—

Q. Uh-hmm.

A. —African-American, Asian, Hispanic, and it was—it was an interesting—

Q. Sure.

A. —observation.

Q. Did the GRAC consider that data when it evaluated the Governor's proposed map that he sent to the GRAC? [172]

MS. KATZ: Objection, speculation.

THE WITNESS: Look, the map that came down from the Governor's office I think reflected what he had got and received back from Ms. Hitchcock.

BY MR. MEDLOCK:

Q. Is that an assumption on your part, or is that—

A. That's an assumption.

Q. —something you know to be true?

A. That's an assumption.

Q. Did you ever ask anyone in the Governor's office whether the map that the Governor proposed to the GRAC took into account the rates of growth in Frederick and Montgomery Counties?

A. No, I did not, except, you know, through the numbers of the census.

Q. Did you confirm for yourself whether the Governor's map took into account the rates of growth in Frederick and Montgomery Counties?

Did—when you got the Governor's [173] map—

A. Right.

Q. —my question is, did you actually sit down with census data to evaluate the map?

A. No.

Q. Did you actually sit down with any demographic information to evaluate the Governor's map when you received it?

A. No.

Q. So when you say that the Governor's map reflected changes in the growth of Frederick and Montgomery Counties—

A. No.

Q. —you never did any independent analysis on your own to determine whether that was true?

A. No, but I had seen the numbers from the Maryland Department of Planning.

Email from Brian Romick

Subject:

From: Brian Rornick <brianrornick@gmail.com>

Date: 10/5/2011 12:25 PM

To: "MG2590@aol.com" <mg2590@aol.com>

This is a good read of how we got to where we ended up...

Josh Kurtz — Sources: Congressional delegation Dems eye Bartlett as redistricting target Rep. Steny Hoyer (D), the dean of the Maryland Congressional delegation and the No. 2 Democrat in the House of Representatives, is a wily legislative veteran, a master of the deal, and used to getting his way.

Rep. Donna Edwards (D), a fiery liberal with three years of Congressional experience under her belt, is known more for her political passion than her insider prowess.

But Edwards appears to be trumping Hoyer, according to multiple sources, when it comes to convincing their Democratic colleagues in the delegation which of the state's Republican-held seats to target in the upcoming redistricting process. And for now, at least, it looks as if a consensus is forming that they ought to go after Rep. Roscoe Bartlett (R) rather than Rep. Andy Harris (R).

Gov. Martin O'Malley (D) recently appointed a redistricting commission to help state lawmakers draft new Congressional and General Assembly maps. The governor and legislative leaders will have plenty of say over how the state's new boundaries will look.

But when it comes to Congressional lines, which will likely be adopted in a special legislative session that will convene in mid-October, the six Democrats in Maryland's House delegation will be accorded much sway.

And at the moment, sources say, despite Hoyer's plea to make the 1st District more Democratic to pave the way for a comeback for former Rep. Frank Kratovil (D), the delegation - with Edwards as one of the prime advocates - is close to signing off on a map that would instead give Democrats at least a 50-50 chance of capturing Bartlett's district in the near future.

In Annapolis and in Washington in recent months, it's become accepted wisdom that Maryland Democrats, under pressure from national party leaders looking for the two dozen seats they need to retake the House in 2012, will attempt to move the delegation to a 7-1 seat Democratic advantage, up from the current 6-2.

The question for Democrats has been whether to go after Bartlett in the Western Maryland-based 6th District, or whether to go after Harris' Eastern Shore-based 1st District seat.

Both districts are Republican strongholds as currently drawn. Both gave Barack Obama just 40 percent of the vote in the 2008 White House election as he was racking up 62 percent statewide. But with clever manipulating, Democrats figure they have a decent shot of stealing one of the Republican seats, with minimal risk to their incumbents.

Hoyer has urged his colleagues to facilitate a comeback for Kratovil, who held the 1st District seat before being ousted by Harris in 2010 - and who, by the way, is an old family friend of Hoyer's. The minority whip argued that Kratovil was a talented member who took some

tough votes for the Democrats - including supporting the cap-and-trade bill - and deserved a chance to represent a friendlier district.

But Edwards made the case, according to sources, that Kratovil's 2008 win was a fluke - and that even bringing the 1st District across the Bay Bridge into Prince George's County or Baltimore City might not provide enough Democrats for Kratovil to win. She also argued that that adding African-American voters into an Eastern Shore district was the wrong thing to do, especially with the city losing one-twentieth of its population over the past decade. And she pointed out that Kratovil's voting record may not have been sufficiently progressive - he voted against health care reform, for example - to captivate base Democratic voters.

Edwards has apparently been working with a redistricting expert as the delegation has been deliberating the redraw. She also is reportedly willing to take on deep Republican territory in Anne Arundel County (while keeping turf in Prince George's and Montgomery counties) to help the Democratic cause. It's easy to be magnanimous when you won your last election with 83 percent of the vote.

So for now, the fragile consensus in the delegation seems to be to draw a new 6th District that runs roughly from Rockville to Oakland, a driving distance of about 170 miles. The 1st District would then take in all of the Eastern Shore and extend into conservative Carroll County, all but guaranteeing Harris a safe seat for the next decade.

A new 6th District would present a golden opportunity for some Democrat - presumably state Senate Majority Leader Rob Garagiola - to run and win. Democratic leaders feel that if they set up a tough general election,

Bartlett, who will be 86 on Election Day 2012, and last faced a tough Democrat in 1992, will choose to retire. And they believe that Maryland Republican Chairman Alex Mooney, at this point the nominal frontrunner in any GDP primary to replace Bartlett, is beatable.

Even if they fall short in 2012, Democrats believe that with the cities of Frederick and Hagerstown trending slowly their way, a "Western Maryland" district anchored by Rockville and Gaithersburg is gettable sooner rather than later. And there's precedent for it: after all, the district that the Byrons - Goodloe and Beverly - represented from the early 1970's to the early 1990's was not dissimilar.

A decade ago, Democratic leaders hotly debated whether to split Montgomery County roughly the same way, to create opportunities for Mark Shriver, the protégé of then-Maryland House Speaker Casper Taylor (D), and Chris Van Hollen, the protégé of state Senate President Mike Miller (D).

Ultimately, then-Gov. Parris Glendening (D) chose instead to create a Democratic-leaning district based in Baltimore County, a reward for term-limited County Executive Dutch Ruppersberger (D). Shriver and Van Hollen had a dramatic showdown in the principal Montgomery County district - with Van Hollen pulling the upset.

If a new 6th District is created, it'll be interesting to see whether any name Democrats besides Garagiola take a shot at it - though no names have circulated at present. It'll also be very interesting to see how Bartlett, who just announced his intention to seek reelection last week, will react. As of March 31, he had $247,000 in his campaign account.

As for Kratovil, with the option of running for his old seat cut off, he'll have to decide whether he wants to run for something else in the near future - like attorney general or comptroller. There's also the possibility that he could be tapped to be Maryland's next U.S. Attorney, assuming there's a second Obama administration.

Nothing is written in stone until the legislature passes a bill and O'Malley has signed it. Even then, the Congressional map could be subject to a legal challenge.

But for now, at least, it looks as if Donna Edwards has outmaneuvered Steny Hoyer - and that Frank Kratovil, as a result, may be the odd man out.

Q. I understand that you state that there are alternative plausible explanations for the boundaries of the Congressional districts in the map.

But, do you offer an affirmative opinion about what the specific intent of the legislature and its map makers was in 2011?

A. No, that was not my task.

My task was to see whether or not your experts established what they claimed to [38] have established.

Q. And, you critique Professor McDonald's vote dilution analysis, correct?

A. Very much so.

Q. Do you offer an affirmative opinion about vote dilution, yourself?

A. I was not aware that vote dilution of minorities was an issue in this litigation.

I thought that was settled the Fletcher case.

And I don't see anything in either of your expert reports that refer to vote dilution of minorities. Rather, I see an inappropriate attempt by Dr. McDonald to shoehorn the vote dilution type of analysis we use in voting rights that I have used scores of times into this matter.

Q. Do you offer any affirmative opinion regarding whether the votes of Republican—whether the voting strength of Republican voters in the 6th Congressional District has been diluted? [39]

A. I don't use the term, diluted. But, obviously the 6th Congressional District became less Republican after the redistricting. No doubt. That is a fact.

Q. That is just obvious, right?

A. That is obvious. And I don't think your experts prove much more than that.

Q. Anyone who knows anything about Maryland politics knows that the, that it became less likely that a Republican would win in the 6th Congressional district after the 2011 redistricting; is that right?

A. Right. And that virtually automatically follows, as I pointed out, from something that has nothing to do with politics, and that is the decision not to cross the Chesapeake Bay.

Once you do that and you move out those 100 and some odd thousand voters from Anne Arundel, you've got to move in Carroll County, Baltimore County and Harford County. And the only way, the only way you can replace that, [40] given the geography of Maryland in CD 6 is Montgomery County.

Q. So, once a decision was made that the 1st Congressional District would not cross the Chesapeake Bay, in your opinion that made it clear that the, that Republican strength in the 6th Congressional District would be diluted?

A. I don't use the word, diluted—

Q. Sure.

A. —because that is from racial voting rights analysis, and I don't think it is appropriate here.

Q. Well, let me—

A. I will answer your question, though, but I don't want to take your terminology.

Yes, once you move, once you had to move Carroll, and parts of Baltimore and Harford, to replace the population loss from Anne Arundel, which followed from not crossing the Bay, and none of your experts deny that was an objective, the only other place to replace the population in CD 6, you can't

take it out of the voting rights [41] district, had to be Montgomery County.

And you don't need to be a political analyst. You just need to know anything about anything about Maryland politics, to know if you are putting voters in from Montgomery County, because you had to take out voters from Carroll County, that is going to make the district more Democratic.

Q. Yes, you don't need to know anything about anything about politics to know if I ad Montgomery County to the 6th Congressional District, and get rid of Carroll County, then I've made a more Democratic district; is that right?

A. Again you are losing loaded terminology that I'm not going to accept. Get rid of Carroll County implies something that I'm not willing to buy into.

Q. I'm not saying we are going to off it, okay?

A. But you are implying that they deliberately decided to get rid of Carroll County [42] to put in—that is not what I said at all.

Q. I'm not trying to put deliberate—anything deliberate into my question.

A. All right, then.

Q. What I'm trying to say is once Carroll County is removed from the 6th Congressional District, for whatever reason, and larger portions of Montgomery County are added, again for whatever reason, that makes the 6th Congressional District more favorable to a Democratic candidate, right?

A. That is obvious for anyone who knows anything about Maryland politics.

Q. Right. So, is not crossing the Chesapeake Bay a, the reason that larger portions of Montgomery

County were added to the 6th Congressional District?

A. It would make it essentially inevitable that larger portions of Montgomery County had to be added to the 6th district, because there is no other place for population from Carroll, Harford, and Baltimore County could [43] have been replaced there.

Q. I understand that, but—

A. And, as I said, and your experts don't address that. They are talking about all of these population changes, as if the 6th and 8th District existed in isolation, and had nothing to do with this decision not to cross the Chesapeake Bay, which isn't even mentioned, even in reply reports, after I spent a good deal of time in my report explaining its central implication here.

* * *

Q. Okay. Have, in your report, am I correct that you cite the Cook report PVI?

A. Yes. [130]

Q. What is PVI stand for?

A. It is, I'm trying to remember the exact acronym. Partisan voter index, I think.

Q. Okay.

A. And it is just a compilation of election returns to come up with the leaning of a district, either neutral, which would be 0. Plus-R, which would be leaning R. Plus-D, would be leaning D.

And it actually has a metric associated with it. So, it could be anywhere from +1 to, you know, a much, a high number.

Q. I assume +100 would be the max?

A. Well, you don't see that.

Q. Not in this country, at least?

A. No.

Q. The, do you find that the Cook PVI to be a reliable source of information regarding the partisan leanings of a Congressional district?

A. You know, insofar as you can figure that out. I think we have been through this colloquy before. [131]

Q. Sure.

A. These are predictions, assessments. And, you know, it is generally accurate, but it also can be wrong.

Q. Okay.

A. Like every other compilation. But, it is a—look, Cook is well respected. His PVI is well respected.

Q. Okay.

A. Nothing is perfect, but it is well respected, well regarded, and his judgments are well regarded.

Q. Do you personally, you know, put stock in the Cook PVI?

A. Sure. Again, you know, it is not the Holy Grail, nothing is. You know, because we are dealing with predictions of, you know, relatively small units of Congressional or state legislative districts.

But, as those things go, I think as I said, it is well respected.

Q. Okay. [132]

MR. MEDLOCK: Let's mark this next exhibit, please. It should be 181.

(Lichtman Exhibit Number 181 marked for identification.)

BY MR. MEDLOCK:

Q. All right, sir. I've put in front of you marked as Exhibit 181 to your deposition.

A. Okay.

Q. It is, if you look at the top of the first page, it is on the Cook Political Reports, for lack of a better word, header, is at the top. Correct?

A. Yes.

Q. And it is drafted by a gentleman by the name of David Wasserman, correct?

A. I don't know who he is, but yes.

Q. And it is dated October 11, 2012, right?

A. Right.

Q. Okay. So this would have, this is a report that came out after Maryland's Congressional redistricting in 2011. Correct? [133]

A. That is correct.

Q. Okay. I would like to direct you, if I may, to Page 8 of this report.

A. Okay.

Q. And, the top of that page is titled 25 Biggest Redistricting Swings Against the Incumbent Party. Do you see that?

A. I do.

Q. And then there is a ranking. There is a chart—well, let me start.

There is a chart below that, correct?

A. There is a chart? I don't see a chart.

Q. There is a table.

A. Yes, I see a table.

Q. Okay. And if you look at that table, on the most left-hand column, there is a rank column. Correct?

A. Correct.

Q. And that is ranked all of the way from 1 through 25, correct? [134]

A. Correct.

Q. Okay. And, then to the right of that, there is a column for district, correct?

A. Yes.

Q. Column for incumbent, right?

A. Yes.

Q. There is a column for PVI before, correct?

A. Yes.

Q. And there is a column for PVI after, correct? To the right of that, there is a column for PVI after?

A. Yes.

Q. And there is a column for swing, correct?

A. Yes.

Q. And then there is a column for current Cook rating?

A. Right.

Q. What is the Cook rating, in your experience?

A. The Cook rating is an attempt to [135] whether the districts are competitive or not. And there are three kinds of competitive districts. And there aren't a whole lot of them in the country. And we can discuss that, but I won't now.

Q. Okay.

A. Let me finish. And so those three kinds of competitive districts are a pure toss-up, lean Republican or Democrat, or likely Republican or Democrat.

And the noncompetitive districts, which are the majority, are called safe Democrat or safe Republican.

Q. Okay. Do you see there is a reference here to solid Republican, on the third line. Is that the same as safe Republican?

If you look at the CA 31, and you go all of the way over to the current Cook rating. It says solid Republican.

A. I would presume, although normally I would call it safe, but it's probably the same thing. [136]

Q. So, toss-up is the Cook, current Cook rating for an election that could conceivably in their minds come out either way, for the Democrat or the Republican, right?

A. It is not quite accurate because any of the competitive districts could come out either way.

Q. Sure.

A. But, what a toss-up means is to the best of your ability, based on, of course, past returns, you can't say whether it leans one way or the other.

Q. What does lean Republican or lean Democrat?

A. That means a very slight advantage to one party or the other.

Q. And what does likely Democrat or likely Republican mean?

A. Still competitive but more likely than not to go in either partisan direction.

Q. Okay. And if you look at this ranking on Page 8, the Number 1 ranked district [137] for biggest redistricting swings against the incumbent party is Maryland's 6th Congressional District, correct?

A. That's correct. It does exactly what I said it did. It took a district that you probably would rate as safe Democratic, to a D+2, which is even within Dr. McDonald's narrowest competitive range.

She created a competitive district that does tilt towards the democrats.

Q. I think you may have misspoke, so I just want to give you a chance to correct yourself?

A. Sorry.

Q. You said it started with a safe Democratic?

A. I meant Republican, obviously.

Q. I just wanted to correct it, to make sure we were on the same page there.

A. But, even a safe district, very rarely, but could possibly turn. But, that is a very black swan type of event. [138]

Q. You would need a wave election for that to happen?

A. Yes, and that does happen.

Q. Yes. Do you know how the current Cook rating of the Maryland's 6th Congressional District has changed since 2012?

A. I haven't looked at it, but I imagine it would become more Democratic, because you now have a well seated Democratic incumbent in the seat, and that would tend to tilt it more Democratic.

Q. Do you know how the actual PVI has changed over time, not just the rating?

A. There is a fair chance it has become more Democratic over time, because of the very heavy Maryland Democratic victories since this rating was set up in 2012, to 2016.

But, let's remember the critical, in terms of reevaluating redistricting, the critical election is the first election under the redistricting plan, which establishes incumbency and most closely mirrors the

politics of the [139] situation at the time the plan was crafted.

When ratings changed later, that could be a response to a whole host of things that no one could be aware of at the time they made the plan.

Q. So, I want to follow up on something you said.

The ratings immediately after the plan comes out, those are most indicative of what the intent was here, correct?

A. I'm not talking about intent here. I'm saying that that is most indicative—

Q. Of the politics, that is your word?

A. —of the politics that existed at the time of the redistricting.

Q. Okay. Got it.

A. Are we done with this?

Q. We are done with that.

MR. MEDLOCK: I will mark the next exhibit.

(Lichtman Exhibit Number 182 marked for identification.) [140]

BY MR. MEDLOCK:

Q. I am showing you what has been marked as Exhibit 182 to your deposition.

And, this is a report from the Cook Political Report, entitled Partisan Voting Index, Districts of the 113th Congress, Arranged by PVI Rank, Most Republican to Most Democratic. Do you see that?

A. Yes.

Q. Okay. And, this is a report that the Cook Political Report generates on a regular basis for each of, for each of the Congressional districts in the United States. Correct?

A. Right. And I think this is post 2012; is that right?

Q. That would be correct, if it is 113th Congress.

A. Yes, that is what I thought, because it has the Romney numbers.

Q. Yes, that is—I was actually going to get into that. So, if we flip one page in, you see [141] that there is a table on that page that continues for several pages.

A. Yes.

Q. That lists on the far left, there is a sequential numbering of each of the districts.

A. Yes.

Q. And then there is an entry for the state in one, in one column, and then an entry for the Congressional district, and then an entry for the member elected, right?

A. Yes, that is all correct.

Q. And then if you move further to the right, you see a PVI, which is the R plus number or D plus a number ranking from the Cook Political Report, correct?

A. Yes.

Q. And then they have information there about who the 2012 winner was in the general election, correct?

A. Correct.

Q. And then there is information, further to the right, about who the 2008 winner [142] was in the Presidential general election, correct?

A. Yes. And I presume that is in that district, not—

Q. In the—exactly. Is that your presumption?

A. That is my presumption. I haven't studied this, but I presume that is what they are doing.

Q. Okay. So, if you turn in to—and the pages are not numbered real well.

But, I want to focus—

A. If you can focus me to a sequence, that will do it.

Q. Yes, I will point you to 2B.6, and I'm looking at sequence Number 268.

A. Correct.

Q. Okay. And that is the Maryland 6th Congressional District, correct?

A. Correct.

Q. And it lists John Delaney as a winner, correct? [143]

A. Correct.

Q. And it says it is a D+4 district.

A. Correct.

Q. Okay. All right.

A. Which is what I predicted.

Q. That it would become more Democratic over time.

A. Right. Now that could have changed again after 2014. I don't know if it did. But, these things do change over time. But, the indicative one is the one immediately after, immediately at the time of the redistricting.

Q. If you look down below the 6th Congressional District, sequential Number 268, can you find any Congressional district that has a rating of D+4, or more, that is represented by a Republican?

A. And these are post hoc, in other words these are created after the election. So, it doesn't make any sense that, you know, they would be.

Q. Right. Well, I will cut to the [144] chase then.

A. Because, they are based upon the fact that, at least in part, that Democrats won those districts.

Q. I will tell you the only one I can find which is 286, Gary Miller in California's 31st. He is a Republican who is elected in a D+5 district. Do you see that?

A. I do. Let me see if there is. I would be surprised, given the way this is done.

I don't see any others. And I wouldn't expect it.

Q. Okay. That would be unusual, correct?

A. Yes.

Q. Okay.

A. Because it is done based, at least in part, on the fact that those Democrats won those districts.

So, it is what it is.

MR. MEDLOCK: Okay. I will mark the next exhibit. [145]

THE WITNESS: And it is worth noting that in the next election, despite a D+4, John Delaney performed well below D+4. He almost lost the district.

BY MR. MEDLOCK:

Q. Right. But, he didn't, did he? He beat—

A. Barely.

Q. —his Republican challenger?

A. By very few thousand votes, by 1.5 percent in a D+4.

So, my point is that we've made this point before, you know, these are imperfect.

Q. Sure. In every Congressional election that has happened—or every election for the U.S. House of Representatives that has happened in the 6th Congressional District since the 2011 redistricting, a Democrat has always won that election, correct?

A. Correct.

Q. Okay. And, in other statewide races that happened in the 6th Congressional District, [146] the only statewide race that a Republican has won was Governor Larry Hogan, correct?

A. Incorrect.

Q. Incorrect. Who is the other one?

A. I think it was Frosh. It is in my report. Got 49.3 percent of the two-party vote. So, a Republican did win in that district, that election as well.

Q. So, besides those two elections, every other one of the ten elections that has happened in that, in the Congressional District 6, a Democrat has won, correct?

A. Correct.

Q. Okay.

MR. MEDLOCK: Mark the next exhibit which is 183.

(Lichtman Exhibit Number 183 marked for identification.)

BY MR. MEDLOCK:

Q. So, I've put in front of you what we've marked as Exhibit 183 to your deposition.

It is a, another Cook Political [147] Report, Partisan Voter Index Report, for the 115th Congress, correct?

A. Yes.

Q. Okay. And it is, if you slip in, the table is arranged in the same manner, only it now includes data from the 2016 Presidential election, and the 2012 Presidential election?

A. That's correct, right.

Q. Okay. And I would like to focus you on sequential—

A. And it was also obviously Congressional elections in 2016, obviously.

Q. Oh, sure, yes. I would like to focus you in on sequence Number 272, which is on Page 2B.6—

A. I'm there.

Q. —of the exhibit. That is the listing for the 6th Congressional District in Maryland, correct?

A. Correct.

Q. And it shows that John Delaney is the member elected, correct? [148]

A. Correct.

Q. And it now shows a PVI of D+6?

A. Yes, that's exactly as I told you I would have predicted.

Q. So, this is not unusual. You would have expected this trend?

A. Yes, given the 2012 and 2016 results in Maryland. But, at the time of the redistricting, these were not the numbers.

Q. Sure. I understand. I'm just trying to get the trend down.

A. Yes.

Q. Okay.

A. And, you know, trends can go in either direction, as we know. And you can't tell back in 2011 which way the trend is going to go.

Q. Right. But since 2011 the trend is clear. It is becoming a more Democratic district, correct?

A. Yes.

Q. Okay. [149]

A. Simply because of the results of these elections. Not because anything was changed about the dis-

trict.

EXAMINATION BY MS. RICE:

Q. Ms. Strine, I noticed, and I apologized this morning, there was an error in the deposition notice that we sent to you. So I've given you the original there and the correction with your name spelled correctly on it.

Have you seen this document before?

A. Yes, I did. Not the corrected one. This is the first time.

Q. Okay. Great.

And you are Sharon Strine?

A. Yes.

Q. So today we are not anticipating that we will be here that long, so we are going to try to make it through without a break, but if you need one, just let me know, and we will find an appropriate place to stop.

If you don't understand a question that I ask you, please tell me, and I will rephrase it so that it's something that you do understand.

Please make sure that your answers are [7] verbal for the benefit of the court reporter. And, also, for the benefit of the court reporter, let's both do our best not to talk over each other. And we will all try to do that as well.

Have you taken any medication today?

A. No.

Q. Is there any other reason why you might not be able to testify this morning?

A. No.

Q. Ms. Strine, what do you do for work?

A. Mostly I take care of our family farm, and then I also do campaign management, and I have a small consulting business, political consulting business.

Q. What kind of farm do you have?

A. It's poultry, and vegetables, and hay, yes.

Q. And does your consulting business have a name?

A. Amethyst Strategies.

Q. And do—

A. LLC. Sorry. [8]

Q. Are you doing any current work?

A. No. This is in between season, so, no.

Q. And what was the last campaign that you worked on?

A. I helped with Frank Howard's campaign. He ran for Congressional CD 6 in the primary, but he did not make it through the primary.

Q. And what was the campaign previous to that one that you worked on?

A. I worked on Dan Bongino's congressional campaign for CD 6, Maryland Congressional District CD 6.

Q. And what was the prior campaign?

A. I worked on Dan Bongino's U.S. Senate campaign in 2012, for Maryland U.S. Senate.

Q. And was that the first campaign that you worked on?

A. No, the first campaign was Kathy Afzali for State Delegate, District 4A.

Q. And what year was that?

A. That was 2010.

Q. And did you work on Mr. Bongino's [9] campaign in Florida?

A. No. I have to stay local. My family's too important.

Q. And what was the highest level of education that you achieved?

A. I finished high school and then I've taken tons of classes since then.

Q. What kinds of classes?

A. I'm not going to be able to name them all. Anything that interests me. I've done accounting, anatomy, physiology, statistics, taxes, web design, photography. And, as I said, I'm not going to be able to name them all. Probably 20 or 30. Right now I'm taking Thai poorly.

Q. And is there some place that you take these classes?

A. Sometimes I do them on site. FCC, HCT, Hood. They are all very good locations, but now with on line, possibilities are endless. You can take anything.

Q. When did you first register to vote? [10]

A. On my 18th birthday, April 29th, 1982.

Q. Where did you live then?

A. I lived on Harp Hill Road. It's 11611 Harp Hill Road, Myersville, Maryland.

Q. And what congressional district is that?

A. District 6. It was. It's not now.

Q. And who was your congressional representative?

A. At that time it was Beverly Byron, but I moved out of there in '83. She left office a couple years after that.

Q. So that gets to my next question. Where did you move next?

A. To Middletown for one year in an apartment, 312 Broad Street, and I was there until '84.

And then I bought my first house on Loy Wolfe Road, which was 12610 Loy Wolfe Road, Myersville, 21773, until '96. And then we moved to the house we are in now, which is 12709 Martin Road, Smithsburg, Maryland, 21783.

Q. And are all those addresses in [11] Congressional District 6?

A. They were.

Q. And so you said that Beverly Byron left office shortly after you moved. Who was your congressional representative after?

A. It was Roscoe Bartlett.

Q. And who is your congressional representative now?

A. Jamie Raskin.

Q. And who was your congressional representative in 2012?

A. Van Hollen.

Q. In 1982, how often did you vote?

A. In 1982?

Q. Yeah.

A. I voted in every election. There are no municipality elections where I live, but any primary, presidential, or gubernatorial election.

Q. So just so I understand, you voted in every election, every primary in a gubernatorial year and every primary in a presidential year?

A. Uh-huh. [12]

Q. And every general election in a gubernatorial year and every general election in a presidential election?

A. Yes. Civics was very important in our family.

Q. And that's continued to the present day?

A. Uh-huh.

Q. Have you ever missed an opportunity to vote?

A. Not with early election. There's no excuse now.

Q. Are you registered as a member of a political party?

A. Yes. I'm a Republican.

Q. And when did you first register as a republican?

A. April 29, 1982.

Q. And have you ever registered with another party?

A. No.

Q. Have you ever affiliated with another party in any way? [13]

A. No. Well, what do you mean? Like helping a candidate that's a Democrat? Because otherwise, no.

Q. So by affiliated with a party, I'll get—we will talk about different candidates you may have helped later, but when I'm talking about affiliating with a party, I would mean going to a meeting of that party, identifying yourself as a member of the party.

A. No.

May I take my jacket off, just because it's 900 degrees in here?

Q. Of course.

A. Thank you. Sorry about that.

MS. WEBB: Could you say for me again, you said, by affiliating, you mean going to a meeting or—

MS. RICE: If we can read that back. Is that okay?

(The record was read by the Reporter.)

BY MS. RICE:

Q. Have you ever voted for a candidate who [14] is not a Republican?

A. Yes.

Q. When?

A. I voted for Beverly Byron. And then I voted for Brad Young, who is the president of Frederick County's Board of Education. They ran two times, two sessions.

Q. Okay. And are those the only times?

A. Yes.

Q. What party was Beverly Byron?

A. She was Democrat. She was a conservative Democrat.

Q. And what party is Mr. Young?

A. You're not supposed to know because it's supposed to be bipartisan, but he's a Democrat.

Q. When Roscoe Bartlett was on the ballot, did you ever vote for someone other than Roscoe Bartlett?

A. No.

Q. Did you vote for Chris Van Hollen?

A. No.

Q. Who did you vote for? [15]

A. Whoever the Republican was that was running.

Q. But you don't remember who that was?

A. Dan. Well, Dan ran against Cardin, and there's always somebody who jumps in and runs as the

Republican party, but they don't have a chance to win, so.

Q. Did you vote for Jamie Raskin?

A. No.

Q. Who did you vote for instead?

A. I can't remember his last name. His first name is Dan. I'm sorry.

Q. That's okay.

When did you first meet Dan Bongino?

A. It would be the summer of like 2010. Somewhere around there.

Q. And how did you start working for him?

A. I started as his volunteer coordinator, and then from that through the organization moved up and became his political director, and during the last part of the campaign, I was his assistant deputy campaign manager. [16]

Q. And why did you decide to act as Mr. Bongino's volunteer coordinator?

A. After I won with Kathy and her election, I met Dan, and he just was a very charismatic candidate. He had all the principles and values that I was looking for in a candidate, and so I got involved.

Q. When you were working for Mr. Bongino, did you send and receive e-mails as part of your job?

A. Yes.

Q. And why would you send and receive e-mails as part of your job?

A. If it was when I doing volunteer coordinating, it was talking to volunteers about events that were coming up. When I moved up to political, I'd—it

was talking to, again, the volunteers, making sure events were taken care of.

And then when I was the deputy campaign manager, it was talking to the accountant. It could have been with anything, anything involving [17] the management of the campaign.

Q. Would you keep e-mails to keep track of Mr. Bongino's appearances?

A. I keep everything.

Q. And would you keep e-mail to keep track of donor information?

A. Very minimally because you want to really protect your donors.

Q. But if you did have e-mail about donors, would that e-mail, the reason you had that e-mail be because of your job?

A. Yes.

Q. Did you believe Mr. Bongino could win the Maryland Senate seat in 2012?

A. That was naive, I did. That's before I truly understood Maryland politics.

Q. Why did you think he could win?

A. Because I thought if you got a good candidate out there, this is at the time, I'm much more knowledgeable now, if you got a good candidate out there and people got to meet him, they would vote for him, but it's just impossible [18] in this political environment.

Q. What do you mean by "this political environment?"

A. There are too many Democrats in Maryland for a Republican to win in a statewide race.

Q. Did Mr. Bongino consider running for Congressional District 6 in 2012?

A. No.

Q. And why not?

A. He left the Secret Service in hopes of winning State Senate or Senate. I mean, it was, again, he didn't understand the environment either. That's just the naiveté of somebody new to the political scene.

Q. Where did Mr. Bongino live in 2012?

A. He lived in Severna Park.

Q. And through his run in 2012 and 2014, did he ever move?

A. No. You don't have to live in your district to be in federal office.

Q. Did you follow Roscoe Bartlett's race in Congressional District 6 in 2012? [19]

A. I did because I was friends with his campaign manager. I followed it rather closely.

Q. Why didn't Mr. Bartlett win?

MS. WEBB: Objection. Speculation.

THE WITNESS: Sorry.

MS. KATZ: You can still answer.

Q. You can still answer.

A. Okay. I speculate that it was because of the redistricting. There's just too many, as I know so much about the district now, there's just too many Ds for a Republican to win.

Q. Is that speculation or is that your belief?

MS. WEBB: Objection. I'm not sure what you mean.

Q. You can go ahead and answer.

A. Yes. I believe that, yes.

Q. And what's—

A. There are four Democrats for every Republican in the district, in District 6.

Q. So you your belief is based on—

A. The numbers. [20]

Q. —the numbers. Okay. And that's your understanding of the numbers. Okay.

Do you know why Mr. Bartlett didn't run for Congressional District 6 in 2014?

MS. WEBB: Objection.

A. No, I don't know personally why he didn't run. Sorry.

Q. Do you have a belief about why he didn't run?

A. No.

Q. Why did Mr. Bongino decide to run for Congressional District 6?

MS. WEBB: Same objection.

Q. You may answer.

A. He knew the people in the district and, you know, he desperately wanted to run for office. So that's why he did it.

Q. What do you mean by "desperately wanted to run for office?"

A. He doesn't want to do it now, but he is one of those people that believes that he can do better if he helps and runs for office. He can [21] make a change if he's in office.

Q. Who is Allyson McMahon?

A. She's a friend of mine.

Q. And what was her role in the Bongino campaign?

A. She was deputy, well, I guess you call her deputy director of operations. That would be the best description. She kind of ran the field, but she was not an employee. She volunteered her time.

Q. But she was the director of operations?

A. Uh-huh.

(Whereupon, Strine Deposition Exhibit No. 3, campaign information e-mail, marked.)

BY MS. RICE:

Q. Do you recognize this document?

A. Uh-huh.

Q. What is it?

A. Yes. I'm sorry.

It looks like it's one of our campaign information documents that we put together.

Q. And who wrote it? [22]

A. It would have either been Ally or it would have been Jim Petit. One of the two. It's 2014, so I'm not a hundred percent sure.

Q. Who is Jim Petit?

A. Jim Petit was our communications director.

Q. And why did you have it in your e-mail?

A. Anything regarding the campaign I would have had.

Q. Great.

If you look at the sheet that says 2014 campaign information, and under the district, I'm just going to give you a second to read that and I will ask you a question about it.

A. Okay.

Q. Do you agree with the description of District 6 in this document?

A. It's not like that now, but, yes.

Q. But at the time in 2014 you agree?

A. Uh-huh.

Q. And moving down to the next section, the document, the opponent, take a look at that and [23] let me know when you're done.

A. Okay.

Q. Do you agree with the description of John Delaney in this document?

A. Yes.

Q. When he decided to run, did you believe that Mr. Bongino could win Congressional District 6?

A. I believed it was going to be an uphill battle.

Q. And why was that?

A. Because of the demographics of his district.

Q. And had you looked at the demographics at that time?

A. I started to really study it once he decided to run.

Q. And what was it about the demographics?

A. It's too many Democrats.

(Whereupon, Strine Deposition Exhibit No. 4, e-mails, marked.)

BY MS. RICE: [24]

Q. Who is Maria Pycha?

A. Uh-huh. She was our finance director.

Q. Do you recognize this document?

A. Yes, but just vaguely. It's been so many years, but, yes.

Q. Would this document have been received as part of your duties as campaign manager?

A. No. She obviously copied me on a conversation with Maria, Ally did, so, yeah. Everybody liked to copy me because I'm the organizer. I keep everything.

Q. Right. Excellent. Okay.

If we look just in the portion of this communication that is from Ally on March 12, 2014, so kind of the bottom of the first page, the first paragraph.

A. The very first paragraph?

MS. WEBB: The one that begins, "Hey, Maria?"

MS. RICE: Yeah.

Q. If you could look at that and tell me when you're done. [25]

A. Okay.

Q. Are you familiar with the poll that Ally is talking about at that point?

A. A poll?

Q. Yeah.

A. Where is there anything about a poll?

Q. The second to the last sentence.

A. Oh, yes. Sorry. Yes, I know the poll.

Q. And what were the results of the poll?

A. It's about a hundred pages, and it was not—it was specifically about different issues. I would have to refamiliarize myself with it.

Q. Do you know what Ally is talking about when she says, "We have a visible path to victory?"

MS. WEBB: Objection. Calls for speculation.

Q. You can answer and you must.

A. Yeah. If we had, you know, hit on the ground and raise money, we may have a visible path of

victory. I understand what she is [26] talking about, but the poll didn't say that specifically.

Q. Okay. So can you just elaborate a little bit because I'm not sure that I understand? What did you think Ally meant when she said a visible path of victory?

MS. WEBB: I will restate my objection.

A. I really don't know because, as I said, the poll itself, it was about issues, economics and where do people feel about fracking. We didn't actually go into the numbers as to whether he could a hundred percent win or not in the poll.

Q. Okay.

A. Name recognition. So, as I said, it's like 200 pages.

Q. Did you at the time, so in March, 2014, share Ally's belief that there was a visible path to victory?

MS. WEBB: Objection. Lacks foundation and calls for speculation.

MS. KATZ: Can we go off the record for a [27] second?

(Discussion off the record.)

MS. WEBB: Go ahead. You can answer.

THE WITNESS: Would you ask the question again, please?

MS. RICE: Yes.

Q. Did you personally share Ally's belief that there was a visible path, in March of 2014, that there was a visible path of victory?

MS. WEBB: Objection.

A. I was always a skeptic because I wanted him in office so badly, but it was going to be such a tough road.

Q. Did you share your skepticism with anyone?

A. My husband. You can't be like that and run a campaign.

Q. And what were the obstacles that you believed were in place at the time? At the time. Not now.

A. Trying to get Democrats, enough Democrats to vote for Dan. [28]

Q. And why did you think that would be a problem?

A. Because of the type of Democrats that are in our district now, they vote straight, especially in an off-year election. The people who people are people who really want to vote. So they are consistent Democrats that vote democratic consistently. So it just seemed like an uphill battle. I wanted it to happen, but I was afraid we would lose by a point or two, which is exactly what happened.

Q. So we just talked about in March. What about after the primary in June? Did you believe that Mr. Bongino could win Congressional District 6?

A. I was always the skeptic.

MS. RICE: This will be marked as Exhibit 5.

(Whereupon, Strine Deposition Exhibit No. 5, e-mail, marked.)

BY MS. RICE:

Q. Do you recognize this document? [29]

A. Uh-huh.

Q. What is it?

A. It's an e-mail of Marge Barnard.

Q. And who wrote it?

A. I did.

Q. And in what capacity did you write it?

A. At the time I was the deputy campaign manager.

MS. RICE: Mark this as Exhibit 6.

(Whereupon, Strine Deposition Exhibit No. 6, e-mails, marked.)

BY MS. RICE:

Q. Do you recognize this document?

A. No, but I'll read it. I'm sure I've seen it. Okay.

Q. What is this document?

A. It looks like it's Maria and, excuse me, Mary Jane raised $2,600 for Dan.

Q. Who is Mary Jane?

A. Mary Jane was a volunteer part of the Finance Committee.

Q. And do you know who Bob Luddy is? [30]

A. No, I don't know Bob.

Q. And why did you have this e-mail?

A. Because I am the organizer and they send everything to me so I can keep it on file.

Q. Great. Thank you.

How many volunteers did the 2014 Bongino campaign have?

A. I'm not going to give you an exact number because I don't know what it was now, but we were over 2,000 volunteers.

Q. Did you think that it was an obstacle to the campaign that Mr. Bongino did not live in Congressional District 6?

A. To be honest with you, that was a question that was in the poll and no one cared.

Q. As the campaign manager, did you receive reports from your team that were out in the field over e-mail?

A. Yes.

Q. What kinds of things would they e-mail you about?

A. It could be anything about with, you [31] know, how, where are we going to set the tent up at a festival. It could be how many people are going to show up at a parade, how many doors were knocked on, how many phone calls were made. We need more T-shirts. We're out of bumper stickers. It could be anything involving the communication of the campaign.

Q. Would your field operators tell you if they heard about a complaint about the campaign?

A. Yes, because, actually, I handled all of the complaints where the campaign was concerned.

Q. And you kept records of those complaints?

A. Uh-huh.

Do you think at 10 we could break to use the bathroom?

Q. No problem. It might be a natural time for a break anyway.

MS. RICE: I'll have marked this as Exhibit 7.

(Whereupon, Strine Deposition Exhibit No. 7, e-mails, marked.)

BY MS. RICE: [32]

Q. Do you recognize this document?

A. No, but I'll read it. Okay.

Q. And what is this document?

A. It's somebody complaining that Dan doesn't live in the district.

MS. RICE: Mark this one as Exhibit 8.

(Whereupon, Strine Deposition Exhibit No. 8, e-mail, marked.)

BY MS. RICE:

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. It looks like Ally is trying to figure out where we are going to put signs up. We were discussing the district. It was a learning curve to learn the district.

Q. Do you see the second sentence on the first paragraph?

A. Yes.

Q. Did you commonly encounter Republicans who were supporting Delaney on the campaign?

A. Some. Not many. [33]

Q. And were there any other common obstacles that you heard from people you thought might be supporters of Mr. Bongino?

MS. WEBB: Objection. Foundation.

MS. RICE: That's an improper objection.

MS. WEBB: No, it's not, and I'm happy to discuss it, if you want her to step out of the room.

(The witness left the room.)

MS. WEBB: You said were there any other common obstacles that you encountered in your work, and we haven't established any obstacles that were common. I'm not sure what you're referring to.

MS. RICE: Foundation, per se, is an improper objection.

MS. WEBB: Not in my practice. I don't know if Maryland has a special rule on that, but—

MS. RICE: It goes to relevance and admissibility of the evidence, which is not the issue. [34]

MS. WEBB: I mean, I guess we have to disagree on that. I'm happy to try to tailor my objections, you know.

MS. RICE: Yes. Please tailor your objections to curable objections because those are the objections that are allowable in Maryland.

So the only times that you can object in Maryland are when it's something that I can cure or it's something that would be about to invade a privilege.

MS. WEBB: Okay.

MS. RICE: So let's to limit those objections to this.

MR. STEIN: Do you have a rule you can show us on this?

MS. RICE: Yes. You want to take a break?

MR. STEIN: Yes.

(Break taken.)

(The witness returned to the room.)

MS. WEBB: I'm just going to remind you [35] that I may make objections from time to time, but you should go ahead and answer the question asked.

THE WITNESS: I'm just pausing to make sure that everything is finished before I answer, but I will be glad to answer.

MS. RICE: Great. Thank you all.

BY MS. RICE:

Q. So I'm going to get back where we were. And I think when we paused I had a question pending, so I'm going to repeat it for that purpose.

Did you know of any other obstacles to Mr. Bongino's campaign, the 2014 campaign, from people who you thought would have been supporters?

MS. WEBB: Objection. Foundation. Speculation.

A. I don't understand what you are asking.

I'm sorry. I genuinely don't understand.

Q. Let me try again.

A. Okay. I'm sorry. [36]

Q. No. That's great.

In your capacity as campaign manager, were you aware of complaints from people that maybe you would have expected to support Mr. Bongino about his campaign?

MS. WEBB: Objection. Speculation.

A. I'm sorry. I'm just trying to think in what direction. You know, going back to the poll, I know that I said nobody cares about it, but what it was, it's 70 percent of the people did not care that he did not live in the district, and we polled Democrats, Independents, and Republicans. So there were 30 percent, but we didn't see the breakdown who it was that cared.

But, other than that, you know, I just am not sure who you are talking about, whether you are talking about business leaders, politicians. Are you talking about voters in particular?

Q. Let me try it another way.

Putting aside what you already talked about, the number of Democrats in the district, [37] were there any other major issues that you thought that Mr. Bongino needed to overcome?

A. Raising money.

MS. WEBB: Objection.

A. Seriously, that's the biggy.

Q. And why did you think Mr. Bongino would have difficulty raising money?

A. Because John Delaney had so much money.

You don't have to match your opponent one to one, but you've got to be able to make a dent.

Q. And was Mr. Bongino successful in raising money?

A. Yes. He raised about $2 million through the process of the primary and the general.

(Whereupon, Strine Deposition Exhibit No. 9, e-mails, marked.)

BY MS. RICE:

Q. Do you recognize this document?

A. I'm reading it. I mean, I know that I sent it, but I don't remember it.

Do you want me to read the whole thing?

Q. I think if you—read as much as you [38] need to familiarize yourself with the document. Let me know if you recognize it.

A. Okay. I got the gist of what the question is. It's typical of the things that I handled.

Q. So this e-mail would be typical of something that you handled in your capacity as campaign manager?

A. Yes.

Q. And who is it from or who is Jeff Miller?

A. I don't recall who he is, but it looks like he is somebody who wanted to attend an event.

Q. Great.

MS. RICE: Mark this one as Exhibit 10.

(Whereupon, Strine Deposition Exhibit No. 10, e-mail, marked.)

BY MS. RICE:

Q. Do you recognize this e-mail?

A. No, but I'm reading it. Okay.

Q. What is this document?

A. It looks like it was someone complaining [39] about getting phone calls from the phone bankers.

Q. And why did you receive this document?

A. Because I handled the complaints of the campaign and then would find who would handle it from there, and I kept it in my files to make sure it was taken care of.

Q. Great. Thank you.

Why do you believe that Mr. Bongino was not successful in his 2014 race?

A. It wasn't for lack of trying. We knocked on so many doors, made so many phone calls, talked to so many voters. There just aren't enough people to vote Republican in the district.

Q. Did Mr. Bongino get fewer votes than Governor Hogan in Congressional District 6?

A. To be honest with you, I wouldn't be able to answer that because I just didn't look at Governor Hogan's numbers in District 6. I'm sorry.

Q. Why didn't you look at Governor Hogan's numbers?

A. Because I wasn't concerned about that. I [40] was looking at District 6.

Q. Do you know if Mr. Bongino got as many votes—oh, never mind. Strike that.

MS. RICE: 11.

(Whereupon, Strine Deposition Exhibit No. 11, e-mail, marked.)

BY MS. RICE:

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. It was communication back and forth with me, Kathy Afzali.

Q. And why do you have, why did you retain this e-mail?

A. Because I keep all my e-mails, unless they are junk.

Q. Did you receive this e-mail in your capacity as Mr. Bongino's campaign manager?

A. Yes, after the election.

Q. I think we mentioned Kathy Afzali a few times. Who is she?

A. She's a delegate in District 4-A. It's [41] just 4 now. It's not 4-A. I ran her campaign.

Q. Oh. Who is Michael—

A. He's a State Senator. Michael Hough.

Q. Hough.

Go to the second page, the third paragraph, full paragraph on the top. Did you write this part of the conversation?

A. Uh-huh.

Q. And what did you mean in that paragraph?

A. Basically what I have been telling you. It was a David and Goliath race. Too many Democrats to win the race.

Q. Who is "you" in that paragraph? I'm well aware of the games you were playing.

A. Who am I?

Q. No. I'm reading from that paragraph.

A. I'm sorry. Please repeat. I'm sorry.

Q. If you look at that paragraph in the first sentence, the word you, who does that refer to?

A. I guess you as in the you, everybody.

Q. Did you write this e-mail in response to [42] Kathy Afzali?

A. Yes.

Q. So you are saying that when you said, "I'm well aware of the games you were playing behind the scenes during the election cycle, and to be honest, I'm ashamed," the "you" in that sentence refers to the general public?

A. Quite honestly—okay. I don't know where you are going with this, so I'm trying to understand.

Even if related, then this amateur hour analysis would lead you to believe, that would be like leave anyone who is looking at it, lead you to believe that Bartlett and Young were the two worst candidates in Frederick County.

That's referring to her analysis. And then I asked her to take a few minutes to do a little research.

So what is your question? I'm so sorry.

Q. Yes. That's the first—

A. I'm not trying to be combative. I just don't understand. [43]

Q. No. That's fine. We all want to understand each other.

That's the first full paragraph. I'm looking at the third full paragraph.

A. Okay.

Q. I just don't understand it.

A. It's saying that she had said that we recreated the politics in Frederick County, and I said that we didn't. We actually were using common sense. We knocked on doors. We didn't have money. That's why we worked every festival.

Q. What are the games that you are referring to in this sentence?

A. The games that she was playing? Kathy has turned into your typical politician, and she was behind the scenes because she was jealous that I was working his campaign. She had run against Bartlett and lost in the primary, and so she was telling people not to vote for Dan.

Q. so—

A. And we are friends again. It was just a heated, emotional discussion, and we talk now all [44] the time.

Q. Who did she tell not to vote for Dan?

A. We would knock on a door and someone would say, hey, I talked to Kathy Afzali and she said we are not supposed to vote for Dan.

Q. Who was she suggesting that they vote for?

A. Delaney.

Q. So sticking with this argument for just a second, if you look to the original e-mail from Michael Hough, it's one, two, it begins on the bottom of page 3 and goes over to page 4, and, actually, before we get to that, how often did you encounter that reaction that somebody had spoken to Ms. Afzali before you got there?

A. It was only in District 4. So it's a very small district and maybe we encountered it four times.

And I can't be a hundred percent accurate on that, but it wasn't that often.

Q. Okay. So on that, I think it's the fourth page here, Mr. Hough was giving some comparisons with Governor Hogan's performance in [45] the Frederick City, not district-wide. Is that correct?

A. I mean, it looks like it, yes. Frederick City is a high Democrat area.

Q. And were you aware that in Frederick City, Governor Hogan had more votes than Mr. Bongino?

MS. WEBB: Objection. Foundation.

A. Obviously, when I see this, but there's a reason for it.

Q. What's the reason?

A. Brad Young was running for County Exec in Frederick County, and he is hated by the Democrats in Frederick City. And—not Brad Young, excuse me, Blaine Young, and Blaine was a supporter of Dan's.

So people who wanted to vote against Blaine voted against Dan in Frederick City.

And, yes, we did hear that when we talked to Democrats at festivals, especially on July 4th, when we were at the July 4th festival.

Politics is an ugly game. I'm sorry. [46]

Q. I'm sorry for skipping around. I apologize.

Back to the second page of this document, the end of the first page, on the top of the second, you talk about, I'm just going to read here, "Anyone with a modicum of experience in politics understands a state race and a federal race are decided by completely different criteria."

Can you explain what those criteria are?

A. If you are referring to a delegate, a delegate is only in a small district. I would assume, but I don't remember, I was probably talking about the Hogan race. And people are looking for somebody who is going to work for them at the State House when they are doing a state election. When they are voting for a federal race, they are looking for somebody who is going to go to Capitol hill and fight for you, and they just look at things differently as to who they vote for.

Q. What kinds of things are looked at [47] differently?

A. Well, you are not going to—as far as a state road, you are going to hope that, you are going to reach out to, as a state, to get improvement in a state road. If you are talking about I-70, you are going to go to—well, actually, they don't do that either.

How about anything that is a federal issue. If it has something to do with the constitution, what laws are being passed on Capitol Hill, that kind of stuff, you vote for your congressman and your senator with that in mind. If you are voting for your governor, you are voting for a governor that is going to work with you within the State laws.

Q. And do you think that difference in what you, what a voter might be looking for creates a change in their voting behavior?

MS. WEBB: Objection. Calls for speculation.

A. Yeah. I can only speculate.

Q. What is your belief about it? You can [48] answe. about your belief.

A. Maryland politics is a rough world. As I said, I had to learn on the fly ten years ago. The Governor has to be able to placate both sides to get in. We don't have Republican governors that get reelected, and I doubt that Hogan will as well just because that's just the way it works. He had a bad candidate that he was up again, I mean, a very bad candidate, and that worked for him as well. Maryland was tired of politics with O'Malley and it was time for a change.

Q. Going back for a second to an answer you gave previously, why did you vote for Beverly Byron?

A. Because she was a conservative Democratic.

Q. What do you mean by conservative Democratic?

A. She was fiscally conservative. That's what I'm looking for.

Q. And you also mentioned the—[49]

A. Brad Young.

Q. Brad Young. Why did you vote for Mr. Young?

A. Because he is fiscally conservative, and everybody likes him.

Q. Do you consider yourself to be politically active?

A. Now, yes.

Q. You said now. When do you think you became politically active?

A. 2010, yes.

Q. And why?

A. Because of the political environment.

The census was coming up. I was scared to death what was going to happen, and I just knew I had to step up.

Some people go back into their own lives and just ignore what's going on in the world.

I'm the type of person that I'm a fixer. If I see there's a problem, I got to get involved, and that's how I got involved.

Q. What were you scared of? [50]

A. The political environment, the debt, the national debt that was happening, the raising of minimum wage. I mean, we could talk for the next three hours with my concerns about politics.

Q. Putting your work for Mr. Bongino aside, have you ever attended an event that was held by your congressional representative?

A. By my congressional representative? No. He has only been in office for a very brief period of time.

Q. Sorry. Throughout your whole voting life, have you ever attended an event held by your then current congressional representative?

A. I did for Roscoe. He always did little town meetings and stuff.

Q. Okay. So you attended town meetings that you just said—

A. I probably went to two in the time that he was in his 2010, how many terms he had.

Q. Do you remember what topic they were on?

A. No.

Q. Do you remember, were you just a [51] participant at the meeting?

A. Actually, the first time I took my son solely so that he could learn about, because he was getting ready to vote, or not vote, excuse me, getting ready to register to vote, my oldest son. I don't remember the topic and I don't remember why I went the second time.

Q. And did you ever attend an event with him with Beverly Byron?

A. I actually did a parade with her when I was like 15 years old, so, yes. I did hold a sign. They were good people, Beverly and Goodloe.

Q. And what about Chris Van Hollen?

A. No.

Q. Have you ever volunteered on a campaign for a congressional representative other than Dan's campaign?

A. Beverly Byron I did a parade. That's it.

Q. And have you ever contacted your, and by your congressional representative, I mean from your whole voting life, your representative at [52] the time?

A. One time I contacted Roscoe Bartlett. We were attempting to get a travel visa for my now daughter-in-law, then engaged to my son. She's Thai. We were unsuccessful. Then I also reached out to Mikulski and Cardin, but they didn't respond.

Q. But that was the only time you attempted to contact a congressional representative?

A. Correct.

Q. And so that was related to constituent services?

A. Uh-huh.

Q. Is the answer the same about an issue? Have you ever contacted your congressional representative about an issue?

A. I wrote a letter to Mikulski when they were getting ready to raise the budget in like 2011, maybe, something like that, and I hand delivered it to her office.

Q. And is that the only time that you—

A. That I can remember. I'm sorry. I don't [53] recall reaching out to them.

Q. When was the first time you became interested in redistricting?

A. As I said, it was 2010 when the census was coming up, and it was just reading an article on the web about the possibility that we could lose District 6, and I was like, I've got to look into it more, and that's when it started.

Q. And was that interest solely confined to congressional redistricting?

A. Yeah, actually, because I wasn't going to lose my state delegate because that was going change. They were going to put two districts together, which they did, and, you know, our state senator wasn't going to change because that district stayed the same. It was just tweaked a little bit by a road or two.

Q. Have you ever—when did you first find out about the 2010 congressional redistricting cycle? Do you remember what month it was?

A. No.

Q. After you found out about it, did you [54] take any action regarding the redistricting?

A. I always do. Argued with my husband, You know, this is what's going to happen. Seriously. He and I talk things through that way, and he actually said, do your thing and get involved, and that's how it happened.

Q. How did you get involved?

A. I first meet Kathy Afzali and decided to help her with her campaign because while we were knocking on doors during that time, we told

people to vote for Ehrlich because the census was coming up, and it was going to be a redistricting time, and that's because I was so new at politics, I thought that was the best way I could help.

Q. And did you testify before the Governor's Redistricting Advisory Committee?

A. No.

Q. Did you submit any public comment on the plan?

A. No.

Q. Did you write a letter about the [55] redistricting?

A. No.

Q. Did you call any of your elected representatives about the redistricting?

A. Of course I talked to Kathy all the time about it. She actually was fighting it tooth and nail at the State House. And I attempted, they had redistricting meetings all over the place, and I attempted to attend them, but I could never find out where they were.

Q. And did you—were you aware of the referendum on redistricting?

A. Is that like the one that was Question 5 about the boundaries according to the census and the constitution? That one?

Q. Yeah.

A. Yeah.

Q. Did you gather any signatures related to that?

A. No.

Q. Did you—how did you vote on the referendum? [56]

A. If that's the correct one, I voted no.

Q. And have you taken any actions about redistricting after the passage of the 2011 plan?

A. I got involved in this.

Q. So without telling me about any conversations that you had with your lawyers after you asked to be represented by them, so after that, how did you first hear about this lawsuit?

A. Maria Pycha has become a very good friend of mine, and she heard me do nothing but complain about the redistricting, and she said, hey, you need to get involved in this. That's how it happened.

Q. Okay. And why did you decide to join the lawsuit?

A. Solely to see if we could fix the mess.

Q. What mess?

A. The redistricting, the gerrymandering of the district.

Q. And what particularly did you want to fix? [57]

A. I would love it to go back to the way it was before it was changed.

Q. And what problem would that solve?

A. It would allow us as a representative republic to have a representative that matches our principles and values in our district.

Q. Who are you talking about when you say us?

A. I'm talking about the Republicans in the district.

Q. Do you think you were harmed by the 2010/2011 Congressional redistricting?

A. In the most simplest form, yes, because we do not have somebody that represents us anymore.

Q. And how is that harmful to you?

A. Because we don't have somebody who speaks for us. Our government was formed as a representative government. We were supposed to vote on somebody that represented us and would go down and speak for us at Capitol Hill. But what has happened is, we no longer have that. Then we [58] can go back to our lives and work; trust they will do the work for us.

Q. Who do you mean by us?

A. The Republicans in the district.

Q. In what district?

A. District 6, but I'm no longer in that district. I got taken out and put into District 8, and I'm exactly 3.1 miles from the district.

Q. Do you have a congressional representative?

A. Yes, Jamie Raskin. He just was sworn into office.

MS. RICE: Let's take a quick break.

(Break taken.)

BY MS. RICE:

Q. Two more questions.

If there was somebody on the ballot who was fiscally conservative, would you vote for them?

A. Uh-huh.

Q. Regardless of—

A. Yes. I'm sorry. Yes. Sorry. [59]

Q. Regardless of what party they were affiliated with?

A. Yes.

MS. RICE: I'm done.

EXAMINATION BY MS. WEBB:

Q. Just a few questions.

A. Okay.

Q. So could you describe again just quickly what jobs you held on the Bongino campaign?

A. The Senate campaign or the Congressional?

Q. The Congressional.

A. I started out as the deputy campaign manager, and then she left to take care of her mom, and I stepped up as campaign manager.

Q. Okay. And what sort of general duties did you have?

A. Everything. Yeah, I can go into details, but anything that encompasses the campaign, I oversaw.

Q. As part of your job, would you try to get your colleagues motivated?

A. That's one of your biggest roles. [60]

Q. Would you try to set the tone?

A. Absolutely. If you have the worst tone, nobody will do anything. You have to be positive and a motivator all the time. And that's with the candidate down to the person who is holding a sign on the corner.

Q. And in your role, did you communicate with potential voters?

A. Yes.

Q. And what sort of tone would you try to project to those voters?

A. Always positive. I mean, you have to make sure that they want to vote. So you have to be positive with them all the time.

Q. You testified that you were harmed from the redistricting of Congressional District 6. Correct?

A. Yes.

Q. And you felt disenfranchised. Correct?

A. Yes.

MS. RICE: Objection. Mischaracterization. [61]

MS. WEBB: Fair enough.

Q. Just to clear that up, you testified that you felt you didn't have someone who speaks for you.

A. Correct.

Q. And did you talk with others in the former congressional district whether they felt harmed?

A. Yes. Uniquely, I can state that I spoke to 60,000 people in the district, and that's between festivals, knocking on doors, parades, anything you can imagine, and I'm serious. 60,000 people is not exaggerating. And every time we were out, we met somebody who said, it's not worth voting anymore, every single time.

Q. Over what period of time were you speaking to all these people?

A. When I got involved in the campaign until the election night in November.

Q. And when did you first get involved?

A. I think it was in October, I think. Honest to God, I don't know the exact date. [62]

Q. October of—

A. It would have been 2011.

Q. Okay. 2011?

A. Yes.

Q. So over—

A. Not 2011. Excuse me. It was 2014. So it would have been 2013. Sorry.

Q. 2013?

A. Yeah.

Q. Until the present?

A. Correct.

Q. And would you--you mentioned some ways you were talking to people, parades, festivals.

Could you elaborate?

A. Myself, I probably made a thousand phone calls. The volunteers made way more than that. And so I didn't have that much time to make phone calls. But every time I got on the phone, I'd call like 50 people, and at least one person would say, I'm not, I don't know why I should vote, and, of course, it was my job to try encourage her to vote because, I'm saying she, as [63] in she or he, okay, they just feel disenfranchised that they can't, they don't have somebody that represents them anymore.

There was an old guy at a festival in Cumberland that came over, and it was so disappointing because you could tell he was the salt of the earth, that he worked hard every day, dirt under his fingernails, in his coveralls, and he just stopped there to get a ham sandwich, and we talked to him, and he said that there's just no point in voting anymore because nobody represents us in Cumberland anymore. So, I mean, it's a valid point that I heard continuously.

Q. Anymore being when?

A. After the redistricting. I'm sorry.

Q. And do you agree with them? Do you feel that as well?

A. Absolutely. I had a rough time this last go-around with Amie Hoeber even getting excited or even wanting to give my time because I just knew it was a losing race. There was no chance

that Amie was going to win, even though she had [64] money and he had money. She lost by 14 percent or a little over 14 percent.

Q. Just one more quick question about Exhibit 11, which you have there in front of you. If you turn to the third page of Exhibit 11, you were asked some questions about an e-mail here from a Michael Hough.

A. Hough. That's all right. I called him that until he corrected me.

Q. Sent November 8th, 2014. And does the e-mail that you see here include some statistics?

A. Yeah.

Q. Do you know for a fact that these are accurate?

A. No.

Q. Okay. Thank you.

A. As I said, I didn't look at stuff after the race. I was in recovery.

MS. WEBB: Thank you.

MS. KATZ: We are going to ask a couple. Take a quick break for a second.

(Break taken.) [65]

EXAMINATION BY MS. RICE:

Q. One question remaining.

So as I understand what you just said, that you had encountered many people that told you that they weren't excited about voting anymore. Is that correct?

A. Uh-huh.

Q. Do you know anyone who actually did not vote?

A. No, because I would have no way of knowing that information.

Deposition of Plaintiff Alonnie L. Ropp

Q. State please your full name.

A. Alonnie Louise Ropp.

MS. KATZ: Okay. Great. And I'm going to—we are doing this sequentially.

(Whereupon, Ropp Deposition Exhibit No. 12, Notice of Deposition, marked.) [6]

BY MS. KATZ:

Q. Take a look at this document. Do you recognize it?

A. Yes, ma'am.

Q. Can you tell me what it is?

A. It is the request for me to appear and provide my oral comments.

Q. Okay. Great.

And you are the person who is represented in this notice?

A. Yes, ma'am.

Q. Okay. Wonderful.

Have you ever been deposed before?

A. No, ma'am.

Q. Okay. I'm just going to go through a few sort of housekeeping rules that will help make this go smoothly.

So because the court reporter is typing down everything we say, I'm going to ask that you wait until I finish a question to provide an answer and that you provide a verbal answer. And then I will wait until you are finished answering [7] a question to pose a new one. And, again, please provide verbal responses.

If you do not understand a question that I ask you, just let me know. If you don't tell me that you don't

understand a question, I'm going to assume that you do understand it. Okay?

A. (Witness nods head.)

Q. We are going to try to make it through—well, actually, we are going to break at 2 because Sarah has to step out.

If you need to use the bathroom or take a break before that time, just please let me know. We can break at any time. We will find a good time to break.

And then, are you taking any medication that may affect your ability to recall events or to testify today?

A. No, ma'am.

Q. Okay. Thank you.

So Ms. Ropp, where do you live?

A. I live in Middletown, Maryland. And I live at 8543 Pete Wiles Road. Based on the [8] deposition, I did want to point out that the, request that the address has changed.

Q. Okay. So the address on the second amended complaint is no longer your, where you reside?

A. Uh-huh.

MR. MEDLOCK: I want to make sure the record is clear. The address, although on our interrogatory responses, is that address.

MS. KATZ: Okay. Great. Thank you. I'm not sure we had these when we did these, but thank you for clarifying.

BY MS. KATZ:

Q. How long have you lived at that address?

A. One year.

Q. One year. Okay.

And we're going to talk in a few minutes about where you lived previously.

How many years of schooling do you have?

A. Can you clarify?

Q. What was the last year of school that you attended? I assume you graduated from high [9] school.

A. Uh-huh. I graduated from high school, and I completed my Bachelor of Arts, yeah.

Q. Where did you go to college?

A. Mount St. Mary's College, it was college at the time, but University. That is where I concluded my studies for my Bachelor's degree.

Q. Is that here in Maryland?

A. Yes, ma'am.

Q. In St. Mary's County?

A. No, actually, in Emmitsburg. Mount St. Mary's. Then there's a St. Mary's.

Q. Okay. Great. What kind of work do you do?

A. I work with an insurance company.

Q. Which insurance company?

A. It's NASW Assurance Services, and it's a for-profit entity.

Q. And what do you do for them?

A. I'm in underwriting and quality assurance analyst.

Q. How long have you been there? [10]

A. If I can point out, I spent two years with the organization completing in June of 2015, and I started working with them again May of 2016 to present.

Q. And what did you do in between?

A. I was actually caring for my parents who were ill.

Q. Sorry to hear that. And what did you do before that?

A. I actually was a stay-at-home mom.

Q. How many kids do you have?

A. Two.

Q. That's nice. I have three girls, so I can relate. Okay. Great.

Do you recall when you first registered to vote?

A. Yes. I registered in 1991.

Q. In 1991?

A. Uh-huh.

Q. Okay. And how old were you at that time?

A. Twenty, approximately.

Q. And where were you living at that time? [11]

A. In Frederick, Maryland.

Q. Do you recall what congressional district that was in?

A. 6 at the time.

Q. And do you recall who your congressional representative was in 1991?

A. Yes, Roscoe Bartlett.

Q. And where in Frederick were you living at that time? Do you remember your address from 1991?

A. Actually, dial back. I'm getting my years together. That would be an address on Taney Avenue in Frederick, Maryland.

Q. Okay. So from—when did—did you move out of Frederick since 1991?

A. Briefly. I did move out of the state in 1997.

Q. And where did you move to?

A. Pennsylvania. Hanover, Pennsylvania.

Q. Isn't that where they make Utz?

A. Uh-huh.

Q. And so from years 1991 to 1997, just to [12] be clear, you lived in Frederick, Maryland?

A. Uh-huh.

Q. And do you know if during all of those years you were in the 6th congressional district?

A. Yes, ma'am, I was.

Q. Okay. And during those years, did you vote regularly?

A. No. In my youth, I did not vote regularly. I tended to miss the gubernatorial elections in those years.

Q. Do you recall if you voted in primary elections during those years, 1991 to 1997?

A. Likely not.

Q. Do you recall if you would have voted in the presidential, the general presidential elections during those years, 1991 to 1997?

A. Yes.

Q. You think that you did?

A. Uh-huh.

Q. Okay. Do you recall if when you voted in those general elections you would have also voted for your congressional representative? [13]

A. Yes.

Q. And do you have any recollection of who you would have voted for to represent you as your congressional representative during that time 1991 to 1997?

A. Yes. I would typically select Roscoe Bartlett.

Q. So when you say typically, does that mean that you think that you voted for him every opportunity that you had to vote for him?

A. I did.

Q. Okay.

A. I apologize for the use of the word typically.

Q. Don't apologize. It's my job to try to clarify if I feel I need clarification on something.

And when did you move back to Maryland from Pennsylvania?

A. 2000.

Q. And where did you move when you came back to Maryland? I'm sorry. What city did you move [14] to?

A. Frederick.

Q. Frederick. So you moved back to Frederick?

A. Uh-huh.

Q. And have you lived in—how long were you in Frederick after you moved back in 2000?

A. I'm sorry. Can you repeat the question?

Q. How long did you live in Frederick after you moved back in 2000?

A. Two years.

Q. Do you recall if during those two years you would have voted in any election?

A. In—oh, goodness. If you will bear with me one second, one moment.

Q. Sure.

A. I remember in particular voting for a presidential election not long after I returned to the state.

Q. Okay.

A. Yes, ma'am. And I did an absentee ballot that year. [15]

Q. So you think that would have been in 2000?

A. Uh-huh.

Q. And when you say it was an absentee ballot, do you think you would have voted in Pennsylvania?

A. No.

Q. Okay.

A. The reason I provided an absentee ballot because I was on business travel on election day, and I remember specifically going to the Elections Board to put that in.

Q. Do you recall in that election you also voted for your congressional representative?

A. Yes.

Q. Do you recall who you voted for?

A. Yes, that would have been Roscoe Bartlett as well.

Q. I'm sorry. I'm going to take you back in time for a moment.

When you lived in Hanover from 1997 to 2000, do you know who your congressional [16] representative was?

A. No, ma'am. I don't remember.

Q. Do you recall if you voted when you lived in Pennsylvania?

A. I did.

Q. Do you know if you voted—do you know which elections you voted for, in which you voted when you lived in Pennsylvania?

A. I don't remember.

Q. Do you recall if you voted for your congressional representative when you lived in Pennsylvania?

A. I don't remember specifically who I chose, but I should point out, typically, if you go to the polls every two years, you are going to vote for your congressional representative.

Q. Okay. In 2002, where did you move?

A. Middletown, Maryland.

Q. I'm not very familiar with Middletown. What county is that in?

A. Frederick County.

Q. And so have you lived in Middletown from [17] 2002 through present?

A. Yes, ma'am.

Q. And so now I want to ask you about your voting history from 2002 to the present. Do you recall if you voted regularly during that time?

A. What would your interpretation of regularly be?

Q. That's a great question.

Do you recall if you voted in every election in which you've had an opportunity to vote during that time?

A. I would say I may not have utilized all of my primary opportunities before 2010.

Q. Prior to 2010, and I just want to be clear about this, is it that you don't recall if you voted in primary elections or you don't think that you did?

A. I actually do not recall.

Q. Do you recall if you voted in presidential, excuse me, in general elections during that time period?

A. I do recall that I did vote in most [18] general elections.

Q. And would that include gubernatorial elections?

A. I would say beyond a reasonable doubt, and we are going to go with that, 2010 I voted that gubernatorial election.

Q. Okay.

A. And definitely the 2014 gubernatorial election. Prior to that point, I didn't take a look at the voter data. I did not make a marked review of that.

Q. Okay. And just so I'm clear, have you voted in every election in which you had an opportunity since 2010?

A. Yes, ma'am.

Q. Okay. And that includes primary elections?

A. Yes, ma'am.

Q. Okay. Great. Thank you.

Are you registered as a member of a political party?

A. Yes, ma'am. [19]

Q. Which one?

A. Republican.

Q. And do you recall when you first registered as a Republican?

A. That would have been when I first registered.

Q. Have you always registered as a Republican?

A. Yes, ma'am.

Q. Have you ever registered with another party?

A. No, ma'am.

Q. Have you ever voted for a candidate who was not a Republican?

A. Yes, ma'am.

Q. When would that have been?

A. In 2010, in a general election, there was a county commissioner race where you selected five positions, and one of the positions I voted for a Democrat.

Q. Do you recall who that was?

A. Yes. Michael Kurtianyk. [20]

Q. Okay. And why did you vote for him?

A. Because based on the last remaining choice in my political party, his fiscal perspective and the community organizations that he was a part of and I was a part of, I chose him because his belief system was very similar to mine.

Q. Do you recall what organizations he was a part of that you were just referring to?

A. He was—I'm trying—a lot of community organizations, a lot of non-profits. I hesitate to mention all because not all come to mind at this point.

Q. Do any come to mind?

A. He was part of—I don't have it beyond reasonable doubt, but I remember being in conjunction and seeing him at the different organizations and church as well.

Q. And in your initial answer as to why you voted for him, I believe you also said that you shared some political beliefs. Do you recall what those were? [21]

MS. WEBB: Objection. Mischaracterizes the testimony.

Q. You can answer the question. In your prior answer, did you say you shared some political beliefs with the Democrat that you voted for in that election?

MS. WEBB: Same objection.

Q. Do you recall?

MS. WEBB: Same objection.

A. I would restate it to say, it was, if you categorize a fiscal perspective instead of an ideology.

Q. What was that fiscal perspective?

A. Well, it was a county commissioner position and our county commissioners facilitate economic development in the community. They facilitate land

use policies. And his thoughts in that area were consistent with mine.

Q. And can you just be more specific about what those thoughts are that are consistent with yours?

A. Well, it was in 2010 and our county has [22] changed, so I can't do that with specificity.

Q. Is that because you don't remember?

A. I don't remember.

Q. Okay. I believe you said this, but I just want to clarify. That person was a Democrat that we were just talking about?

A. Yes. He was part of the Democratic party.

Q. Do you recall if that was the only time that you've ever voted for a candidate who was not a Republican?

A. I believe that's the case.

Q. Okay. Did you ever vote for someone other than Roscoe Bartlett when he was on the ballot?

A. No, not when he was on the ballot. Obviously the ballot changed later, so I had different choices later.

Q. And when you say later, are you referring to after 2010?

A. Uh-huh.

Q. Do you recall who you voted for to be [23] your congressional representative in 2012?

A. Yes, ma'am.

Q. Who was that?

A. Ken Timmerman.

Q. And do you recall who you voted for to be your congressional representative in 2014?

A. Yes.

Q. Who was that?

A. Dan Cox.

Q. Do you recall who you voted to be your congressional representative in 2016?

A. Excuse me. Hold on. 2016, just for full clarity, was congressional candidate Cox. And fast forwarding, I realize I made an error in my Congressional races.

So in 2016, we have Dan Cox. 2014—if you will bear with me. It will come to me.

Q. Okay.

A. I know the folks personally. And you know how you have a face in front of you. The name is not happening.

Q. I know. We can move on. If it springs [24] into your head, which sometimes an answer to a question will, you can just shout it out later.

A. It will come at the most inconvenient time, but I will share it later.

Q. Call me tomorrow.

A. No, it will come today.

MR. MEDLOCK: Call us first and then—

Q. No. No. Of course. Okay. What are the qualities that you look for in a political candidate?

A. I look for somebody who has a solution that makes fiscal sense.

Q. How—I'm sorry.

A. And I look for a candidate that really, in all reality, I look at each and every different area of interest that is important to me and my family at the time, and keep in mind not every candidate will represent each and every circumstance a hundred percent of the time, but I go with the candidate that

represents the vast majority of the issues and sees the vast majority of the issues the way that I do. [25]

Q. The first thing that you mentioned was solutions that make fiscal sense. How do you define fiscal sense? What does that mean to you?

A. It is important to me to have legislative solutions, whether it be local, state, or federal, pursued in an economically feasible setting, and that that is part of their solution that they are concerned about. So it's one of the decision-making elements in forwarding that solution.

Q. If a candidate shared these values, would it matter to you what party they belonged to?

A. There's a difference between sharing a value and having an experience or a record of voting circumstances that lead me to believe that person may or may not have pursued that direction. And so if the activities of the individual that I was vetting as a candidate showed fiscal responsibility in all their decision making, then I would consider them, but I haven't found a person, well, I found folks to do that, to orchestrate that. [26]

Q. What does that mean you found folks to orchestrate that?

A. Every candidate that I've chosen has a record, either a voting record or outlines a plan that reflects a responsible fiscal direction.

Q. If you found a candidate that had a voting record or outlined a plan that reflected responsible, a responsible fiscal direction, would it matter to you if that candidate were a Republican or a Democrat?

A. I haven't found one.

Q. Is a voting record for outlining a plan that reflects responsible fiscal direction more important to you than whether somebody is a Republican or a Democrat?

MS. WEBB: Objection. Vague.

A. Can you explain?

Q. I guess what I'm trying to get at, if you were vetting a candidate, and the way that you described the things that you are looking for most are a voting record or somebody who had outlined a plan that reflected responsible fiscal [27] direction, so what I'm asking is, if a candidate met either of those criteria, but happened to be a Democrat, would you consider voting for that person?

MS. WEBB: Objection. Vague. Calls for speculation.

A. Funny thing. I found these candidates and they typically have been a Republican.

Q. If you had to choice between a Republican who did not have a voting record of responsible fiscal direction and a Democrat who did, who would you vote for?

MS. WEBB: Objection. Vague. It's a hypothetical.

A. Based on the—can you repeat the question?

Q. Sure.

What I asked is, if you were choosing between a Democrat who had a voting record of responsible fiscal direction and a Republican who did not, who do you think you would vote for?

MS. WEBB: Objection. Speculation. [28] Hypothetical.

A. What is your interpretation of a fiscal direction? I'm just trying to get your parameters.

Q. That's what you described as what you look for in a candidate.

A. Uh-huh.

Q. So maybe you can provide me with some more explanation of what you mean by that.

A. Well, I haven't found a Democratic candidate that has a voting record that has supported the fiscal responsibility that I'm looking for.

Q. What fiscal responsibility are you looking for?

A. When legislation is approached and reviewed, the pieces of legislation—basically I just look at who votes for legislation that is not fiscally responsible. I've found the data in that. So basically I just have to look at each piece of legislation and then I judge whether it's fiscally responsible or not. Basically it [29] is relative to the position in office. It is also relative to all the votes. And it's also relative to the legislation that I view as not fiscally responsible tends to have the folks that I don't vote for.

Q. Okay. So were you affiliated with the Dan Bongino 2014 congressional campaign?

MS. WEBB: Objection. Vague.

Q. You can answer the question. You can answer the question.

A. What would you define as involvement?

Q. I said affiliated.

A. Affiliated.

Q. Were you affiliated with his campaign?

A. I guess what is your definition of affiliation because I know how, where my thoughts were in that regard, but I'd like to hear your definition of affiliation so I make sure that I give you exactly what you are asking.

Q. Did you volunteer for the campaign or work for the campaign in any way?

A. No, not in 2014. [30]

Q. Did you work on his or volunteer on his 2012 campaign?

A. Yes.

Q. For Senate?

A. Yes, ma'am.

Q. Okay. But you were not involved in his 2014 congressional campaign?

A. No, I did not hold a position in his 2014 campaign.

Q. You said you didn't hold a position. Did you go to events for his campaign that year?

A. I did attend, I know what comes to mind definitely one event.

Q. Which event was that?

A. There was a picnic.

Q. Do you recall where that was?

A. Yes. That was somewhere in Montgomery County, I believe.

Q. Do you recall when that was?

A. It was very early in the campaign. I think it was the day he announced.

Q. Did you get regularly updates from the [31] campaign by e-mail?

A. Yes, I did. Did I read them? No. Not to be mean. I was just very busy.

Q. I can relate.

A. Before the next question, I wanted to tell you I remembered something.

Q. Okay. Great.

A. The 2014 candidate, he came into mind and, okay, his name has left me again. I will return to it. Hello.

Q. No problem.

A. I have his face in front of me. Wallace, Dave Wallace. Thank you.

Q. We've got it on the record. You can now forget it forever.

When you worked on Mr. Bongino's 2012 campaign, what was your role?

A. I was a volunteer coordinator.

Q. Did you give any money to his 2014 congressional campaign?

A. Yes, ma'am.

Q. Did you do any—did you talk to [32] potential voters on his behalf during the 2014 congressional campaign?

A. No.

Q. Did you talk to any voters just sort of on your own regarding him in 2014 trying to encourage people to vote for him in 2014?

A. Okay. I just remembered something related to the last question. Can I answer that before I address that?

Q. Absolutely.

A. And then I will have you restate the question. I'm sorry.

Q. No problem.

A. When you asked me if I spoke to voters on his behalf in the 2014 race, I was interpreting, even though you didn't say it, I was interpreting it related to the primary. During the primary I did not engage in suggesting a candidate because it was primary season and there were several candidates running for the office.

Post primary, between the primary and the general election, I definitely spoke with people [33] or engaged, but in a non-organized fashion, if the topic came up, which it rarely did because in my professional life, that wasn't an area that was ever spoken about. But if the opportunity came up in my circles of influence, which they were rather limited, I did promote the candidate, Dan Bongino, when asked between primary to general in 2014.

Q. And so this was just you as an interested voter talking to people and not as a part of the campaign is sort of what I just heard you describe, so correct me if I'm wrong.

A. Exactly. And then, also, I served on the Republican Central Committee at the time, so it was my duty at the time to promote all of our Republican candidates running in our geographic territory.

Q. Is that the Frederick County Republican Committee?

A. Yes, ma'am.

Q. Okay. Did you believe that Mr. Bongino could win his Congressional election in 2014? [34]

A. I actually did not have an opinion as to whether he could or couldn't win. The assumption for every candidate that runs for office is that their ideas will allow them to prevail at the ballot box.

Q. When you were talking to people in that limited role you were describing, encouraging them to vote for him after the primary and before the general, did you find that people were planning to vote for him?

MS. WEBB: Objection. Vague. Speculation.

A. Can you restate the question with a little more specificity?

Q. Sure.

When you were talking to people in that sort of informal role you were describing, did you encounter people who were excited to vote for him?

MS. WEBB: Objection. Vague.

A. Well, oddly enough, most of the conversation in my county that I had to end up [35] going into before I'd even engage the person I was talking to was gaining, and educating, and facilitating, and understanding of what district they were in so they knew who they would be considering.

So if there was any time left over, whomever we were considering, whether we were running District 8 or running District 6, depending upon where the person lived, if there's any time left over, of course I suggested the candidate at the time.

Q. Okay. When you would speak with a potential voter, did you attempt to gauge whether that person intended to vote in the upcoming election?

A. I would ask them if they intended to vote, yes.

Q. When you would have those conversations, was your experience that people did intend to vote?

MS. WEBB: Objection. Vague. Speculation. [36]

A. Can you restate the question?

Q. When you would have those conversations, how would people typically respond to you?

MS. WEBB: Same objections.

A. Well, you have to understand that in the course of a conversation, the first thing that you start with when you engage folks in your community could be a multitude of different topics. If the topic would come up, I found myself spending most of my time explaining why in the same county we had a num-

ber or two different congressional candidates. And where do I live? What district am I? Then who should I be considering from your vantage point? Who's the opposition? And so I would share when we spend most of our time getting through there.

Q. And do you recall ever having someone say to you that they were not going to vote?

A. Uh-huh.

Q. What do you recall about those conversations?

A. Quite frankly, it would just come up in [37] the conversation. I would ask why, and a large percentage of folks, if they had historically voted, they were confused about the candidates. They didn't know who they should be engaging. It was a very confusing situation for them that year.

Q. Do you recall why any particular person was confused?

A. Uh-huh. In our community, we had two congressional districts represented and the lines for it were very confusing. So somebody in town, in this town, part of that town could be part of District 8, part of District 6. So we spent most of our time on the hand-held devices trying to verify the addresses and figuring out if they were in the part of this town that was in this district or that district.

And then by the time you get through 20 minutes of that conversation, they were like, well, if they are going—there was definitely some concern that it was made to be too confusing for people who had a certain amount of time, and [38] they felt as though they didn't want to participate that time because it seemed too confusing. They felt as though they might make a wrong choice.

Q. Aside from that confusion that you just described, do you recall people giving you other reasons why they may not vote?

A. I'm sure they did, but I don't recall it with specificity.

Q. Okay. Do you consider yourself to be politically active?

MS. WEBB: Objection. Vague.

A. Can you specify a time frame?

Q. Sure.

Since 2010, since you sort of—I think earlier in your testimony you described that you started voting regularly in 2010. So since 2010, would you consider that you've been politically active?

A. I guess what—the reason I ask is for your interpretation of what politically active is. [39]

Q. Have you ever worked on a campaign other than Dan Bongino's 2012 senatorial campaign?

A. Yes, one other in 2010 for a delegate race for the State House.

Q. Whose race was that?

A. Kathy Afzali.

Q. Okay. Any time prior to 2010 did you work on a political campaign?

A. No, ma'am.

Q. Not even as a volunteer?

A. No.

Q. Since 2010, have you volunteered on a campaign other than that delegate campaign or the 2012 senatorial campaign?

A. No.

Q. I think you described a picnic that you attended that was part of Dan Bongino's campaign in 2014.

A. Yes.

Q. Other than that, have you ever attended an event held by your congressional representative or any congressional [40] representative? We will start with your congressional representative.

A. For Dan Cox this year. No, no, I did not attend any events for the congressional candidate. Since 2012, just for clarity, or, actually, 2014, since 2014, I have not been attending political events.

Q. But you did prior to 2014?

A. Periodically. I was part of a Central Committee, so we had an annual fund-raiser. That was a typical event that was coordinated and attended. So if you are talking about specific support of a specific individual, that would only be relegated the two folks we have before us today that you mentioned.

Q. That would be the 2010 delegate race and—

A. Senatorial race. And I did attend a fund-raiser for or the fund-raiser for Dan in his congressional race.

Q. Is that the picnic you were talking about or is that something else?

A. There was a picnic, and I'm sure that I attended a couple other events, but I just don't remember which ones. [41]

Q. Was the fund-raiser the picnic or was that a different event?

A. Well, he had several fund-raisers, so I'm sure that I went to more than one.

Q. Okay. What did you do at those fund-raisers?

A. Enjoyed the company.

Q. Did you do any political work?

A. No.

MS. WEBB: Objection.

Q. You were just an attendee?

A. (Witness nods head.)

Q. Got it.

Would you pay to attend those fund-raisers?

A. Yes, ma'am.

Q. Let's start with when you lived in Maryland prior to your move to Pennsylvania. So from the time that you registered to vote, let's [42] say, in 1991 to 1997, do you recall if you ever contacted your congressional representative for any reason?

A. I don't recall. I'm pretty sure I did, but I don't remember what it was about, but I'm pretty sure I did.

Q. In that instance, do you remember who you would have contacted?

A. I typically would contact Roscoe Bartlett's office.

Q. And since that was I think before e-mail was the only way people communicate, do you recall if you would have done that by phone or in person? Do you recall how you made that communication?

A. I believe it would have been a phone call, if I needed something. As I say, I don't remember.

Q. Sometimes when we talk about things, it sort of like jogs the memory. That's why I'm asking you other questions.

So you think you probably made a phone [43] call to Congressman Bartlett's office sometime between 1991 and 1997. Is that correct?

A. Uh-huh. I think it was just a question about a passport because I obtained my passport for the very first time. I needed some guidance.

Q. Okay. And then since you've moved back to Maryland, which was I believe you said 2000, since you moved back to Maryland in 2000, do you recall if you have contacted your congressional representative constituent services?

A. Yes, I have in between I think 2004 and 2005. If I remember correctly, in 2005 we had an issue obtaining my infant's passport.

Q. And so do you recall what form that communication took?

A. That was actually a point of contact that my husband initiated, and that was via e-mail and phone. I know we worked significantly by phone.

Q. And, again, I'm sorry. That was with Congressman Bartlett's office?

A. Uh-huh.

Q. Were they able to help you? [44]

A. Yes.

Q. And since that time, 2004 to 2005, do you recall contacting your congressional representative's constituent services at any other time?

A. Not the constituent services, no. Uh-uh.

Q. Okay. How else have you contacted your congressional representative?

A. Typically if I would ask a question about an issue or if I would share any thoughts on a matter, I would e-mail them, but that was typically via e-mail.

Q. And do you recall what sorts of issues you e-mailed your congressional representative about?

A. School choice, charter school events.

Q. And do you recall who you would have made those communications with, the school choice and charter school events?

A. The elected official in the position at the time.

Q. Okay. So when you lived, or prior to [45] 2012, would that have been Congressman Bartlett's office?

A. Sure.

Q. Do you have a specific recollection of communicating with Congressman's Bartlett's office about school choice and charter school issues?

A. No, because at that time we did not attend one.

Q. Okay. So when you say that you contacted your representative about school choice and charter school issues, who were you referring to? Which representative?

A. That was within the last year. I had touched bases with at the time it was Van Hollen's office, and he's our senator now, but that was 8 and then the 6, Delaney.

We had an event at the school and I did ask them if they would enjoy the event with us.

Q. Did you hear back from those offices, from those communications?

A. Oddly enough, I did hear back from—[46] keep in mind, and this goes back into some of the confusion, our central location for most of our events or when you offer a charter school, you want to offer a school in the middle of the county and that would be Frederick City. So our congressman in Frederick City is Congressman Delaney, but my actual congressman at the time was Congressman Van Hollen, but now senator. So that was why I would

have been in contact with his office. But Congressman's Van Hollen's office did not respond and I know Congressman Delaney's did.

Q. Do you know how Congressman's Delaney's office responded?

A. Uh-huh.

Q. How is that?

A. Responded via e-mail. It appears they put me on an e-mail list as well.

Q. Okay.

A. Even though he's not my representative. But—and I believe Congressman Delaney, even though he is not my Congressman, but he is [47] Frederick City's, they sent somebody along to go to the event, but not himself.

MR. MEDLOCK: I don't want to interrupt your flow, but it's 2 o'clock.

MS. KATZ: Okay. Thank you. Thank you. I will ask one more question and then we will break.

Q. I just want to be clear, a representative from Congressman Delaney's office came to the event that you invited Congressman Delaney to attend in Frederick City?

A. Just so you know, I was not inviting him on behalf of myself. I was inviting him on behalf of the school.

Q. Okay.

A. So it was not a personal invitation. It was building an awareness for an event. Wouldn't they like to come?

Q. And the invitation came from you?

A. It was penned by me, but as a board member of that school.

Q. Certainly. I understand. [48]

MS. KATZ: Okay. Great. We will break.

(Break taken.)

(Ms. Rice was not present for the remainder of the deposition.)

BY MS. KATZ:

Q. Why did you become politically active in 2010?

MS. WEBB: Objection. Vague.

A. Can you be more—

Q. Sure. I think you described you started voting regularly in 2010. When did you become—when did you join the Frederick County, what was it, Central Republican Committee?

MS. WEBB: Objection. Mischaracterizes the testimony.

MS. KATZ: That she became involved with the Frederick County—

MS. WEBB: That she started voting regularly in 2010?

MS. KATZ: That's what she told me.

Q. Isn't that what you told me? [49]

A. I have a distinct memory of my actions as to whether I attended primaries and general from 2010 solidly going forward. Before that it was intermittent. I'm not sure if I hit every primary and every general is what I was trying to say.

Q. So you have a memory of voting—

A. 2010 going forward.

Q. Got it. When did you become involved with the Frederick County Republican Central Committee?

A. That would have started in 2011.

Q. Why did you become involved with that organization?

A. I was a volunteer for many candidates, supporting many candidates in the general election in 2010. So during my volunteer efforts, I found that the coordinating body of the party and the candidates that I tended to support happened to be embodied in the Central Committee.

Q. Which candidates did you volunteer for in [50] 2010?

A. I just volunteered for Kathy Afzali. However, after she made it through the general election, I ended up meeting and actually personally knowing more so the other candidates in the field. Even though I knew their positions and whatnot, I tended to know them personally as well.

So a lot of my efforts not only engaged on my specific candidate, but I also worked to leverage a lot of the things that I did for the one candidate, and these are like more administrative tasks, and helped some other candidates in that regard.

Like I will give you an example. Sign distribution on election day, all of the polling stations, so I would carry other signs if other folks needed help kind of thing. So just administrative duty.

Q. Thank you. What does the Frederick County Republican Central Committee do? [51]

A. They coordinate, get out the vote efforts.

Q. Anything else? Oh, I'm sorry.

A. And the purpose of the Central Committee is a coordinative entity and a supportive entity.

Q. And how are they a supportive entity?

A. After primary season is over and the nominees are selected, they work to coordinate events and administrative efforts like the one that I just detailed

to assist the candidates running for office in the general election.

Q. And what did you do for that organization?

A. Exactly what I just outlined. I assisted in that way.

Q. Did you have like a position name at the organization?

A. I was a general member until November of 2013. Oh. Shortly before that I was a supportive position. I was co-chair for a little bit before November, 2013. And then from November, 2013, until June, 2014, I served as the chair of that committee.

Q. What did you do as the chair of the committee? What were your responsibilities?

A. Support all of the efforts that we outlined in the previous question.

Q. Okay. I don't think I've asked this. Why did you get involved with the Frederick County Republican Central Committee?

A. Because they supported the candidates that I supported as well.

Q. Do you recall if there was a reason that you—do you recall why in 2010 you decided to get involved in—I'm sorry, I'm not going to be able to say her last name—the delegate's campaign?

MR. MEDLOCK: Afzali.

MS. KATZ: Afzali?

MR. MEDLOCK: Yeah.

Q. Do you recall why you decided to get involved in her campaign?

A. Yes. Yes. Uh-huh.

Q. What were those reasons? [53]

A. I was very cognizant of activities on a national and becoming more focused on state laws and local laws, and I found that my participation was something that would help promote candidates that would make better choices. And that my only way to do that is seek and find and support those candidates.

Q. What state laws were you particularly concerned about?

A. At the time?

Q. Yes.

A. Actually, you know what? They changed so much since then. I was actually disappointed in many of the laws affecting our farmers and our local economy at the time. My county happened to be at the time the leading milk producer in the state and the population of that group was severely receding.

Q. I think you just identified farming issues.

A. Yeah.

Q. At the time. [54]

Were there any other issues that you were concerned about at the time?

A. I would say that issue was one of the most severe, but there were a number of other issues, and, quite frankly, they just do not come to mind at this point.

Q. Okay. Who is Blaine Young?

A. He was a previous elected official in Frederick County.

Q. What office did he hold?

A. I believe he was a county commissioner. Actually, I know he was a county commissioner.

Q. Is that somebody you supported politically?

A. In what year?

Q. 2014.

A. Yes.

Q. How did you support him, Blaine Young?

A. Well, quite frankly, the area, I did not provide any campaign contributions. During the time frame between November and June of 2014, I was the chairman of the Central Committee, and [55] during primary season I supported no candidate for County Executive. In that case he was running for County Executive.

The reason I didn't support a candidate during primary season is because when you are with a political organization, and it runs the same way on the other side, you do not endorse or give any extra effort toward any candidate when there are other persons in the primary. So I did not outwardly and even, I definitely didn't even volunteer for his campaign at all.

So, in 2014 after the primary, I resigned from the Central Committee or, actually, no. I was not chair. I resigned as chair in June. So from the primary until the general election, I was a Central Committee, regular Central Committee member, and at that time I was not active on any candidate's campaign at that point.

Q. Why did you resign as chair in June of 2014?

A. We had a death in the family. My brother died in April and we were assisting in efforts in [56] that regard.

Q. I'm very sorry to hear that.

A. Thank you. And I didn't think it was fair if I sat in that position between the primary and general. We

needed somebody more available and more present.

Q. I understand. Did Blaine Young win the general election in 2014?

A. No.

Q. Based on your knowledge of Frederick County politics, why do you think he lost?

A. I don't know. You would have to ask all the voters and why they chose that way. Quite frankly, I didn't ask folks. It wasn't a conversation that I had.

Q. Okay. When was the first time you became interested in redistricting?

A. As soon as it was proposed in like 2011.

Q. Okay. So prior to the 2011 redistricting process, prior to that process, did you have an [57] interest in redistricting?

MS. WEBB: Objection. Vague.

A. I had an interest in following the process.

Q. Okay.

A. And reviewing that process.

Q. Okay. Have you ever testified before a political body about redistricting?

A. No.

Q. Have you ever submitted a written comment about redistricting to an elected official?

A. No.

Q. Have you ever called an elected representative about redistricting?

A. I spoke personally with the elected officials at the time regarding my concerns.

Q. Which elected officials were those?

A. At the time it would have been my two delegates, Kathy Afzali, and at the time Delegate Kelly Schultz. And then also I shared my comments with at the time my state senator, Senator Brinkley. [58]

Q. And that was in 2011? Those contacts took place in 2011?

A. Uh-huh.

Q. I think you said this. I'm sorry. Those were in person?

A. Uh-huh.

Q. Those comments were in person to those individuals?

A. Uh-huh.

Q. Did you help gather signatures on a petition related to redistricting?

A. I believe I did.

Q. Do you know when that was?

A. I don't recall the date, but I know the time frame, that was appropriate. It was very few in number on that petition.

Q. Okay. Do you recall when you first found out about the 2011 congressional redistricting cycle?

A. No. I don't have a date, an exact date in mind. I do know that as soon as the information was available, I was attempting to [59] share with folks because of our concerns.

Q. When you say the information was available, what information are you referring to?

A. The map. I'm more of a visual person. Probably the advertisement as to what was happening was more so available when the map was available.

Q. Do you recall if that was before the legislation was passed?

A. I do know that I viewed it before the legislation was passed and also what was finalized.

Q. Okay. Did you testify before the Governor's Redistricting Advisory Committee?

A. No, ma'am.

Q. Did you post any public comments or submit any public comments to the Governor's Redistricting Advisory Committee after the plan was made public?

A. No. I shared it with my local to officials or my state officials.

Q. And do you recall voting on the [60] referendum specific to the redistricting plan?

A. Yes.

Q. Do you recall how you voted?

A. Honestly, quite frankly, I would have to have the words in front of me and then I can tell you how I voted.

Q. Okay.

A. I definitely voted to request that another redistricting plan would come forward.

Q. Great. Thank you. Aside from the comments with your two delegates and the senator that you described and your conduct in this lawsuit, have you taken any other action about redistricting after the passage of the plan in 2011?

MS. WEBB: Objection. Vague.

A. Actually, I did, and this is where a Central Committee is very valuable. Being a participant of the Central Committee, I work to make sure that at our events and also in the area of the folks that we

had contact with that we shared the implications of the changes in [61] district and made sure, tried to educate the public on the new realities within that map.

Q. Okay.

A. So I put together materials, help educate folks. We handed out palm cards. We handed those out during parades and gave them the candidates to consider and where do you live because it wasn't enough just to promote the candidate. You needed to spend half your time educating the public as to who they should be talking to.

Q. How did you first hear about this lawsuit?

A. I actually have a friend, a few friends that I knew from the Bongino campaign that I was reading some articles on their social media and happened to see that and read about it, and I, of course, follow national and global issues.

Q. And so did you reach out to them, the people whose comments you saw on social media, or did somebody talk to you?

MS. WEBB: Just a general caution not to [62] disclose any conversations you had with attorneys in this matter.

Q. After you asked to be represented in this matter.

A. Can you restate the question?

Q. So you said you first heard about the lawsuit like on social media.

A. Reading an article. There was a Washington Post article.

Q. That you knew from the Bongino campaign?

A. Uh-huh.

Q. So the follow-up question was, how did you join the lawsuit?

MS. WEBB: Objection.

Q. So without going into specifics, did somebody reach out to you to join the lawsuit?

A. In this case, my contact with my friend, I actually asked her about it, and contact was made at a later point regarding my interest.

Q. Contact from your friend?

A. I shared some opinions with my friend, but we didn't talk about a connection to any [63] interest in joining. And then from that point, I had some confidential communication.

Q. So somebody reached out to you and asked you to join this lawsuit?

A. I indicated I was interested.

Q. So you indicated you were interested to your friend? Who did you indicate your interest to?

A. I indicated I was interested in the topic to my friend, and then my communication from that point on I can't disclose.

Q. You can disclose who reached out to you about joining this lawsuit before you joined the lawsuit.

MR. MEDLOCK: You know what? It might be easier if we have a quick conversation off the record where I can direct her about privilege. Do you want to take a quick break?

MS. KATZ: I do, yes. Let's do that.

(Break taken.)

BY MS. KATZ:

Q. I think I asked who reached out to you to [64] ask you to join the lawsuit.

A. Okay. This is how the conversation pursued. I was very interested in articles and the topic because of my past experience. And Maria Pycha asked me if I was interested in the lawsuit, and I said, yes, I was. And after that point I was contacted by an attorney regarding it.

Q. Thank you. And why did you decide to join it?

A. Because I was very concerned that the changes actually divided my community. And when I say divided my community, our county is, if you look at a picture, the two congressional districts, we spent the 2012 and even the 2014 election really educating voters on the differences and making sure that when they were considering their candidates, that they were considering the right ones.

And usually as somebody who wants the voter to be met with the best information available, you don't want to spend time on those [65] matters. You want them to find the people that align with their interest.

Q. Okay. Thank you. Do you think that you were harmed by the 2011 congressional redistricting plan?

MS. WEBB: Objection. Vague.

A. How would you interpret or how would you like to define harm?

Q. Did it negatively impact you in any way?

A. I feel as though it negatively impacted my community, as well as myself, because it geographically split my community. In all communities, especially in Frederick County, and a lot of other areas are much like this, where you have outer lying areas and you have a central meeting point. Frederick City is our central meeting point, and I'm very ac-

tive in a lot of activities and they all culminate in Frederick.

When you know that people need to be the people running for office, you want to make sure they have the best opportunity to meet the people that they will actually be voting for on election [66] day. And I found as though folks, even very highly educated folks, being Ph.D.s, Master's, a number of different areas, they honestly did not believe that it had changed so significantly, not only with the, especially with the congressional map, because they didn't know who they should be voting for.

A lot of times I would be in a group of people and they would be like, well, I can't wait to vote for this person, and to have to explain to them, no, actually, you can't vote for this person because you are in this congressional district. Oh. Well, who are my candidates there and how do I meet them?

So it really divided the community, and it also placed a situation where there was a lot of extra steps that they needed to do along with others to make sure that they had that opportunity to vote and to be fully vested in the election cycle.

Q. How did it negatively impact you?

A. How did it negatively impact me? [67]

Q. Uh-huh.

A. I found that I was separated from areas that I aligned with. Like take, for example, speaking geographically, I live 10 miles away from a friend voting in a different congressional district. There was a disconnect between myself and my community as to who we would be voting for these positions.

Q. Anything else?

A. I also felt very harmed because I saw many people in my community very frustrated with the process and very frustrated that there were not clear lines drawn to keep everybody together.

Q. Okay.

A. I—yeah. Never mind.

MS. KATZ: Ms. Ropp, those are all the questions I have for you today. Your lawyers may have some.

MR. MEDLOCK: Can we have a quick break so we can confer whether we do, actually?

MS. KATZ: Absolutely.

(Break taken.) [68]

MR. MEDLOCK: I think we will have a few questions.

EXAMINATION BY MS. WEBB:

Q. A few more questions about some testimony you gave earlier. You testified that you registered to vote when you were 20 years old. Is that right?

A. Approximately, yeah.

Q. Okay.

A. Because that was the first presidential election after I turned 18.

Q. That you could vote in?

A. Uh-huh.

Q. Okay. And you testified that you voted in every presidential race after you turned 20 to the present. Correct?

A. Uh-huh.

Q. And then you also testified that in each of those you voted for a U.S. house representative?

A. Uh-huh.

Q. And do you recall voting in some of the [69] gubernatorial elections since you were 20 years old prior to 2010?

A. I know I did vote in the gubernatorial election at some point, but I don't remember how many, but I know particularly one.

Q. But you voted regularly in every presidential election since then?

A. Uh-huh.

Q. Thank you. You mentioned that you voted in the referendum on the 2011 redistricting. Is that correct?

A. I voted—

Q. I'm sorry. You voted on the referendum about the redistricting?

A. Yes, and that took place in 2012.

Q. And you mentioned that you would have to see the referendum text itself to remember how you voted.

A. Uh-huh.

Q. Whether yes or no. Correct?

A. Correct. [70]

Q. And why is that?

A. Because the wording did not show the visual as to the clear impact to the House of Representatives voting districts, and I found that one of the biggest promotional items that I gave before the referendum was not only why we were voting this way, but what was a picture of the actual voting districts. And I found that if I just gave folks a copy of the referendum, but not a picture to illustrate it, they would not orchestrate a decision based on the words because they felt as though the words were not clear to them, but the most clear example was

when they looked at the picture and the words, they were able, beyond a reasonable doubt, to put together their position as to being dissatisfied with the map and that they wanted the State to go back and consider a different map.

Q. So people didn't like the map when they saw it?

A. No. My concern was, is that the people that we didn't get to, which we really tried far [71] and wide to get to, the people that we didn't get to, that they would go into the ballot box not understanding, and there was a big undervote on those referendums, specifically that one.

Q. Did people talk about why they didn't like the map?

A. Yes, because, like I will give you an example, one of the reasons I was concerned was that I was in the 8th district here in a community where we had a mixture of economic development, agriculture, growth, and then we had Bethesda as part of it, and I didn't do any community activities in the central locations like Bethesda, and I didn't have a correlation with or an identity with the folks in that area. So I felt as though, and so did everybody else, depending on their circumstance, they felt as though there were areas of influence that were not reflective of their geography and their communities.

Q. Did the referendum include any pictures of the districts, the new districts? [72]

A. No. They did early on share some information, but that map was not available on the day of voting for the referendum.

Q. You testified, I will try to use your exact words, that there is an assumption that every candidate that runs has a real chance of getting elected based

on their views, if they are the right views. Do you believe that is true presently in the 6th district?

A. No, because there is—I've had exposure to voter data, voter attendance, and voter affiliation and identification, and there's no way that that is the case.

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

JOINT APPENDIX
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Jurisdiction Postponed Jan. 4, 2019

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Q. Good morning, Mr. Cueman, and thank you for being here with us today. Could you just state your name for the record?

A. Okay. Edmund R. Cueman. And my address is 1201 Woods Road, Westminster, Maryland.

Q. Great. Thank you.

MR. MEDLOCK: Sarah, I don't mean to interrupt. Can we get just who's in the room real quick?

MS. RICE: Yep. So I am Sarah Rice, and I'm an Assistant Attorney General with the State of Maryland. I represent the defendants in this matter.

MS. KATZ: I'm Jennifer Katz, Assistant [6] Attorney General, and I also represent the defendants.

MR. MEDLOCK: Stephen Medlock, and with me is Micah Stein, counsel for the plaintiffs and the witness.

BY MS. RICE:

Q. So just a few preliminary matters. I think today we won't be here that long so we'll try to get through without a break, but if you need one for any reason, just let me know, and we'll find a good place to stop.

A. Okay.

Q. Also, if I ask you a question and you don't understand my question, please let me know, and I'll try to ask it in a different way so that you understand.

A. Okay.

Q. If you don't hear me, just let me know, and I will repeat myself. Please also, just for the court reporter's sake, try to give verbal answers to questions. That will help out a lot. And I think that's it. I'm going to just show you this [7] document.

(E. Cueman Deposition Exhibit 1 was marked for identification and is attached to the transcript.)

MR. MEDLOCK: Do you want to do sequential numbers throughout to keep everything—across all the depositions just to keep everything organized? So, for example, if we would have three here and then we would start with 4 in the next deposition.

MS. RICE: Sure, if that would be your preference.

MR. MEDLOCK: Sure.

MS. RICE: I don't have a strong one, but that sounds just fine.

Q. Mr. Cueman, have you seen this document before?

A. I have.

Q. And what is it?

A. It's a Notice of Deposition of myself.

Q. Okay. Great. And Mr. Cueman, have you taken any medication today?

A. Have I what? [8]

Q. Taken any medication today.

A. Yes, I did.

Q. And what was that medication?

A. Lisinopril.

Q. And would that medication impair your ability to testify today?

A. It would not.

Q. And is there any other reason why you might not be able to testify today?

A. No.

Q. Okay. Thank you. Mr. Cueman, what's your employer? Who's your employer? Are you employed?

A. I'm sorry?

Q. Are you employed?

A. I am.

Q. And who's—

A. I'm self-employed.

Q. Great. And what do you do?

A. I'm a land planner.

Q. And what does a land planner do?

A. Well, a land planner in the public sector which I was in, I served for 33 years in the public [9] sector. In Worcester County I was the County Planning Director for five years and 24 years in Carroll County. And then when I retired in '95 I hung out my own shingle. And I've been doing that ever since, practicing professional planning in the private sector.

Q. And who are your clients?

A. I have private clients, I have had public clients. I still have some public clients. Like for example, the Town of Union Bridge I handle site plan review for them, comprehensive planning, requirements and other administrative duties that they may assign to me. For private clients I can be called as an expert witness to testify based on my professional experience. And I do work for non profits too like the Carroll County Land Trust. I serve as the easement coordinator for the Carroll County Land Trust and I also serve on the Board of Land Trusts.

Q. You mentioned serving as an expert witness in some types of cases. What kinds of matters would you serve as an expert witness? [10]

A. It would be municipal matters pertaining to rezoning or conditional uses for the Board of Zoning Appeals cases. That's generally the focus that I've had.

Q. And would your clients be individuals or corporations?

A. It could be both, yeah.

Q. And what is the highest level of education that you attained?

A. I have a Bachelor of Arts degree from Western Maryland College.

Q. Great. When did you first register to vote?

A. When did I first register to vote? When I was eligible and I think it was 1963.

Q. And where did you live then?

A. Pardon me?

Q. Where did you live when you first registered?

A. I lived in Snow Hill, Maryland.

Q. And what Congressional District did you live in then?

A. Then that would have been District 1. [11]

Q. And who was your Congressional representative?

MR. MEDLOCK: Objection. Vague as to time frame.

Q. Who was your Congressional representative when you first registered to vote?

A. I can't recall right now. I'm drawing a blank on that.

Q. That's okay.

A. I can see him. I can see his face. He was a big man and he was very much involved with the Chesapeake Bay. I think his first name was Tom. I'm sorry, it's too far back there and I just can't bring that up.

Q. I understand. I do not—I cannot recall 1963 either.

MR. MEDLOCK: Me neither.

Q. How long did you live in Snow Hill?

A. I lived there until I moved—my family moved when I was offered a job in Carroll County in 1971.

Q. Okay. Where did you live after you moved? [12]

A. I lived for about almost two years in Finksburg, Maryland. We rented a place to stay while I was getting a piece of property to build a home on and get the house built and we moved into the house in December of 1973.

Q. Okay. And where was the house?

A. It was at 1201 Woods Road, Westminster, Maryland.

Q. When you lived in Finksburg do you know what Congressional District you lived in then?

A. I was in the 6th Congressional District.

Q. And do you remember who your Congressional representative was then?

A. It was Goodloe Byron.

Q. And when you moved to Westminster what Congressional District did you live in?

A. That was the 6th District as well. The entire county was in the District 6th.

Q. Who was your Congressional representative?

A. Goodloe Byron and then when Goodloe died, he had a heart attack, his wife assumed the office and then when she ran she was also my representative [13] then.

Q. Okay. And who was your representative after?

A. After Beverly was Roscoe Bartlett.

Q. Okay. And who was your representative after Mr. Bartlett?

A. Who is it, who is the representative?

Q. Who was the next representative?

A. I think it's Delaney.

Q. Okay. And that's your current representative?

A. Yes.

Q. Okay. So I'm going to ask you to return to 1963 again, I'm sorry, or thereabouts when you lived in Snow Hill. So for the entire time that you lived in Snow Hill, how often did you vote?

A. As I recall, I didn't miss a vote. Any time an election came around I voted and, as I said, I was working as a public servant at the time so it would have been inexcusable not to vote, in my own mind anyway.

Q. And when you say that you voted in every [14] election do you mean all general elections?

A. Um-hum. Yes.

Q. And primary elections?

A. Yes.

Q. And what if there was a special local election?

A. I don't recall any special local election that I ever voted in. I just don't recall that there was any while I was in Snow Hill.

Q. Okay. So when you moved to Finksburg is that the same answer or what were your voting habits then?

A. Yeah, I voted. I have not missed a vote that I'm aware of and I don't remember any special elections either that were held that I voted in. I just don't recall any.

Q. And just so I understand completely, when you moved to Westminster was there ever a vote that you missed after you moved there?

A. No.

Q. If you recall were there ever any special elections held? [15]

A. I don't recall any and I think if you're defining a special election as one that's out of the ordinary, it's called forth for some reason, something has happened and I'll put it this way, if there have been any special elections that were called for and I would have been eligible to vote, I would have voted but I just don't recall any.

Q. That's fair. And I just want to make completely sure that I understand you and that it's on the record. So would that be the same answer even in the most recent elections in 2012?

A. Yes.

Q. And 2014?

A. Yes.

Q. And 2016?

A. Yes.

Q. Great. Thank you. Are you registered as a member of a political party?

A. I am.

Q. And which one?

A. Republican.

Q. And when did you first register as a [16] republican?

A. When I first registered. My family was republican and when I became eligible to vote I registered republican.

Q. And have you ever changed your party registration?

A. I have not.

Q. And have you ever had any affiliation with another party in any other way other than registering?

A. An affiliation?

MR. MEDLOCK: Objection, vague.

Q. Okay. Have you ever donated to another political party?

A. Not to another political party, no.

Q. Have you ever attended a meeting of another political party?

A. I have not.

Q. Have you ever voted for a candidate that is not a republican?

A. I have.

Q. And when was that? [17]

A. That was—I can tell you who I voted for. I voted—are you talking about any election I guess?

Q. In any election, yep.

A. I voted for Charles Smelser who was a Senator, one of the finest Senators Maryland has ever had. I voted for him and he was a democrat.

Q. Okay.

A. I voted for Richard Dixon who was my delegate from Carroll County and I voted for Goodloe Byron and Beverly Byron who were both democrats.

Q. Okay. And are those—is that a complete list of all the times that you voted for someone who was not a republican?

A. Yes.

Q. Did you vote for Roscoe Bartlett in the 2012—

A. I did.

Q. —primary?

A. One thing I will just to amend that previous answer if we're talking about voting for members of the Board of County Commissioners, there were

[18] democrats that I voted for there. The Board was made up of both republican and democrats but I did vote for some members of the Board of County Commissioners who were democrats.

Q. Which Board of County Commissioners?

A. The Carroll County Board of Commissioners.

Q. Okay. And do you know during what time period?

A. Yes, that would have been between 1973 and 1995.

Q. And do you recall any particular Commissioners who were not republican who you voted for?

A. Yes. Roger Mann would be one. John Joy would be another one. I think that's it. I can't recall any others. Those two specifically.

Q. Great. Do you consider yourself to be politically active?

MR. MEDLOCK: Objection, vague.

A. I'm politically interested. I'm not an activist. I don't go around telling other people how to vote but I have my opinions and I do maintain [19] a pretty high level of interest in what's going on.

Q. And how do you maintain that interest?

A. I maintain it because having served, I guess when you serve in a county for 24 years as a County Planning Director and then you make maybe the mistake of not retiring somewhere else just, you know, hit the road, so you're living in the place you have been working for for a long time, so I pay attention to the newspapers and what's going on and local, in a local sense. And I do care about the country. I have a 12 year-old grandson and I'm very concerned for him and, you know, where we're going as a country. So it's just my nature, I'm not politically disinterested kind of person and that's

who I am. My wife makes sure that that doesn't get out of control.

MR. MEDLOCK: That sounds familiar.

Q. Have you ever attended an event held by your Congressional representative?

A. Yes. All the—an event is pretty broad and I would say mostly they would be meetings. For example, if I'm the County Planning Director and we [20] were attempting to construct a reservoir under Public Law 566 and Goodloe Byron is my representative and he has the money lined up in Washington for this project but with public hearing process you have to bring in everybody to explain what's going on. So that's an event that he would attend and then I would end up being there.

Q. So let's narrow it a little bit I think for purposes of this conversation. I'm interested in events that you may have attended held by your Congressional representative or with your Congressional representative not in connection with your work.

A. Okay.

Q. So outside of work.

A. Yeah. They border more on I guess you could say the social. Like we have the Carroll County Farm Museum and so whether it's Fall Harvest Days or some other function that's going on, that will typically draw your representative to it as well as state senators and delegates that will come, but it's not like a political meeting per se, you know, [21] it's more on the social side of it and that wouldn't be connected with my work.

Q. Sure. So I mean taking that kind of event would you ever attend an event like that to see your Congressional representative?

A. An event like what?

Q. How you described the farm festival.

A. Oh, yeah. Yeah, I would go because even if I wasn't the County Planning Director, even if I was retired, if I had nothing better to do would go because one of the problems with our country today, I shouldn't be doing this, but anyway, it's good to meet and greet your representatives, to see them in the flesh, and they don't get out enough to do that. They don't get out of Washington enough to do it.

Q. So you mentioned before when you were talking about these kinds of events that maybe you might have attended one with Goodloe Byron; do I understand you correctly?

A. Yes.

Q. So did you attend any of that kind of event with Beverly Byron? [22]

MR. MEDLOCK: Objection. Vague.

A. I can't recall a specific one but I had interactions with Beverly Byron just by virtue of my job, and sometimes, you know, a public servant's job doesn't end at 4:30 on a Friday so if something happens on the weekend and you have a representative coming to your county, it was almost expected that you might want to be around when they were, you know, coming to the county.

Q. Okay.

A. It was an opportunity to chat about things that were important to the county.

Q. And what about with representative Bartlett?

A. I would say the same. He used to come if there was a parade in Westminster, and Westminster is a big

parade to him, he'd be there in the parade on foot, not in a car riding. He'd walk the whole parade.

Q. And have you attended such a meeting or an event with representative Delaney?

A. I have not.

Q. And why haven't you attended a meeting with [23] representative Delaney?

A. I haven't seen him. I have no knowledge as to whether he's been in the county. He may have been but I haven't had any knowledge of him being in the county.

Q. And do you still attend parades in Westminster?

A. I do. Um-hum.

Q. Have you ever volunteered on a Congressional campaign?

A. I have not.

Q. Have you ever contacted your Congressional Representative Constituent Services?

A. I have. Um-hum. Yes.

Q. And on what occasion did you do that?

A. I did that with Congressman Bartlett and I was looking into a passport situation for a family that's in the Philippines.

Q. And have you had occasion for any other Congressional representative to contact Constituent Services?

A. For Constituent Service? [24]

Q. Yes.

A. Yes, we—I think this would come under that but the Carroll County Land Trust was very frustrated with some decisions that had been made in Washington by the Attorney General's Office when it came to the ground rules for administering federal

farm and ranch land protection funds. The Land Trust had been successful in securing almost two million dollars worth of money because we existed as a Land Trust, and it was a really good program because this was money that we could use to match against money that the county would put up.

Long story short, somebody started fooling around with the program and they started requiring things that our Land Trust didn't want to be in the position of asking any landowner to sign a document that would have this, what we considered very offensive language. It was like you were involved in a condemnation case. So we were kind of furious about that because we're on a goal, a mission up there to get a hundred thousand acres of land preserved and this was going to slow us down. It [25] wasn't the only program but it was—so we went to our congressman who was Roscoe Bartlett. We went through his office. He had an office in Westminster.

Q. Um-hum.

A. And he set up meetings in Washington and he brought people in and we went down and this was hashed out and discussed and so forth. And so that's the last time I have a vivid recollection of, you know, Constituent Service, and not for me directly but for the county, the Land Trust. Not even the county but the County Land Trust.

Q. Do you remember any other time that you contacted even before that about an issue that was important to you, your Congressional representative?

A. I don't remember, you know, where you would get very exercised about something and then you want to call them and talk. Not directly to the con-

gressman, I can't think of any, and we would probably be talking about Roscoe Bartlett probably because we're talking the last what, decade or so?

Q. Well, really any time that you remember. [26]

A. Yeah. Nothing jumps out at me. And I think part of the reason is because I was fortunate enough to maybe see or have contact with them. I wasn't, you know, commuting to Baltimore every day and away from home or I was pretty close to home.

Q. Okay. Do you remember what year the meeting with Roscoe Bartlett about the Land Trust issue was?

A. I don't remember the year but I'm going to say it's probably getting close to 10, 8 to 10 years back there.

Q. Okay. When was the first time that you became interested in redistricting?

A. It started with me in the late 60s and when I was in Snow Hill. At that time something happened that really disturbed me and that was when there were court cases and a Supreme Court decision which did not involve the State of Maryland, but as a result of that decision the State of Maryland went about reorganizing its legislature and then specifically the Senate because originally when Maryland was founded and they created and they had their counties that made up Maryland, they all had [27] at least one Senator and that transpired all the way on up until this point in Maryland's history when they changed how the Senate is organized. And my recollection is that Baltimore City had three Senators. Every county had one. So you had roughly 26, if I'm right on my numbers, that composed the Senate. And it was essentially a carbon copy of our federal system where every

state has two Senators and as we know, that's not what we have today. So that bothered me then and it's bothered me ever since.

Q. Do you remember what the Supreme Court case was called?

A. Pardon me?

Q. Do you remember the name of the case that you mentioned?

A. I remember I have this brought to my attention because I couldn't remember here of late but I think when it started it was Carr versus somebody, and then there was a companion case that came into play in some way. So I'm very hazy on it and when I get time because of what I'm doing here [28] now, when I get some time I'm going to—I'm going to try and get into that case and read it.

MR. MEDLOCK: Always good to read the cases.

THE WITNESS: Yeah.

Q. Favorite pastime of lawyers. Was it Baker V Carr?

A. Yes, I think that's what it was.

Q. And so that was about your interest in legislative redistricting, right?

A. Yes, and I will volunteer this. When I say I was concerned about it, I wrote a letter to Everett Dirksen who was a senator from Illinois and I put my concerns on paper and I got a reply from him that was not one of these staff written things. It was about three sentences long but it had his real signature on there. It was signed with a fountain pen and I've got that letter in my special papers file at home because I was a big fan of his.

Q. Yeah.

A. He was very upset about it too.

Q. Yeah.

A. He was not happy with the Supreme Court. [29]

Q. Do you remember a time that you became interested in Congressional redistricting rather than legislative?

A. Yeah. I had no concerns about Congressional redistricting until very recently. After the last—well, it was 2011 I believe when it followed the 2010 census and then I, you know, got concerned about that, yes. When it happened.

Q. When you say when it happened, do you mean—could you be more specific about what you mean?

A. Well, just that I woke up one day and realized I wasn't in the 6th Congressional District. A new map had been prepared and apparently adopted and so it was the result of, you know, just the changed boundaries and the realization that they had been changed.

Q. Do you know when that was you had that realization?

A. I just know it was in 2011 sometime. I'm not even sure of the month when it happened and there would have been a duration of time after it happened to, you know, understand what had happened. [30] You know, like sometimes something happens but you don't catch up with it and really realize what—you know, what the change really was.

Q. Were you aware that there was a referendum regarding the redistricting plan?

A. Now that you mention it, I sort of recall there was one but that sort of faded off my memory but I think you're right. I mean I believe there was one.

Q. And do you remember did you vote in favor of the referendum?

A. I would have, yeah. I wasn't happy with what had been done.

Q. Okay.

A. If the referendum was for the—if it was—I don't know what—

Q. Okay. Let me clarify just to make sure that we're all clear.

A. Yeah.

Q. I don't want any confusion. If there was a vote for or against the plan on the ballet how would you have voted? [31]

A. I would have voted against the plan, yeah. I would have voted against it.

Q. But do you have a specific recollection of doing that?

A. I would have had—yes, I would have had that opportunity to do that and I would have voted against that, yes.

Q. So you explained about the letter that you wrote when you first became interested in redistricting. Have you written any other letters since that time—

A. No.

Q. —about redistricting?

A. Nope.

Q. Have you ever gone to a public hearing about redistricting?

A. If I have I don't recall going.

Q. Have you ever submitted a comment about a redistricting plan?

A. I have no recollection of having submitted a comment.

Q. Have you ever called an elected [32] representative about redistricting?

A. No.

Q. And have you ever gathered signatures on a petition about redistricting?

A. I have not.

Q. Other than joining this lawsuit have you taken any action about the 2011 plan after its passage?

MR. MEDLOCK: Was that between—you're referring to the Congressional redistricting plan?

MS. RICE: Congressional redistricting plan.

A. I'm sorry, can you say that again? It's not your fault, my hearing is a little—

Q. I'm a little soft spoken so it's a combination of the two. So after the plan was passed, and we spoke about that and how that was the first time you became aware of Congressional redistricting; is that right?

A. Yes.

Q. I just don't want to mis-summarize what you said. Have you taken any actions—other than joining this lawsuit, have you taken any other [33] actions?

A. No. Now I understand. No, I have not.

Q. Okay. How did you first hear about this lawsuit?

MR. MEDLOCK: I caution you without going into anything you've talked to your attorneys about after there was a representational agreement but before that, you can go into that.

A. Okay. I received a phone call from a friend of mine who's name is Sam Riley and he informed me that

there was a case that was being developed and he asked me whether I'd be willing to be a plaintiff in this case. He gave me a little more information, you know, about what was happening and the upshot of it was I agreed to do that.

Q. And when was that conversation?

A. That was about a year ago. It was in January of last year.

Q. And how are you friends with Sam Riley?

A. Sam Riley is a—he's an attorney himself but there's no connection between his being an attorney and me. I know him, I've known him since [34] he was in 4H and he's the president of the Union Mills Homestead Foundation. He's a Shriner too. That's another thing. And so he's a valued friend and he's the kind of person if he calls up and asks you if you'd be willing to do something like this you just have to figure out whether, you know, you have the time to do it. So and I guess my feelings about districting, you know, which I think everybody should have some feelings about it, I said sure, I'll do it.

Q. And so what are those feelings?

A. Well, I guess the feelings are when your instincts tell you that something is going on that doesn't feel right, that's the feeling I had after I got the—the 6th District's been around from the beginning of Maryland's history. The counties that lie between the Mason Dixon Line and the Potomac River, Garrett, Allegheny, Washington, Frederick, Carroll, and even though the northern portion of Baltimore County was in the 6th District and it went over and included a pretty big part of Harford County along the Mason Dixon Line, it's just a [35] cohesive entity, and when you wake up some day

and you realize that the shape of this thing is what it is now, it looked to me like something didn't smell right. I just couldn't figure out how anybody could carve out something like that. So I became curious about it. And you read newspapers, it's not like this has not been discussed or people have made their opinions known about it, and to connect dots that it had been a very strongly held district, held by a republican in recent years, and prior to that it was democrats.

But what it really is it's not so much whether in my mind over these years I will draw a line up to maybe the present, but I will say if you're looking back it was not about democrats and republicans. It was about people who were generally conservative in their thinking, advocates of small government, being frugal, not having high tax rates. You can run through these counties you can find that kind of thinking up and down, you know, and all around.

So it just—and the county is—in this [36] state the county has always been a very significant entity. The counties are very—you know, they're—how shall I say? You identify with your county. It's not like New Jersey or any of the places where you have townships that break up the county and that sort of thing. The county government is a strong form of local government, and in the case of these counties that I just mentioned there's a bond that exists there. Over the years and all the years that I served, they met. They didn't have to but they had common values and problems and things, you know, that caused them so there's that kind of cohesiveness that's just been sitting there.

And my feelings were that every time there's a census, yeah, you may have to make some adjust-

ments. You can't freeze it in time but this is—the nature of what took place there was—it just like chopped up. It was a chop job. I don't know how—I mean what can express what took place but to say that I was disoriented or felt disconnected. Those are the kind of words that go into my own speaking for myself. I have absolutely [37] no connection with what is in this district except the portions of Frederick that were thrown in.

If you take a good hard look at all these counties that made up the six our entire county was in, and then someone went up into Westminster and they took the I think it's 3rd election district. It's the district that surrounds Westminster, took everything south to Mount Airy and to Sykesville or Freedom, took that all out and dropped it and hooked it up. You have that little point in Montgomery County that comes up and just touches our border about like a dot. It's where Howard and Carroll and Frederick all come together. Four corners they call it. And they funneled all that of our county down into what they were calling the 8th and what was left, that got tossed into the 1st District.

So where I live at 1201 Woods Road if you went a half a mile say, I could be in the 1st District and I could be back in Snow Hill again in Carroll County because the 1st District comes -- runs all along the Mason Dixon Line going east and then it comes down onto the Eastern Shore all the [38] way down to Virginia.

And so you asked me about my feelings, those are my feelings. And we have so many things that disconnect us as citizens from our representatives, it's worse now than it ever was I think. A person, an-

other attorney who is a good friend of mine, his name isn't important but he said—

MR. MEDLOCK: Just to stop you. If he's representing you then you shouldn't talk about conversations you had with another attorney.

THE WITNESS: Okay. I retract that.

Q. Yeah. If it was while he was representing you in a matter. If you were just speaking as friends you can go on.

A. Yeah.

Q. Okay, thank you. Oh, I wanted to clarify one of the things that you were talking about. You said that the unity that you felt with the fellow members of your county was not about democrats or republicans but more of a general conservatism that you shared, but I think I heard you say, and this is what I just want to clarify, that more recently you [39] didn't feel that that was the case. So could you tell me when that feeling changed?

MR. MEDLOCK: Objection. Mischaracterizes his testimony. Go ahead.

Q. And please correct me if I didn't get that correct.

A. No, I think you—what I'm saying I think my own voting record shows that just because I'm registered republican I don't necessarily vote a party ticket. I'm a conservative before—I guess me and I think a lot of other people are conservatives first and then they are party affiliated secondly. And so that's why you see in the history I guess of the district there have been both democrats and republicans who have represented it.

There's a point, this point I was referring to, I think there's been a drastic change between the parties today as compared to what they were in my

time frame, you know, we're going back to the '70s and the '80s and '90s. I'll just put it this way, the democrat party is not today what it was in [40] 1970. It's not the same political party. And so that's where it can put people I think more in a position of what choice do you have when you are going to the polls to vote in a district that still tends to be very conservative.

Q. So I'm interested in when you think that changed.

A. I don't think it was—I don't think it was like any one day or maybe the word point is not a good one. It didn't swing—I think it's been a gradual, a gradual. I would say probably you would have to go back—you could go back 10 years maybe and say, you know, it was starting. I don't really have a good handle on it but all I know is that in the last several years it's just a totally different party.

And you know, you could say something similar about the republican party. They're not the same either but there's no comparison whatsoever in terms of who's hung around to kind of be conservative and represent the people who tend to be conservative. So that's just how I see it. [41]

MR. MEDLOCK: Do you want to take a break if you want to confer?

MS. RICE: That's what I was going to say. Why don't we take a break.

(A recess was taken.)

BY MS. RICE:

Q. I just have a few more questions. So I just want to go back over a little bit that we did before because I'm just afraid that we might not have been clear. So we talked—because at times I think we—you had talked about or maybe I asked you questions

about John Delaney, but I wanted—and so to clarify, we also asked you a specific question about the 2012 election and whether you voted for Roscoe Bartlett in the republican primary. So I wanted to give you a chance to clarify that answer because it's my understanding that you live in the 8th Congressional District now; is that right?

A. Yes, I am.

Q. Right.

A. Yes.

Q. Okay. [42]

A. Okay. Yes, so I couldn't have voted for him.

Q. Right.

A. I guess is what we're saying.

Q. Well, yeah. I don't want to mislead you and make sure --

A. Yeah.

Q. —that—

A. No. Thank you.

Q. So have you ever been to an event with Chris Van Hollen?

A. I have not.

Q. And have you ever talked to Mr. Van Hollen?

A. I have not.

Q. Have you had any occasion to contact him for Constituent Services, his office?

A. I have not.

Q. Okay. Great. Those are our questions.

A. The only time I ever—

MR. MEDLOCK: Go ahead.

Q. Go ahead.

A. Chris used to be in the Maryland legislature [43] but I had nothing—you know, I knew him. I might have waved to him or said hello, but at that time this wasn't even on the radar screen because that's going back to, you know, prior to him even serving in Congress.

Q. Great.

A. Yeah.

MS. RICE: Okay. That is all that we have for you guys.

MR. MEDLOCK: I don't have any other --

THE WITNESS: Do you want to mention that one about Delaney?

MR. MEDLOCK: Yeah. So I guess I will ask one that builds on what you were talking about.

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS BY MR. MEDLOCK:

Q. So I want to be really clear. When you were redistricted in 2011 the area you were in moved from the 6th District to the 8th District, right?

A. Yes.

Q. And in 2012 when you were voting your choice was between Chris Van Hollen and his republican [44] opponent and anyone else that was running against Mr. Van Hollen on the ballot, right?

A. Correct.

Q. And in the last election it would have been Jamie Raskin and anyone running against Mr. Raskin?

A. Correct.

Reply Expert Report of Dr. Peter Morrison

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

O. John Benisek, et al.,

Plaintiffs,

vs.

Linda H. Lamone, et al.,

Defendants.

Case No. 13-cv-3233
Three-Judge Court

REPLY EXPERT REPORT OF DR. PETER A. MORRISON

May 22, 2017

I. INTRODUCTION

1. My name is Dr. Peter A. Morrison. I previously prepared a report in this matter dated April 7, 2017 (my "Initial Report"). My qualifications are included in that report and are not repeated here.

2. My original assignment in this case was to ascertain whether the boundaries of the Sixth Congressional District that were adopted by the Maryland General Assembly in 2011 can be explained by legitimate districting considerations. In particular, I was asked to assess whether the boundaries of 2013

CD6 can be explained by the maintenance of communities of interest. I also was asked to determine whether there is objective demographic evidence supporting the conclusion that the Maryland General Assembly specifically intended to burden the representational rights of Maryland Republicans because of how they had voted in the past and the political party with which they had affiliated.

3. I have been asked by counsel for Plaintiffs to comment on the theories and analyses presented in the reports of Prof. Allan J. Lichtman, Secretary John T. Willis, and Mr. William S. Cooper to the extent that they are relevant to my Initial Report. I also have been asked to review Prof. Lichtman's criticisms of my report and his own conclusions, to evaluate their relevance and reliability with reference to standard demographic methods and data.

4. In preparing my Initial Report, I reviewed documents, depositions, interrogatory responses, and responses to requests for admissions and drew upon data from the 2010 decennial census and the annual American Community Survey. In addition to the materials considered in my Initial Report, I have reviewed these Lichtman, Willis, and Cooper reports, the documents relied upon in those reports, and depositions that have been taken since I submitted my Initial Report. The opinions expressed in this report are based on my review of this information as well as my training and experience as a demographer and sociologist.

II. SUMMARY OF OPINIONS

5. Based on my analysis to date, I have reached the opinions that I expressed in my Initial Report, as well as the following additional opinions:

   a) Nothing in the Lichtman, Willis, or Cooper reports has caused me to change any of the opinions that I expressed and explained in my Initial Report.

   b) Mr. Cooper and Secretary Willis offer no critique of the methodology, data, or conclusions contained in my initial report. Only Prof. Lichtman attempts to critique the reasoning behind my demographic conclusions and methodology.

   c) Prof. Lichtman's criticism of my Initial Report is largely irrelevant. He neither challenges any of my conclusions nor questions the data and analyses supporting those conclusions.

   d) Prof. Lichtman appears to have misconstrued what is at issue in this case. As Plaintiffs have explained to me, the issue is whether State officials sought to impose a burden on a group of citizens in response to their engagement in activity protected by the First Amendment, and whether they succeeded in doing so.

   e) Prof. Lichtman's criticism of my Initial Report as unscientific is misplaced. Both Prof. Lichtman and I each rely upon and reason in line with distinct scientific models. My reasoning abides by the well-defined model for drawing conclusions from quantitative data. I pose a null hypothesis, and subject it to possible rejection by empirical data. Scientific null assumptions are used to advance an alternative to the null proposition.

f) Prof. Lichtman and I draw on different disciplines to reach our conclusions. While I am a demographer, Prof. Lichtman is an historian. His reasoning follows a different scientific model befitted to historical accounts and anecdotal evidence, not objective demographic data.

g) The issues Prof. Lichtman raises about "community of interest" are unfounded. I have relied upon Census Bureau definitions of established communities: incorporated cities and towns and unincorporated Census Designated Places (CDPs). Demographers such as myself recognize these as standard definitions of established geographic communities of interest.

h) I have examined the existing evidence on daily commuting patterns on I-270. Census Bureau data concerning patterns of commuting and the deposition testimony in this case lead me to conclude that there is no community of interest based on commuting patterns on I-270.

i) Contrary to Prof. Lichtman's doubts, objective demographic facts can be used to identify the plausible intentions of the Maryland legislature and its map-makers. When supplemented by the discovery record, my analysis can be used to form a conclusion regarding the intent of the Maryland legislature and its map-makers.

j) Prof. Lichtman mischaracterizes my analysis in this case and in *Fletcher v. Lamone*.

III. Prof. Lichtman Challenges None Of My Central Conclusions Or Supporting Data

6. In my Initial Report, I reached the following conclusions, which Prof. Lichtman does not dispute:

a) First, the reconfiguration of CD6 cannot be explained by legitimate districting considerations, such as the preservation of existing communities of interest. As shown in Table 3 (on page 67) of my Initial Report, the 2011 Congressional Plan dismembered most established communities of interest in CD6. In the prior version of CD6 (used for the 111th Congress), 4 of 35 (11%) communities of interest (also known as "Census Places") were split by the boundaries of the Sixth District. In the current version of CD6 (used for the 113th Congress), 13 of 22 (59%) of communities of interest were split by the boundaries of the Sixth District. Prof. Lichtman does not challenge this demographic evidence.

b) Second, objective demographic evidence supports the conclusion that the Maryland General Assembly specifically intended to burden the representational rights of Maryland Republicans. The General Assembly did so by interchanging approximately 375,000 residents (nearly half the original CD6 population). That excessive interchange of 375,000 residents was over 20 times greater than the mere 17,249 reduction of the district's residents necessary to reapportion the total population of CD6. Prof. Lichtman does not challenge this demographic evidence.

c) It was readily possible to reapportion the total population of CD6 without splitting so many existing Census Places. The post-redistricting increase in non-intact Census Places (from 11% of all communities to 59%) strongly indicates that the Maryland General Assembly and its map-

makers had motives other than rebalancing total population.

d) One such plausible motive was to remove Republican registered voters and scatter them across other districts, so as to burden their representational rights. This motive has been confirmed by the testimony of high-level Maryland officials, including former Governor Martin O'Malley.

e) Prof. Lichtman questions my inferring legislative intent from objective demographic evidence. My conclusion as originally stated, however, is not in dispute: Objective demographic evidence does support this plausible motive. The newly-configured CD6 did, in fact, result in a wholesale replacement of Republican registered voters with non-Republican ones. Prof. Lichtman does not challenge this objective demographic evidence, nor does he challenge the plausibility of that motive.

f) Third, my partisan gain and loss accounting reveals a telltale statistical footprint presenting unambiguous evidence of partisan intent as the predominant motivating factor for dismembering CD6. The legitimate aims of equalizing the District's total resident population and respecting existing communities of interest insofar as possible were subordinated in favor of that single-minded partisan intent. Prof. Lichtman does not challenge these objective demographic truths, nor does he challenge my conclusion that this statistical footprint presents "unambiguous evidence."

IV. Prof. Lichtman Misunderstands The Point Of My Initial Report

7. Prof. Lichtman criticizes me for examining only CD6.[1] Evidently, Prof. Lichtman misunderstands the scope of my analysis and the questions that I was retained to answer.

8. It is my understanding that the opinions and analysis in my Initial Report stem from the central issue in this case. That issue, I was told, derives from the "First Amendment retaliation" doctrine and the following questions: Did state officials act with specific intent to impose a burden on a group of citizens in response to those citizens' engagement in activity protected by the First Amendment, and did they succeed in imposing such a burden?

9. I set out to analyze demographic questions related to this legal inquiry, not those questions that Prof. Lichtman faults me for ignoring. I did so by examining changes just to CD6, not the entire 2011 redistricting plan. The two questions I addressed are:

   a) Can the new boundaries of CD6 be explained by legitimate districting considerations, in particular by the maintenance of existing communities of interest?

   b) Does objective demographic evidence support the conclusion that the Maryland General Assembly intended to burden the representational rights of Maryland Republicans because of how they had voted in the past and the political party with which they had affiliated?

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[1] Lichtman Rep. at 3.

10. If respect for communities of interest was a prominent consideration in reapportioning the total population of CD6, the map drawers easily could have drawn a different district—one that closely resembled the district that existed between 2001 and 2011 and that respected its historical continuity.[2] Prof. McDonald's Opening Expert Report, which confirms my conclusions, demonstrates this point. He presents an alternative, illustrative map confirming that the population of the Sixth District could be reapportioned, without ripple effects, while respecting existing communities of interest.[3] Based on Prof. McDonald's analysis, and my own review of relevant demographic factors, I conclude that there was some other explanation for why CD6 was drawn as it was.

V. My Scientific Model Befits Drawing Conclusions From Quantitative Data

11. Prof. Lichtman characterizes my Initial Report as "result-driven," and, therefore, unscientific and unreliable.[4] He is mistaken.

12. Prof. Lichtman is an historian, not a demographer. Our different disciplines dictate the use of different

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[2] For example, Frederick County was included (in its entirety) in the Sixth Congressional District continuously since 1872. However, the 2011 redistricting split Frederick County's population roughly in half between the Sixth and Eighth Congressional Districts. Likewise, while Carroll County had been included in the Sixth Congressional District continuously since 1966, the redistricting removed it from the Sixth District entirely and split its population between the Eighth and First Districts.

[3] Opening Expert Report of Prof. Michael P. McDonald, PhD, dated April 7, 2017.

[4] Lichtman Rep. at 11.

models and data. Prof. Lichtman reasons from a different scientific model befitted to historical accounts and anecdotal information, not hard demographic data. I rely upon quantitative demographic data and methods.[5]

13. My professional field of applied demography encompasses a diverse set of endeavors that draw on demographers' specialized knowledge, technical skills, and extensive familiarity with relevant data sources.[6] Data are at the heart of applied demography, which is why its practitioners devote considerable effort to understanding the limits imposed by the data they use. In my field, an established model for drawing conclusions from quantitative data poses a null hypothesis, denoted as H_0, then subjects that null hypothesis to potential rejection by empirical data. That is how I have addressed the two questions above.

14. My first step was to identify available data for subjecting the null hypotheses to empirical test. I settled on the Census Bureau's measures of established geographic communities, detailed below.

A. Census Bureau Measures Define Established Communities Of Interest

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[5] Prof. Lichtman criticizes me for "pursuing [a] historical inquiry." (Lichtman Rep. at 12). Again, Prof. Lichtman appears to misunderstands my Initial Report. I offered the factual bases for my opinions including the history of how Maryland's Congressional Map was drawn. These facts confirm the demographic analysis that I offer in my Initial Report. Determining whether the facts supported my analysis was not an error, it is sound science.

[6] See Peter A. Morrison, "Continuity and Change Across the Population Sciences," access at: www.researchgate. net/publication /316999486_Continuity_and_Change_Across _the_Population_Sciences.

15. In my Initial Report, I explained that "the most clearly recognized communities of interest center on the residents of established communities, such as incorporated cities and towns and Census Designated Places."[7] I elaborated as follows:

> The US Census Bureau defines such established communities collectively as Census "Places," recognizing that their residents share well-defined commonalities of interest tied to place. Census Designated Places (CDPs) have been recognized and identified in each decennial census since 1980 as the counterparts of incorporated cities, towns, and villages. CDPs are populated areas that generally include one officially designated but currently unincorporated small community, for which the CDP is named, plus surrounding inhabited countryside of varying dimensions and, occasionally, other, smaller unincorporated communities as well.[8]

16. Current Census Bureau criteria require that a CDP name "be one that is recognized and used in daily communication by the residents of the community" (not "a name developed solely for planning or other purposes") and recommend that a CDP's boundaries be mapped based on the geographic extent associated with inhabitants' regular use of the named place.[9]

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[7] Initial Report, ¶ 138.

[8] *Id.*

[9] *Id.*; *see also* US Census Bureau, "Geographic Terms and Concepts – Place," https://goo.gl/T7aKiL (last visited April 5, 2017).

17. My next step was to formulate the null hypothesis to be challenged by the Census Place data: "The newly configured CD6 respects existing communities of interest."

18. To test this null hypothesis, I compared the number and percentage of Census Places that were split before CD6 was drawn and after CD6 had been reapportioned. That comparison rejects *Ho* decisively: Far more Census Places (or, communities of interest) were split following redistricting than beforehand. Specifically, 59% of the 22 Census Places within the 113th CD6 were split, whereas only 11% of the 35 Census Places within the 111th CD6 were split. Such an extreme difference leads to the conclusion that respect for communities of interest was disregarded.

B. Commuters Are Unrecognizable As A "Community Of Interest" In CD6

19. As I pointed out in my Initial Report, the State of Maryland's justification for attaching portions of Montgomery County to CD6 was to respect an *existing* purported "community of interest."[10] Citing testimony from certain GRAC Hearings and a portion of Senate President Miller's deposition, Prof. Lichtman claims that commuting patterns on I-270 between Montgomery County and Frederick County justified the new boundaries of CD6.[11] Prof. Lichtman misconstrues this testimony. In fact, demographic data shows that commuter flows cannot justify the new boundaries of CD6.

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[10] Initial Rep. at ¶¶ 136-139.

[11] Lichtman Rep. at 15-23.

20. To be clear, I do not deny that I-270 is used by some commuters to travel from Frederick County to Montgomery County or the District of Columbia. That is not the question. The question is whether this flow of commuters, and any other relevant factors, justify creating a new community of interest that encompasses Western Maryland and portions of Montgomery County, including Census Places such as Gaithersburg, Germantown, Potomac, Aspen Hill, and Derwood. Plaintiffs argue that this DC-bound commuter population is a vital "community of interest," which justified adding a portion of Montgomery County to CD6 and retaining only a portion of Frederick County in the newly-drawn CD6. This is not the case. As I point out in my Initial Report:

> This "community of interest" justification fades in the face of US Census Bureau data on journey to work (see Table 2). Only 21.3% of workers living in Montgomery County commute to a job in DC; most commute to jobs located *within* Montgomery County (59.4%) or in neighboring Frederick, Howard, Anne Arundel, or Prince George's Counties. Among workers in Frederick County, a miniscule 3.4% commute to a job in DC; and in Washington County, just 1.1% do so.[12]

21. Even were one to regard workers across a region who commute to jobs within that region as a weak "community of interest," that community cannot justify splitting the majority of established Census Places within CD6. As I note in my Initial Report:

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[12] Initial Rep. ¶ 137.

The data in Table 3 discredit any suggestion that a purported shared interest among a small fraction of resident commuters could justify splitting the majority of established Census Places within the 113th CD6. Even granting the existence of that purported shared interest, its significance pales relative to the collective shared interests of the 13 established Census Places whose boundaries ended up being split in the 113th CD6.[13]

22. ***Senate President Miller's Testimony.*** Prof. Lichtman's reliance on Senate President Miller's testimony is misplaced for several reasons:

    a) Although Senate President Miller justified the new boundaries of CD6 based on commuting patterns on I-270, Senate President Miller testified that he did not review any data concerning commuting patterns on I-270 before voting on the Congressional map.[14] Nor did Senate President Miller recall asking to see such data or reviewing it.[15] Other witnesses, such as Governor's Redistricting Advisory Committee chair, Jeanne Hitchcock, did not recall seeing any data regarding commuting patterns on I-270 during her time on the GRAC,[16] or requesting such data.[17] When asked "Did you at all consider when voting on the proposed congressional map commuting patterns on I-270?," Michael Busch, the

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[13] *Id.* at ¶ 144.

[14] Miller Dep. at 20:2-8.

[15] *Id.* at 20:16-22:1, 44:17-45:11.

[16] Hitchcock Dep. at 60:1-62:3.

[17] *Id.* at 171:2-15.

Speaker of the Maryland House of Delegates and a member of the GRAC, testified, "No. It never—never crossed my mind."[18] Speaker Busch went on to testify that he never asked for data concerning commuting patterns on I-270 and that he did not recall anyone else asking for such data.[19] In fact, although the GRAC was provided with several hundred pages of Census data and briefing materials,[20] these materials contained no information regarding the purported "I-270 Corridor,"[21] and Ms. Hitchcock did not request any separate briefing materials regarding the I-270 corridor.[22]

b) Importantly, Senate President Miller's testimony gets that very process of redistricting backwards. Redistricting is supposed to maintain and respect existing communities of interest, not manufacture new communities of interest. Senate President Miller did not testify that the GRAC and General Assembly were respecting *existing* communities of interest. Instead, he testified that the legislature and its map-makers created a *new* community of interest by including southern Frederick County and portions of Montgomery County in the same congressional district.[23] Creating a purported new "community

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[18] Busch Dep. at 100:12-16.

[19] *Id.* at 100:17-101:5.

[20] *See* Hitchcock Dep. Ex. 104.

[21] Hitchcock Dep. at 169:11-19.

[22] *Id.* at 169:20-170:1.

[23] *See* Miller Dep. at 143:19-144:29 ("Q: Could the 6th Congressional District have been drawn in such a way as to keep Frederick County intact? A: Not if you keep the Potomac River Corridor

of interest" is wholly different than respecting one that actually exists, based on hard demographic data. Senate President Miller's "community of interest" envisions district lines drawn so as to connect economically disadvantaged communities in one section of Maryland with prosperous urban communities in another section. Such district lines delineate no existing "community of interest." Rather, they artificially join residents with distinctly different interests, who reside in established communities of interest (specific established Census Places) in one or another section of the state.

23. ***GRAC Hearing Testimony.*** Prof. Lichtman's reliance on select portions of the oral testimony offered before the GRAC is also misplaced:

    a) Prof. Lichtman's analysis assumes that the GRAC changed the borders of CD6 in response to comments received at certain public hearings. However, the chair of the GRAC, Ms. Hitchcock, did not recall relaying any of this feedback to anyone.[24]

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or the 270 Corridor. Q: So it's your testimony that you can't keep Frederick County intact if you want to keep the I-270 Corridor or the Potomac River Corridor intact as well? A: And also enjoy the benefits of economic development from Montgomery County. Q: When you say enjoy the benefits of economic development from Montgomery County – A: Right. Q:— how does this map spur economic development? A: Well, it creates a community of interest from the poor areas with those that— developing areas with those areas that are developed, and it creates very— for example, these areas are very challenged economically. Q: So you're referring to Garrett, Allegany and Washington? A: Yes.").

[24] Hitchcock Dep. at 171:22-173:10.

b) Prof. Lichtman focuses on the oral testimony offered at GRAC Hearings, but he ignores written comments that the GRAC received that are contrary to his analysis. Such as:

- "This 'plan,' especially the gerrymandering of the sixth congressional district[,] is as subtle as being stuck in the face by a baseball bat."[25]
- "To lump in a portion of Montgomery county with the remainder of the proposed 6th is ludicrous. The have a complete different set of problem just because of their population density. The rural counties of Carroll, Fredrick, Washington and Allegheny have a completely different set of problems. . . . We need somebody who knows the people who live in rural areas and their needs, hunting, limited government overreach, farming, etc."[26]
- "It would appear that you are adding just enough Montgomery County to negate the Republican voice of the western counties. The areas are as different as the people and no one person can effective[e]ly represent both of those areas in my opi[ni]on[.]"[27]
- "This plan is just an attempt to eliminate the conservative voters from really having any say in Western Md. politics. There is no[] inherent connection with Montgomery County and Frederick County just because

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[25] MCM002437.

[26] MCM002240.

[27] MCM002240.

of I270. The people of Frederick County will not stand for this attempt to reduce our influence on how we as voters feel. Please don't [vote] for this new district map."[28]

VI. Ample Testimony Corroborates My Demographic Conclusions

24. Prof. Lichtman criticizes me for using demographic data and methods to reach conclusions relevant to the intent of the Maryland General Assembly and its map-makers.[29] This criticism misses the mark. I am not an expert on intent, as Prof. Lichtman, supposes me to be. Instead, I opine on demographic facts and observe that those facts are consistent with the deposition testimony and other evidence.

25. Prof. Lichtman states, "No evidence, whether demographic or otherwise, simply leaps out and speaks for itself. Evidence must be culled, selected, and interpreted, especially as it relates to a complex causal question such as the intent of a legislative body."[30] Prof. Lichtman is correct—demographic evidence does not, and cannot, speak for itself. Instead, my analysis corroborates the testimony of key observers. I have joined my assembled empirical demographic facts with numerous specific statements by individuals concerning the intent of the legislature and its map-makers. Those facts are consistent with the demographic data documented in my report. These numerous specific statements, further corroborate my conclusions.

26. <u>Deposition of Governor Martin O'Malley</u>

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[28] MCM002527.

[29] Lichtman Rep. at 3, 12.

[30] Lichtman Rep. at 12.

a) Pages 25-27:

Q. Right, but in your capacity as governor of the state, you made a decision that what you'd like to see is the Sixth District converted from a majority of Republican voters to a majority of Democratic voters; is that a fair statement?

A. Well, I think it's fair to say that, as we did the redistricting, that we knew it would impact the Sixth, and our hope was—my intention was—that it would impact it in—all things being equal—in a more positive way for our nominee, whoever that might be. . . . Was a decision made? I suppose in the sense that we decided not to try to cross the Chesapeake Bay, that **a decision was made to go for the Sixth**. . . . [S]o, yes, we—**everybody pretty much knew that, as we redrew the lines, it would put more Democrats and Independents into the Sixth District**. And, hopefully, in the course of the campaign, I hoped, as a Democrat, that that would mean the election of another Democrat.

b) Page 28:

Q. [W]hat specific goals were advanced by moving 350,000 Montgomery County residents into the Sixth District?

A. The Congressional representation of Montgomery County improved, the number of Democrats and Independents living in—and progressive-minded people living in the Sixth Congressional District probably increased, and, as I said before, a couple of times, and as I, you know, it was also my

hope that we would—that the people would elect a Democratic Congressperson rather than a Republican at the end of this process.

c) Page 43:

A. [After meeting the statutory deadline and complying with one-person-one-vote], then a third factor was, when we redrew this, **yes, we wanted to do it in a way . . . that will make it more likely rather than less likely that a Democrat . . . is able to prevail in the general election.**

d) Page 47:

A. And as I've said many, many times here before, **part of my intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less.**

e) Page 63:

A. . . . [O]ne of the considerations I had was to create a district that was more favorable rather than less favorable to Democratic nominees.

f) Page 81:

A. . . . [S]o, yes, **we all—those of us in leadership positions in our party, the Speaker, the Senate President, the Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that,** while our—while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, **it was also—part of our intent was to create a map that was more favora-**

ble for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many modus.

g) Page 82:

A. . . . [I]t was also my intent to create a map that would be more likely to elect or create—create a district where the people would be more likely to elect a Democrat than a Republican, yes, this was clearly my intent.

27. **October 3, 2011, Democratic Caucus Talking Points**: The draft Congressional map "gives Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett."[31]

28. **Deposition of Maryland Delegate Curtis Anderson:**

Q. But you understood that the map would move Maryland from six Democrats and two Republicans to seven Democrats and one Republican?

A. Yes.[32]

29. **Deposition of Eric Hawkins (NCEC Services):**

Q. When you redrew the boundaries of Maryland's congressional districts, did you intend to make the 6th Congressional District more Democratic?

A. The intent was to see if there was a way to get another Democratic district in the state. . . .[33]

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[31] Miller Dep. Ex. 139 at 2.

[32] Anderson Dep. at 212:6-9.

[33] Hawkins Dep. at 230:15-231:1.

30. **Speech Delivered by Attorney General Douglas Gansler:**

> The third issue is redistricting. And the redistricting is interesting because I actually have to defend the legislature in its drawings of the map. . . . So many people have a problem with the way in which the state was gerrymandered this last time. For example, in the Sixth District . . . Garrett County, Maryland, a very rural, agrarian part of the state is coupled with Potomac, Maryland in Montgomery County, which is perhaps the most wealthy and least agrarian part of the state. And, yet, they are voting for the same representative in the election between Roscoe Bartlett, a long-time Congressman, and John Delaney, sort of a newcomer on the political scene. . . . So, what happened, we have eight congressional districts, . . . the Democrats had the ability . . . to look at the state gerrymandered in such a way to make it 7 [Democratic representatives] to 1 [Republican representative]. . . . They were looking do they want to make the Eastern Shore, try that again, to make it even more Democratic and make that the seventh Democratic district, or Western Maryland. They chose Western Maryland, and it's actually a 53% Democratic District.[34]

31. **October 20, 2011 Letter From Attorney General:**

> As indicted by those who participated in developing and adopting the redistricting plan, including the [GRAC], the Governor, and the

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[34] Initial Rep. at ¶ 111.

> General Assembly, the boundaries of the newly adopted Congressional districts reflect a number of considerations, including . . . partisan consideration.[35]

32. I also cite several additional statements made by the legislators who considered and voted on the 2011 Congressional map at pages 50-57 of my Initial Report. Prof. Lichtman does not contradict these statements in anyway. Rather, he takes issue with me for including them in my Initial Report. But Prof. Lichtman never explains why it is wrong for a scientist to determine whether the evidence supports his or her key conclusions. This is a necessary and important part of any rigorous scientific inquiry, and exactly why I lay out these facts in my Initial Report and this report.[36]

VII. Prof. Lichtman Misunderstands My Statements In *Fletcher v. Lamone*

33. Prof. Lichtman misunderstood the analysis that I offered in *Fletcher v. Lamone*. My point in *Fletcher* was that there was a corridor between Baltimore

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[35] *Id.* at ¶ 120.

[36] Prof. Lichtman also misses the point when he criticizes the facts that I offer concerning cultural and media sources in Western Maryland. The point of my Initial Report was that Western Maryland has its own educational and cultural institutions, newspapers, and television stations located in Western Maryland. *See* Initial Rep. at ¶ 23. Prof. Lichtman does not challenge this fact. Instead, he claims that it should be disregarded because some students at these educational institutions and attendees at cultural events may not come from Western Maryland. Lichtman Rep. at 23. Nor does Prof. Lichtman deny that communities in Western Maryland have their own newspapers, or that some individuals in Western Maryland have advocated that Western Maryland should secede from the remainder of the state. *Id.* at 25.

and Washington, D.C. that "has grown in population and integration in the last three decades."[37] As I noted in my *Fletcher* declaration, there are significant links between Baltimore and Washington, D.C. beyond commuting patterns. In particular, the African-American and Hispanic share of registered voters in this area had increased significantly between 2000 and 2010.[38] This migratory influx of African-Americans and Hispanics to the suburbs between Washington, D.C. and Baltimore was part of a national demographic trend toward more racially diverse suburbs, fueled by minority suburbanization.[39] These minority populations were younger and replacing older Caucasian voters in these suburban communities.[40] My analysis showed that the minority communities in this "Maryland corridor" had "common needs" and "share concerns," making them a natural community of shared interest.[41] Therefore, I concluded that a new Congressional District, proposed CD5, could be drawn connecting communities between Washington, D.C. and Baltimore.[42]

34. Prof. Lichtman ignores most of my analysis and opinions in *Fletcher*, and claims that I concluded

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[37] Morrison Aff. at ¶ 3, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 16, 2011) (ECF No. 48-3).

[38] Morrison Decl. at ¶¶ 6-14, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 7, 2011) (ECF No. 43-18).

[39] Morrison Decl. at ¶¶ 18-22, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 7, 2011) (ECF No. 43-18).

[40] *Id.* at ¶¶ 23-29.

[41] Morrison Aff. at ¶ 1, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 16, 2011) (ECF No. 48-3).

[42] *Id.* at ¶ 9.

that a new Congressional district could be drawn based on transportation linkages alone.[43] That is incorrect. As I noted above, by the scientific standards in my field, an established community of interest does not exist in an area simply because a highway runs through that area.

35. In this case, my analysis and conclusions are distinct from those offered in *Fletcher*. In *Fletcher*, I called attention to demographic trends in minority populations in suburban communities between Baltimore and Washington, D.C.[44] In this case, I call attention to the massive interchange of territory and splitting of Census Places in the post-2010 reconfiguration of CD 6 and considered whether it can possibly be justified by demographic data and consistent with traditional redistricting principles.[45]

36. Prof. Lichtman also appears to misunderstand the scope of my Initial Report. Prof. Lichtman argues that I "acknowledge[d] that the proper inquiry is statewide."[46] This is not the case. In my Initial Report, I stated clearly that I was retained to examine "whether the boundaries of the Sixth Congressional District that were adopted by the Maryland General Assembly in 2011 . . . can be explained by legitimate districting considerations," such as "maintenance of communities of interest."[47] Therefore, contrary to Prof. Lichtman's claim, I do not state or

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[43] Lichtman Rep. at 12-15.

[44] Morrison Decl. at ¶¶ 6-29, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 7, 2011) (ECF No. 43-18).

[45] Initial Rep. at ¶ 140.

[46] Lichtman Rep. at 3.

[47] Initial Rep. at ¶ 11.

otherwise acknowledge that the proper inquiry in this case is statewide.

VIII. Conclusion

37. Prof. Lichtman, Secretary Willis, and Mr. Cooper do not criticize the demographic methodology, analysis, or conclusions expressed in my Initial Report. Secretary Willis and Mr. Cooper do not offer any criticism of my Initial Report in their submissions. Prof. Lichtman offers no criticism of the key conclusions expressed in my Initial Report. Instead, Prof. Lichtman makes the unfounded claim that my demographic model is unscientific and biased, and he mischaracterizes the conclusions that I reached in this case and in *Fletcher*.

38. None of Prof. Lichtman's arguments are sufficient to show that there was a legitimate demographic justification, based in traditional redistricting principles, for the massive interchange of territory and voters that created the new Sixth Congressional District in 2011.

Date: May 22, 2017

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Dr. Peter A. Morrison

STATE OF MARYLAND
DEPARTMENT OF PLANNING

REDISTRICTING COMMITTEE MEETING
PUBLIC HEARING
CONGRESSIONAL REDISTRICTING PLAN
AND LEGISLATIVE REDISTRICTING PLAN

Frederick County – Hood College
JULY 23, 2011 2:00 P.M.

COMMITTEE MEMBERS:
CHAIRPERSON JEAN HITCHCOCK
PRESIDENT MIKE MILLER
SPEAKER MIKE BUSH
DELEGATE JAMES KING [1]

SPEAKERS:
SENATOR JIM GETTY
JOE KELLY
SENATOR DAVID BRINKLEY
ROBERT KRESSLEIN
DAN RUPLI
MYRNA WHITWORTH
ANDREW DUCK
BOYCE RENSBERGER
TOM SLATER
DELEGATE SUE HECHT

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[2] Congressional District 6. We would appreciate being redesigned in Congressional District 6, but at the most, keep the county together in one Congressional District aligned with Western Maryland. Thank you very much.

MADAME CHAIRPERSON: Okay. Thank you, Senator. Mr. Joe Kelly. Mr. Kelly?

MR. KELLY: I'm Joe Kelly. I want to thank you guys for all being here today. Thanks for giving us an opportunity to speak.

MADAME CHAIRPERSON: Okay.

MR. KELLY: I want to speak a little bit on the Congressional District, and on also the Legislation Districts. Basically, the Congressional Districts throughout the state, we'd like to see more balance. You have some districts in the state that are balanced between the two major parties of like 80 to 20, and then you have—out here in Western Maryland, it's—we—in the Sixth District, we have [14] a Congressman who has been elected and been protected pretty much with the vote of—you know—of going the other way. And what I'm saying is—what I'm saying is, I'd like to make sure that the Sixth Congressional District is a district that is more of a toss-up, that we would have a chance to—you know—have a good race between two quality candidates and with both of them having the ability to get elected on their—not so—rather than what party they belong to, but what they're presenting to the people—to the district, and that's not the case out here right now.

The other thing is, on the Legislative Districts, I live in Jefferson, which is in the District 3 Senate. The Senate Districts are very good. I don't have any problem they way they're designed, but I do have a problem with the delegates breaking out, where you have 2B and—or 3B and 3A, one of them having two delegates, and the other one [15] only having one delegate. It's kind of like those people who are in the area where you have two delegates, they're getting a lit bit more—they have two people to speak for them down in the—and we're all from Frederick County, yet they're getting

like two people to speak for them down in Annapolis, while out in Jefferson, we're represented by one delegate. I think a Legislative District that has three delegates in it, but when you're all in the same county like this, there is a little bit right now that's in Washington County in that district, but the majority of those people are all in Frederick County. We should all have an equal vote—an equal chance to vote for people in, so make it a three-district rather than a two and a one split. Thank you.

MADAME CHAIRPERSON: All right. Thank you. Our next speaker is Senator Brinkley.

SENATOR BRINKLEY: Good afternoon.

MADAME CHAIRPERSON: Good afternoon,

* * *

[21] communities, and I think bring all the representatives together on that. And again, I think three-member delegate seats would certainly be appropriate, too. Thank you.

MADAME CHAIRPERSON: All right. Thank you, Senator. Our next speaker is Bob Kresslein.

MR. KRESSLEIN: Good afternoon, Madame Chairman—Woman and Speaker, Mr. President, Delegate. My name's Bob Kresslein. I live in Middletown, Maryland. I am involved with the state Democratic party, but I'm here speaking on my own behalf today. I'd like to address two points. First, with respect to the Congressional districting, we'd like—I'd like to see you consider a couple of different factors. One is, sort of the communities of interest that we have. Senator Brinkley indicated—you know—if you look at Carroll County and west, there's a lot of similarity, but I would also posit that if you go south and east, you're going to find a [22] lot of things in common. If you look at, historically, upper Montgomery County, look toward Frederick,

for many, many years, that area has picked up quite a lot of population. And if you look at transportation patterns, you'll see that—you know—70 and 270 combine right here in Frederick County. And if you're on that road every day going to work, you know there's an awful lot of people from Washington County, even into Pennsylvania and West Virginia and Virginia that get on that road and go on into Montgomery County to work or into Washington, D.C. metropolitan area.

So if you look at the way people live and the orientation that they have geographically, in the state, I would say that northern Montgomery County would be a good place to—if you're going to move the district lines. Also, if you look at media markets, I mean, one of the things that you have in a Congressional campaign is the ability to communicate [23] with voters. Those of us here in Frederick County and west primarily in our media from Washington, D.C. market, if you look—where, if you've got a satellite T.V., you're pretty much getting channels 4, 9, and 7. That's what you're going to get your local news. Many more people get the Washington Post than the Baltimore Sun. There are a lot of Redskin fans out here, but there's a lot of Ravens fans, too.

So, I think if you look—you've got the Mark train that goes right down the river, so I think if you look at the Congressional District, you'll see that, certainly, when you compare that to upper Baltimore County and Harford County, and with the population changes, and you're going to have to pick up or move that line somewhere, where are you going to move it, over to Cecil County? Then, you're going to have basically a district that runs from Philadelphia to Pittsburgh along the Mason Dixon Line, and I mean, that's kind of—I don't know that we have a lot of [24] communities of interest in that regard. So, I would ask you to try to make the

district a little bit more compact, as opposed to being as spread out as it is, to take those things into account.

With respect to Legislative Districts, I think it's been stated by the Senator and Delegate—the Senators that, certainly, to the extent that you can keep the Senate Districts within the county lines, I think I would agree with that wholeheartedly. District 3 is—probably got more excess population in it than almost any Senate District in the state at this point, so that district is probably going to be compact—somewhat more compact, and that ought to be Senate around Frederick City. And I think as Mr. Kelly said, a three-member district makes sense. You may want to consider with District 4, like they mentioned earlier, to keep that in Frederick County, but how that's aligned, whether or not it makes sense to have single-member districts for District 4, it [25] might be a consideration.

So I appreciate your consideration, and welcome to Frederick County.

MADAME CHAIRPERSON: Thank you. Mr. Dan Rupli?

MR. RUPLI: Madame Chair—

MADAME CHAIRPERSON: Good afternoon.

MR. RUPLI: President Miller, Mr. Speaker, Delegate King. I'm Dan Rupli. I live here in the county, and I had the opportunity to actually run in this district in 1976--1978. It seems like a long time ago, and it's kind of ironic to remember that in those days, there was a parallel to what we have today, only it was kind of 180 degrees out of whack. In those days, if you were nominated by the Democratic party, you were almost automatically going to be the Congressional representative from the six Congressional Districts. In fact, in 1978, when I ran, the Republicans didn't field a nominee. They [26] were represented by a homeless man.

Today, it seems like we flipped the other way, and one of the reasons for that, I think, is the configuration of the district. There is no community of interest between Harford County and Garrett County. There is very little community of interest between Allegany and Carroll. You know, in spite of how we like to characterize our state, we can say, "Okay, maybe there's a conservative consensus." I don't even believe that. This district was once represented by David J. Lewis, who is one of the architects of the new deal and one of Roosevelt's favorite Congressmen, one of the people who wrote the Worker's Compensation law and contributed to the Social Security Act. So this is a district of largely working people.

I think the current alignment is that we have a district here where the incumbent can kind of put the people to sleep. There is no community of interest either in—or a shared media that reaches [27] the district. We're kind of a patchwork, and I would like very much to see the district go into northern Montgomery County, and I also think it would be very instructive, and I would encourage you, in your future meetings, to have a suggested map of what this district might look like under what is being considered. These things rarely happen in a vacuum. There are all kinds of political considerations made when we redistrict; that's a fact. I think we ought to acknowledge that with transparency, and let us have a look, so that we can see what we're considering as an alternative to the current district. Thank you.

MADAME CHAIRPERSON: All right. Thank you. Don DeArmon?

MR. DeARMON: Hello. Thanks for coming to Frederick today. I want to comment just on the Congressional Redistricting. I have sort of one macro thought and one micro thought I want to share with you. If we

were to describe a country, maybe an ally [28] of ours, a developing country, where the most numerous house of the legislature routinely, more than 90 percent of the incumbents were re-elected, we would think, "Well, geez, that's not a very Democratic system that they have there." Though, that's the case here in the United States, and in fact, in the last 13 election cycles, the House of Representatives has—over 95 percent of the incumbents that ran for officer were re-elected, and that means that—and there have even been three changes in party during that time. So, my macro thought is that, you have a chance here, and you certainly can't do it nationwide, but to create competitive districts. And to the extent that you can create competitive districts, I think you should try to create competitive districts. I think that engages the public, it makes voters more likely to come out and vote, it makes the electorate more likely to take to—take an interest in public affairs, and so try to create competitive districts. [29]

When it comes to the Sixth Congressional District, I was the nominee for my party in the 2000—2002 cycle, so I ran in the district when it was constituted as six counties, and ran in a district where it was constituted as eight counties. So the start of the Sixth District is pretty easy, with Garrett, Allegany, Washington and Frederick, you've got a nucleus there, and then it's just a question which direction you go. Are you going to go east, or are you going to go southeast, or are you going to go south? Having campaigned in both, I have to tell you that my sense is, especially since the lines were drawn after the 2000 census, I think if you took a poll in upper Harford County, Baltimore Counties and the section of Montgomery County that's in our Congressional District, a very low percentage of

those people would actually understand that they're residing in the Sixth Congressional District.

In fact, I thought it was humorous the other [30] day. I—Barry Rascovar, in the Gazette, actually mischaracterized the district, and it was interesting to me that somebody who is as well-attuned to political affairs as that would not know, and I think it's because the district has changed. So my sense is, having campaigned in those areas, that when you start there, that Carroll, and certainly, Baltimore and Harford Counties, their orientation is much more toward a Baltimore County or Baltimore City direction. And Frederick is increasingly, and it's—as Bob Kresslein pointed out, we're heading southeast, and our orientation is toward Montgomery County.

I think that so many things are done in the state or county centric, and so you need to come up with a minimum number of counties for this district, and that our orientation, once you start with those four counties, if at all possible, your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest [31] extent possible, and leave Montgomery—excuse me—leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district. Thank you very much.

MADAME CHAIRPERSON: Thank you. Myrna Whitworth? Ms. Whitworth? Okay.

MS. WHITWORTH: Good afternoon.

MADAME CHAIRPERSON: Good afternoon.

MS. WHITWORTH: I'm speaking to you very much as a partisan Democrat. I rep—I'm chair of the Democratic party here in Frederick County, and I'm speaking from that perspective. My job is to turn Frederick blue and hopefully the Sixth Congressional District along with it. I have been here a very short time, only

nine years, which, in Frederick County, is only yesterday. I come from the Fifth Congressional and Steny Hoyer. And believe me, it's a lot easier being a Democrat in Prince George's County than it is here in Frederick County. However, we are making [32] strides. We are building the party. We have an active volunteer organization, and we expect to make inroads, and your decisions here that you present to the Governor will have a large impact on how well we do.

In 2010, we, like so many others, didn't do well. But, as I say, we are growing the party, and we're prepared to work very hard in 2012. But we have had problems with trying to get Congressional candidates elected, particularly since the 2002 redistricting. And despite heroic efforts by our Congressional candidates, they have been at a severe disadvantage. And because of that, they have not received the support of the state or national party. And we also feel that it has negatively impacted down ballot candidates for us.

I also understand that you and this commission are looking at two factors, diversity and national natural and political boundaries or—and I [33] strongly believe that if you look at those, you will find that our current configuration, as others here today have indicated, makes little sense. Historic—right now, Frederick is the gateway to Western Maryland. It's the largest population center, and among Frederick County residents are those people from Urbana, who very much look south. Frederick County, many of the people here look south, go down the 270 corridor and have businesses and jobs in the Greater Washington Metropolitan area. And so, to look at Frederick and west, as well as to look at Frederick south, gives a much more natural boundary to what the Sixth Congressional District should look like.

In terms of diversity, no Sixth Congressional District is going to be representative of the state. It's just a matter of fact. But let me just give you one statistic, if I may. If you look at Carroll County, for instance, if you would lob off Carroll County and Northern Baltimore and Northern [34] Harford County, you would have a better chance of breaching the diversity that we are—you hopefully are looking at. Carroll County, for instance, if you look at it, is a 92.9 percent white population in a state that's only 48.2 percent white. The African American population in Carroll County is only 3.2, with a state average of 29.4. The Hispanic population is 2.6, the Asian population is 1.4, both well below the state average. I'm not suggesting that Frederick County is a whole lot better, but I do know that looking to the northeast of the state will not improve that diversity. Looking to the south will, and I hope you will take into consideration those aspects as you come up with your recommendations. Give us a fighting chance to win, to work and to change the composition of the Sixth Congressional District. Thank you.

MADAME CHAIRPERSON: Thank you. Chris Huckenpoler (phonetic). Is—okay. Chris Huckenpoler? Unless I'm not pronouncing that person's [35] name correctly. Okay, let's move on to Andrew Duck.

MR. DUCK: First of all, thank you for coming to Frederick. I also saw you out in Hancock this morning. I appreciate you coming out to Western Maryland and taking our input. I speak to you—

MADAME CHAIRPERSON: Excuse me—you know - - they're asking me to have you pull that out and speak directly into it, because we are getting—

MR. DUCK: Is this better?

MADAME CHAIRPERSON:—a record of it.

MR. DUCK: Well, I was just thanking you for coming here. I speak to you today as someone who has run for Congress in the district as it is currently configured, been the nominee twice. And so, for the last six years, I have gone across the Sixth District of Maryland, all the way from Friendsville and Garrett County to Dublin and Harford County, and when it comes to communities of interest, those two communities have nothing really in common. The folks in Garrett County [36] are not even in the Chesapeake Bay drainage area. They're—they get very mad about the flush tax, because they're trying to clean up the Chesapeake Bay, when their sewage flows out through the Mississippi.

The folks in Harford County are very much concerned about the bay. They live right next to it. The differences between mountain Maryland and even central Maryland are vast, and these district—this district, because it's over 220 miles east to west, makes it very difficult logistically for one Congressman to represent that whole district. It makes it difficult for a candidate to reach out to voters across that district. Voter contact is particularly difficult in Harford and Baltimore County, because those voters who are in the northern part of that county have their center of life in Baltimore. And if you're trying to do an event where you're doing voter contact, you don't contact voters there, because they're all down in Baltimore. You go [37] to Baltimore to contact them, you're contacting more out-of-district voters than in-district voters. So the way that those counties are split makes it very problematic. And so, I would encourage they be organized into a district that is more suitable to keep those communities together with the Baltimore community.

Carroll County is also interesting, and I note that even in your map of Legislative Districts, you have the western part of Carroll County shown here with West-

ern Maryland, but not the eastern part. And I think that that's reflective of the pattern of life of the people who live in Carroll County. The folks on the eastern side live in—they work in Baltimore, live in Carroll County, and so they really are very different from the folks in the western half of Carroll County. This is what I've found as I've gone out and talked to people.

Frederick and Washington County have really [38] become part of the Washington suburbs, and I think, as such, the community of interest makes it more relevant for them to be lumped with Montgomery County than with people from Harford or Baltimore County. So I think, both in terms of making it viable for someone to reach the voters, and in terms of better representing the population, it would make more sense to re-orient the district to include more of Montgomery County and less—and none of Harford and Baltimore and less of Carroll, as you put those communities in with the Baltimore County area that they are naturally a part of.

Those are my comments. Thank you for your opportunity to speak.

MADAME CHAIRPERSON: All right. Thank you. Holly House? Holly House? Going once, twice. I think this is Boyce Rensberger? Did I pronounce your name correctly, sir?

MR. RENSBERGER: Closer than most people get [39] it. Yes, that's great. Thank you.

MADAME CHAIRPERSON: Okay.

MR. RENSBERGER: Yeah, my name is Boyce Rensberger. I first lived in Frederick County in 1981 in Urbana when it did not deserve that name at all. It wasn't urban in any sense. It was—

MADAME CHAIRPERSON: Right.

MR. RENSBERGER:—there were just about a dozen houses there.

MADAME CHAIRPERSON: Oh, they're going to tell you to—

MR. RENSBERGER: Oh, sorry, yeah. Nobody else is going to like it at this height.

MALE VOICE: Get close.

MR. RENSBERGER: Yeah, okay, I'll get very close. When I got to Urbana in 1981, there were only about a dozen houses. After a few years, I moved away for work and family reasons. Just moved back three years ago, to a place north of Woodsboro, in a town [40] called New Midway, and looked at Urbana, and the county population has changed so drastically, the area around Urbana, that it doesn't seem like the same county. And I've—so I want to speak in favor of a redrawing of District 6 boundaries so that they go down and include more of the interest of the Urbana-ites, the folks that live in Urbana, if I can call them that, and also to recognize demographic trends that are occurring and surely will accelerate through the next census. The city of Frederick's the second largest city in the state. It's majority Democrat.

All of Frederick County looks to our city as its center of its cultural life. It's a very vibrant city, lots of great reasons to live here and visit here. I know of couples from Boston and New York who looked for places to retire, and they—one of them in particular told me they did some searches, looked at surveys asking what you want in a retirement community, and the surveys consistently pointed to [41] Frederick County and Frederick City. They moved down here, and then they were shocked to realize that, in a city as sophisticated as Frederick, their politics weren't represented at all at the national level, and I'm just speaking about Con-

gressional Districts here. I—so it's—you know—the district lines that's drawn now give it a population distribution that is very unlike that of the reason that so many people are being drawn to Frederick—Frederick County and City.

We live in a republic, a representative democracy, and yet our representative in the Congress is not representative of the kinds of people who are choosing to live in Frederick County, and I think that's something that ought to be changed. They feel that their interest, their feelings and so on are being shut out of the process. So I'd urge you to realign the boundaries of District 6 so that it's demographics come closer to representing what are becoming and what we certainly will become even more [42] over the next few years, and maybe even more—because we'd like to attract more of those retirees who are coming here looking for the kind of good life that Frederick can offer. Thank you.

MADAME CHAIRPERSON: Thank you, thank you. Mr. Tom Slater?

MR. SLATER: Thank you, and good morning—or good afternoon to all of you. I'm going to try to read my comments, so that I can make sure I get them in within five minutes, but give me a little leeway. What I want to do is look at things from a historical perspective. And so, you know that the current Sixth District consists of Allegany, Carroll, Frederick, Washington and Garrett Counties, all of those counties, and parts of Baltimore County, Harford and Montgomery. That current district was created after the 2000 census, and Harford County has only been included in the Sixth Congressional District since that time, since 2000. [43]

Going backwards, the 1990 census produced the Sixth District that included all of those same five counties in the western part, plus Howard County. And that

was when Congressman Bartlett (phonetic) was elected in 1992 after incumbent Beverly Byron (phonetic) was defeated in the Democratic primary. The 1980 census, and subsequent redistricting, resulted in a Sixth District that included those five counties and parts of Howard and Montgomery County. With the 70s census and redistricting, a small portion of Baltimore County and Montgomery County was added to those five western-most counties. Goodloe Byron was elected in 1970 from the 60 census lines, and then continued to be elected with this configuration until he died in 1978 when he was succeeded by his wife, Beverly.

The 1960s, there were two Congressional redistrictings, the first included the five counties that I've mentioned, a small part of Baltimore County. [44] And then, in '62 and '64, the Congressional District included all of Allegany, Frederick, Garrett, Washington, and for the first time, all of Montgomery County, and that was when [Charles] 'Mac' Mathias and Glenn Beall represented the district. Note that portions of Baltimore County have been included in the Sixth Congressional District for only about 26 years, which, in the whole history of redistricting, is not a long period of time. And I'm not going to go decade by decade all the way back to 1789, because that would take too long. But before I'm thinking about this, I thought about a book that I read, Walter Johnson, Baseball's Big Train.

Now, you're wondering, "What does this have to do with redistricting?" Walter Johnson, as most of you may know, was the original member of the baseball hall of fame. What you may—and this book is written by his grandson, Henry Thomas. And if you're a baseball fan, you want to read this book. It's a [45] really good book. I see the Speaker shaking his head.

SPEAKER: I've read it.

MR. SLATER: He's probably read it.

SPEAKER: He was also a Commissioner.

MR. SLATER: I'm getting to that, because I had the pleasure of meeting Mr. Thomas, and he had signed the book for me. And when he signed it, he said, "To Tom, who lives in Walter Johnson territory. Best wishes always." Now, at that time, I lived in Adamstown in Frederick County when he wrote that in 1996. What does he mean by Walter Johnson territory? I guess it could mean the areas that supported the senators, which would probably be true. But on pages 338 to 340, he describes Walter Johnson's run for Congress, and some of you may not have known this. Walter Johnson ran for Congress for Montgomery County in the Sixth Congressional District in 1940. He ran against incumbent Woodrow Byron, Goodloe Byron's father, and Beverly Byron's father-in-law. So Walter [46] Johnson territory could refer to the Sixth Congressional District, including all of Montgomery County.

Walter Johnson, at that time, as the Speaker said, was a Commissioner, a County Commissioner from Frederick County. Interestingly enough, as described by his grandson, he lost that election, as follows: "Johnson's alliance with the Republican platform of isolationism and opposition to Roosevelt's big government dictatorship swayed the heavily Democratic electorate against him, giving the victory to the able and popular, young incumbent." Another one—another Congressman from this district, when it included Montgomery, as mentioned by Dan Rupli, was David J. Lewis. He was William Byron's successor. He served from 1931 to '41, and then previously from '11 to '17, 1911 to '17, and he was the main sponsor of Social Security, and I put in here the unemployment insurance law, but I think Dan's right. It was probably [47] Worker's Comp.

The important point that I want to make is that going back to the very first Congressional districting—and I didn't say redistricting—districting—in 1789, Montgomery County has historically been a part of the same Congressional District as Frederick and the more western counties. From 1871 until 1966, almost 100 years, the Sixth Congressional District consisted solely of Frederick, Washington, Allegany, Garrett and Montgomery County, all of Montgomery County. So historically, Montgomery County's been connected with Western Maryland. Carroll County has been a part of the same Congressional District as Frederick for 81 out of 174 years, so less than half of the time. Carroll County's more often shared its Congressional District with neighboring Baltimore County, and I agree with those who said earlier that that's where the direction ought to go for Carroll County. [48]

Frederick County and the counties west of Frederick have more in common with Montgomery County than they do with Carroll, Baltimore, or Harford. The historical record supports the inclusion of at least a portion of Montgomery County to continue to be a part of the Sixth Congressional District. And I had said I was going to talk about General Assembly redistricting, but I'm out of time. Thank you.

MADAME CHAIRPERSON: Thank you. Okay, thank you. Delegate Sue Hecht?

DELEGATE HECHT: Thank you, Madame Chair, Mr. President, Mr. Speaker and Delegate King, it's nice to see you again. I did ask originally for the three minutes, but I would ask if I can extend that, because I do have some information, having served in the General Assembly for two terms—for three terms, so could I ask for the five minutes?

MADAME CHAIRPERSON: Yeah, the five minutes would be—you're going to speak to both of them? [49]

DELEGATE HECHT: Both, yes.

MADAME CHAIRPERSON: Okay, five minutes.

DELEGATE HECHT: Thank you.

MADAME CHAIRPERSON: Okay, all right.

DELEGATE HECHT: I believe I come to you with a unique perspective and background, as a retired state legislator serving District 3, Frederick and Washington Counties for eight years, and then after that, after the redistricting, serving District 3A and Frederick County for four years. While Frederick County is my county of choice since 1975, my county of birth is Montgomery County. I was born, raised, educated, employed, became a mother—and a wife and a mother, I should say it that way, in Montgomery County for nearly 30 years. So in the 1970s, my young family, as thousands of people, especially the baby boomers, moved up north, up west, north and west on the 270 corridor, so we could afford the American dream; i.e., a house and a little patch of land. [50] During the 1970s and continuing until the economic downturn recently, Washington—Frederick and Washington County have seen a huge increase of Maryland citizens migrating, mostly from the Washington Metropolitan Area, especially Montgomery County, as we did.

It's my experience that Frederick County and the greater Hagerstown area, especially along the I-270 corridor, increasingly identifies itself with the exurbia of the Washington D.C., not Baltimore City and its suburbs. Even though Frederick is in the enviable position of sitting 50 miles as an apex of both Washington and Baltimore City triangle, the more new Western Maryland residents maintain close ties with Montgomery County and D.C. area, not as much with the Balti-

more. Let me give you just a couple of examples. We've heard about the thousands of commuters that come down I-270 and Route 15, coming through Frederick. They're most of the majority—vast majority of those [51] folks are going to jobs in the Washington Metropolitan Area, not Baltimore. We've heard about our mass transit links that go to Washington through the Mark, not Baltimore. Frederick is part of the Greater Washington initiative and an affiliate of the Greater Washington Board of Trade, marketing the Greater Washington Area.

We are not included in the similar Greater Baltimore initiative, even though we love Don Fry (phonetic). Frederick is part of WASHCOG, or the Washington Council of Governments, a regional organization of Washington area local governments surrounding our nation's capital, plus members in the Maryland and Virginia legislatures. The Bureau of Labor statistics and the U.S. standard—U.S. Census Bureau count Frederick among the Bethesda, Rockville, Frederick, Maryland, Metropolitan Division.

The years that I served in the General Assembly, I worked closely with the folks in [52] Montgomery County on economic development. One example is a former County Executive Doug Duncan, and I did develop the Frederick—excuse me—the Potomac Technology Corridor that runs from Montgomery County up 270, up I-66, as a way to expand our biotechnology business, and it was folks from Montgomery County that helped make sure that when MedImmune and Montgomery County had to expand and couldn't find a place in Montgomery County, Doug Duncan said, "There is no such thing as county lines between Frederick and Wash—Frederick and Montgomery County," and made sure that MedImmune expanded here in Frederick County, not out of our state.

So those are just a couple of examples. So my suggestion, and I hope that we return Montgomery County—the upper part of Montgomery County, move it into Frederick County as it was before. Now, very quickly, I'd like to talk about the legislative state districts, because I have served as a state legislator [53] in two different districts, within two different sections. When I first was elected in '94, I was in an at-large district called District 3 that was Frederick and Washington County. There was three of us serving, and the way it was drawn, no Washington County resident could have a chance of winning that district. It was just too heavily populated in the Frederick area. It was hard to serve when you are serving in another county that has a very different reference. It has changed somewhat now that we are much more alike, but—and then, the next time when I ran, it was in a two-member district, mostly Frederick City and 3A, because of redistricting had drawn it.

So I would like to say if you can possibly make the population, the legislative population so that you are in their county, it is much better for the residents, it is easier to serve for the legislators, but mostly, it is more representative for [54] the people of those counties to have the opportunity to have somebody that lives and works and will; serve them within their county. Thank you very much.

MADAME CHAIRPERSON: Thank you. That comes to the end of the people who have signed up to speak. Ms. Janey, was there another sheet for anyone else?

FEMALE VOICE: No.

MADAME CHAIRPERSON: Okay. Assuming there is no one else who'd like—would like to have an opportunity to be heard, I want to thank the persons who did

make presentations. I'd like to thank all of you for coming out and participating in this process as an observer to see how government works. And with that, thank you very much. This brings us to the end of the hearing.

(Meeting was adjourned at 3:00 p.m.)

STATE OF MARYLAND
DEPARTMENT OF PLANNING
REDISTRICTING COMMITTEE MEETING
PUBLIC HEARING
CONGRESSIONAL REDISTRICTING PLAN
AND LEGISLATIVE REDISTRICTING PLAN

Washington County Middle-Hancock High School
JULY 23, 2011 11:00 A.M.

SPEAKERS:
HOWARD GORRELL
ELIZABETH PAUL
SENATOR CHRIS SHANK
KAYE ROBUCCI
SENATOR GEORGE EDWARDS

* * *

[14] Congressional districts are completely very important.

So, my final word, on (indiscernible) hearing. Do you have any questions?

MADAM CHAIRMAN: Thank you. Thank you so much. I'm sorry, no time is left. But I have your presentation. I have your presentation. Thank you.

Okay. Our next speaker will Ms. Elizabeth Paul. Good morning, Ms. Paul.

MS. PAUL: Hi. And I have a copy for you.

MADAM CHAIRMAN: Okay.

MS. PAUL: Good morning. I'm Elizabeth Paul. I'm going to talk about the Congressional District. I live in (indiscernible) and I'm Chair of the Washington County Democratic Central Committee.

We need a sixth Congressional District that's not a patchwork of odds and ends of the different counties, but rather one that makes sense and shares more than the Mason Dixon Line. This district currently spans a distance of, you know, 200 [15] miles across the northern part of the state. Unless the district is approached southeast instead, it's likely the population changes could push it all the way into Cecil County elongating the district even more.

When the State decides the population of Maryland, that just doesn't make sense. Until recently, you all heard that Montgomery County is part of our district and historically that region has had close ties to the Frederick area, as well as the western counties up here, and certainly more so than upper Baltimore and Harford County which were added in 2002.

Residents in the more populated parts of the sixth district are more aligned with Washington, D.C. suburbs by transportation routes such as I-270 and the MARC Commuter Trains, by employment in the D.C. Metro area and Northern Montgomery County as opposed to Baltimore suburbs or Harford County. We are linked by [16] media outlets including print and television.

For example, many more people subscribe to the Washington Post than the Baltimore Sun in this area. The TV markets include us in the Greater D.C. Metro

area and not Baltimore, unlike Carroll, upper Baltimore and Harford. The Potomac River and population along it is a more natural sixth district boundary to the Mason Dixon Line at this time. Please make the boundaries of the Sixth District more logical, creating a more unified region. Thank you.

MADAM CHAIRMAN: Thank you. And do you have a copy for me? Okay. Thank you.

MS. PAUL: I can get them and give them to you.

MADAM CHAIRMAN: All right. Our next speaker is Senator Chris Shank.

SENATOR SHANK: We have a man on the way here, too. Good morning, Madam Secretary and Mr. President, Mr. Speaker and Delegate. It's a pleasure

STATE OF MARYLAND
DEPARTMENT OF PLANNING
REDISTRICTING COMMITTEE MEETING
PUBLIC HEARING
CONGRESSIONAL REDISTRICTING PLAN
AND
LEGISLATIVE REDISTRICTING PLAN
Prince George's County - Prince George's Community College
July 25, 2011 7:00 P.M.

SPEAKERS:

MARCUS AFZALI
DAVE E. MORAN
DELEGATE MELONY GRIFFITH
TREVOR OTTS
PAT FLETCHER
JIM HENDERSON
DELEGATE AISHA BRAVEBOY
HEATHER OLSEN

TANYA HILL
YVETTE JARDIN
KAREN JO POPE-ONWUKWE
LEMAN JOHN AUNCHMAN
MYKEL HARRIS
JUNE WHITE DILLARD
BRIAN MORRIS
NICOLE WILLIAMS
JOSEPH KITCHEN
JUANITA MILLER
CHONYA JOHNSON
MARY MURPHY
STEVE WAUGH
DENNIS SERRETTE
DELEGATE MARVIN HOLMES
BOB ROSS
PHIL LEE
SHARON TAYLOR
SENATOR JOANE BENSON
LEN LUCCHI
CASEY LEWIS
TERRY SPEIGNER
MAYOR ANDREW FELLOWS

* * *

[53] black and Democrats, they'll never vote for him, without any regard for the fact that Congressman (indiscernible) doesn't have anything akin to our community. We may be city and suburban, they're country, oceanfront. Nothing alike.

So in closing, I'll just simply ask you to please avoid the lawsuits that will come and the disenchantment and disillusion. Do the right thing. It's never too late to do the right thing. And we will recognize good government when we see it.

MADAME CHAIRPERSON: June White Dillard.

MS. DILLARD: Good evening, Madame Chairman and members of the State Redistricting Commission. Thank you very much for coming to Prince George's County. Since the 2010 population, 2000 population was taken, 2010 shows an increase of more than five percent of the African American population statewide, making us about 30 percent of the total population in the State of Maryland. [54]

African Americans are grossly unrepresented, both in the United States Congress and in the General Assembly in Annapolis, and that's what we need to have remedied by your Commission. There should be 721,000 people in the district or the U.S. Congress. Prince George's County has now three representatives. We need to have two. We need to have Prince George's County shared between the 4th and the 5th Congressional Districts and Montgomery County have the 8th and the 6th Congressional Districts covered in Montgomery County and the 5th Congressional District extended into Charles County.

In terms of the state legislative districts, our population is 865,000 and we need approximately 122,000 per district. We need to have seven whole districts for Prince George's County, 21, 22, 24, 25, 26, and 27 and the last one would be 47. Twenty three needs to be incorporated into Anne Arundel County. Districts need to be compact and contiguous to [55] withstand any court challenge. They also need to be fair in the creation of new majority/minority districts for the federal and the state districts. Thank you for your time.

MADAME CHAIRPERSON: Thank you. Brian Morris?

MR. MORRIS: Good afternoon.

MADAME CHAIRPERSON: Good afternoon.

MR. MORRIS: Good evening, Madame Chair. Good evening, Committee members. Welcome to Prince George's County. I'm also representing Fannie Lou Hamer Political Action Committee. And just what everybody's saying here tonight, it seems like everybody's pretty much saying the same things. The population has changed and they want to see it evened out. They want to see everybody represented fairly.

MADAME CHAIRPERSON: Your name?

MR. MORRIS: Brian Morris.

MADAME CHAIRPERSON: Are you going to speak

* * *

So those are my concerns about the legislative districts. More importantly, I just really want to make sure that we (indiscernible) to what is Prince George's County and we cannot give up our representation in the House of Delegates or the State Senate. I do not see that as a way for us to move forward. Thank you.

MADAME CHAIRPERSON: Ms. Danita Boffolo? Danita Boffolo? Juanita Miller?

MS. MILLER: Good evening, Madame Chair and members of the Commission. Much of what I'm about to say has been reported, however, I will read it for the record and—

MADAME CHAIRPERSON: Both?

MS. MILLER: Yes, on both the congressional and legislative redistricting plans. The census figures released on February 9th, 2011, we feel that the black population in Maryland rose by 15.1 percent to over 1.7 million and that African Americans now [68] make up roughly one third of the state's total population.

As the state's demographics continue to change, we must, we must leave an opportunity for a more diverse

delegation reflective of our state in the future. This population change will have a significant impact on the new congressional districts and state legislative districts.

Goals that I'm recommending on behalf of my constituency as a community advocate. The goals for the Maryland congressional redistricting plan are preserve and strengthen the two majority African American congressional districts and create a future opportunity for a third minority congressional representative by maintaining the integrity of the 5th Congressional District, which currently has a Democratic voting age population of 57.62 percent. As an educator, I don't talk when the children talk, so once I have everybody's attention, I will continue. [69]

The increase in population in this district is largely a result of the increase of African Americans in Prince George's and Charles County. Maps should not be drawn to reduce the African American or—the African American vote or percentage in the 5th Congressional District.

The second goal should be to remove the 8th Congressional District from parts of Prince George's County to allow for a more compact, contiguous 4th Congressional District that does not stretch to the border of Frederick and contains communities that have more in common.

And the third goal, prevent other legislative districts from reaching into Prince George's County, which would have the effect of diluting the minority voting strength and minority voting percentages in Congressional Districts 4 and 5. In particular, there has been discussion about bringing the 1st, 3rd, and/or 7th Congressional [70] Districts into the county. We strongly oppose that approach.

Goals for the state legislative redistricting plan. Provide state legislative districts that will achieve the goal of having more opportunity for African Americans to be elected to the state legislature in proportion to their population size in the state, 30 percent House, 42 African American members, and 30 percent of the Senate, 14 members.

The second goal is prevent the dilution of African American voters by not allowing multiple legislative districts to cross jurisdictional boundaries. The 21st legislative district should move out of Anne Arundel County and pick up part of South Laurel and Northern Bowie that are currently in District 23, which is overpopulated.

The 23rd District not be extended into Crofton, but should be made in Bowie, Mitchellville, [71] Glen Dale, Kettering, and parts of Upper Marlboro, as it states. Further, the 23rd District should not be split into A and B on the House side. It should become one whole district with three delegates.

Number four, blacks should not be packed into the 24th, 25th, and 26th Districts because the black population has grown to over 64 percent of Prince George's County, while the white population shrunk to 15 percent and Hispanic is at 15 percent.

The fifth goal and the final one that I'm going to present to you this evening, the 47th and 22nd districts must be reconfigured to become more contiguous and contain more communities that have similar interests. Thank you for your attention and time.

MADAME CHAIRPERSON: Chonya Johnson. (Indiscernible.) Laurel. Live in Laurel.

MS. JOHNSON: Yes.

MADAME CHAIRPERSON: And your name is Chonya

* * *

Prince George's County has in the U.S. Capital have the opportunity to continue in those two roles. We're very blessed to have very good, very excellent representatives. And whatever happens, I think we need to make sure we have those two representatives have the opportunity to represent Prince George's County in the U.S. House of Representatives. Thank you very much.

MADAME CHAIRPERSON: Casey Lewis. And then, after that, Terry Speigner.

MS. LEWIS: Yes. Good evening, Madame Chair and those on the Commission. I'm Casey Lewis. I'm a realtor in Prince George's County and I totally agree with what Delegate Braveboy said and what Sharon Taylor said.

I think we should keep Prince George's compact. I would love to stay in the 23rd District. That's my district. I've been there for quite some time. I've educated most of my constituents around [101] Prince George's County and most of the realtors are my clients who are builders to let them know about the redistricting process. A lot of them are here tonight. I disagree with the lady who said 23 should get Anne Arundel County. No, it shouldn't be. It should stay in Prince George's County.

I also agree with—there was somebody else here who said that we do want a compact, compact area and we do love Prince George's County. I would really pray that you would really look at how you redistrict this county and keep it as close to what it is right now. Thank you so much for your time.

MR. SPEIGNER: Good evening, Commissioners. I'm not going to say the same words that you've heard tonight about compact, contiguous. I'm not going to say

a word about communities with interests. But I think you understand that the people tonight want those things and I'm going to speak on the whole congressional and legislative. [102]

At the end of the day, I want everybody to understand that Prince George's County has changed tremendously over the last decade. We've increased our population by over 60,000 people, 27 municipalities that represent 27 percent of our population. Our CDPs and our incorporated areas, like Camp Springs, Mitchellville, Landover, places like Largo, Kettering, Lake Harbor, they represent 72 percent of our population. They're called CDPs, census designated places, and they deserve to be together in tightly knit districts.

These are people who are neighbors who have the same issues as the neighbors across the street from them and we do not want these communities, whether it is Chillum, which has over 33,000 people in it, which is larger than every municipality in Prince George's County with the exception of the City of Bowie. We do not want that community to be in more than one legislative—congressional district. [103]

I agree that it's time for Prince George's County to have only two congressional districts—

MADAME CHAIRPERSON: Do you need some help?

UNIDENTIFIED SPEAKER: Did you say three?

MR. LEWIS: Two. Two congressional districts. I say two. This is my testimony, so listen and I don't need any comments from you right now. Two congressional districts. Congressional District 45 should be in Prince George's. The 8th Congressional District I think really doesn't do anything other than use Prince George's to put another member of congress in it. I like Congressman Van Hollen very much but, at the end of

the day, all politics are local and, right now, we need to focus on our home turf and that's Prince George's County.

Congressional District 5 I would hope that it will stay mostly in Prince George's County, mostly the way it is. Congressional District 4, we should bring it out of Montgomery County mostly, put most of [104] it into Prince George's County, because that is where the heart of our district is. Most of Congressional District 4 is in Prince George's. We have about—I think about, oh, 60 percent of—enough congressional fodder to affect the outcome there, where 50 percent, almost 60 percent, of that is African American voters.

This is not about people. When I say people, it's not about the people that are in office. This is about the people who live, work, play, and pray in Prince George's County. This is about the citizens of Prince George's County. This is not about keeping a particular incumbent in office because incumbents come and incumbents go. But the people are going to be here and they're going to have issues that they want to be able to have to deal with in the future, setting up, you know, the future for their children and their (indiscernible). That's what this is about.

This is about the next ten years in Prince [105] George's County, whether we're going to stay the same, go backwards, or whether we're going to progress and join our neighbors in a great economy called the United States of America. We want to grow our county and we want our county to succeed.

The 27th Legislative District I would love that to stay in Prince George's County. It is almost 50 percent African American. (Indiscernible) a different time in Prince George's, or what used to be in Prince George's. It used to be in Prince George's but, at some point in

time, I think that someone who lives in Prince George's will actually represent the 27th Legislative District.

So I simply ask everyone don't cut off your nose to spite your face. Do not try to axe 27, Legislative District 27, out of Prince George's County. Don't try to axe the 5th Congressional District out of Prince George's County. The demographics are in the favor of the majority of the [106] people who live in Prince George's County.

At some point in time, it will become a district whereby (indiscernible) will represent the 5th Congressional District. It may not happen in two years. It may not happen in four years. But at some point in time, it will happen. So what we're looking for is do the right thing with the districts, do not change the demographics of the districts because the vibration patterns of people who live in this region are following those districts.

So that's what I would encourage the Commission to do, is keep the fair in the county, keep the demographics and the population numbers the same as it relates to the racial base, keep the 4th in the county, (indiscernible) in the county, take the 8th out of the county. (Indiscernible) Congressman Van Hollen, but it's time to put Prince George's County back together, put our neighborhoods back together, put our communities back together.

STATE OF MARYLAND
DEPARTMENT OF PLANNING

REDISTRICTING COMMITTEE MEETING
PUBLIC HEARING
CONGRESSIONAL REDISTRICTING PLAN
AND
LEGISLATIVE REDISTRICTING PLAN

Montgomery County - Shady Grove
August 10, 2011 7:00 P.M.

SPEAKERS:
CHIP BERMAN
DON O'NEILL
DOUG MAINWARING
STEPHEN MCLAUGHLIN
JOSEPH DOANE
STEVE SHAPIRO
LYNN CREECY
DELEGATE ANA SOL GUTIERREZ

* * *

[19] more or less Golden Rule basis, as one of the earlier speakers alluded to, retribution is probably going to be forthcoming.

And then, finally, there are laws, federal laws, that say that these districts should be relatively compact and, unless they are made compact, the courts may have to address the wrong that's been done. Thank you.

MADAME CHAIRPERSON: Mr. Steve Shapiro. And then followed by Lynn Creecy.

MR. SHAPIRO: Good evening, Madame Chair and members of the Committee.

MADAME CHAIRPERSON: Good evening.

MR. SHAPIRO: My name is Steve Shapiro. I live in Bethesda. A few years back during previous redistrictings, I lived in Silver Spring right along the Prince George's-Montgomery County border. And at that time, I had similar concerns that you've heard tonight to the way the current 4th District was [20] established as far as a relatively small piece of ribbon in Montgomery County was joined by a ribbon to a piece, larger piece, in central Prince George's County. That basically disenfranchised many of us who lived in the smaller Montgomery County section.

And I was particularly concerned, not that we were being paired with Prince George's County, but that we were being paired with a part of Prince George's County that was not adjacent to where we lived. If we had been moved with our neighbors in Adelphi, Beltsville, Laurel, that would have been a much more compact, reasonable looking district than to merge us with areas much further to the south with a narrow ribbon.

I understand there are even maybe more egregious similar situations in the Baltimore region, more so than just in the Montgomery and Prince George's County area. But I urge the Committee, also, to try to establish a little bit more compactness. [21]

Ideally, Montgomery County, with its fairly large population, would have one district entirely within its borders and share about one half of a district with an adjoining part of the state. A reasonable option to do this would be to maybe take the western third of Montgomery County and pair it with Western Maryland, which, based on history and geography, would be a reasonable situation and one that existed several decades ago. Keeping the Montgomery section about equal in size to the Western Maryland section I think would keep it from being overly dominated by the Montgomery section and, thus, would be fair to the

Western Maryland residents, as well as to the Montgomery County residents.

And another option, if that wouldn't work, would be to take the eastern third of Montgomery County and pair it with its immediate neighbors adjacent to either Prince George's or Howard County. But in any event, one district in Montgomery and then [22] half of a district with immediate neighbors adjoining either to the west or to the east.

In some respects, the current congressional districts have made my job as a Democratic precinct chair a little bit too easy. As others have said, my candidates almost always win, at least in the general election. That's not necessarily a bad thing, but I am concerned that it has decreased turnout and interest a little bit. Most of the discussions in the primary where most of the candidates tend to agree and there is little or no discussion in the general, where the result is usually a foregone conclusion.

I live in precinct 77 now, which is in between Friendship Heights and Glen Echo, not too far from the Potomac River, and I'd be pleased to be part of that western third of Montgomery if that would be split into the Western Maryland district.

I'd also like to speak briefly about the legislative redistricting. A decade ago, I had [23] proposed a study looking at more single member House districts. As you all know, it's up to the Governor and the legislature whether to split the senate districts into one, two, or three pieces on a case by case basis. I believe that smaller districts would help reduce the size of elections and increase interest in the elections and, also, reduce the interest in slights.

In fairly homogenous districts, I do note that many of my neighbors disagree with that and are perfectly

comfortable having three at-large. However, I think the single member district concept is even more important in places where there is a fair amount of diversity within a district where there may be significant variations, either due to political affiliation, racial makeup, other demographics, that it may make sense to keep populations from being unfairly diluted by spreading some of the current state senate districts into more one or two member [24] districts.

So, in closing, I appreciate you being here to listen to our views tonight and hope that, even in consideration of the other factors that I know you need to consider, if keeping districts a little more compact and cohesive could be something in the equation. Thank you very much.

MADAME CHAIRPERSON: Thank you.

MS. CREECY: Good evening. My name is Lynn Creecy and I'm a resident of Olney, Maryland.

MADAME CHAIRPERSON: Okay.

MS. CREECY: 2012 marks the 200th anniversary of the War of 1812, which Maryland is commemorating on its license plates. 2012 is also the 200th anniversary of the first gerrymandered districts by Massachusetts Governor Elbridge Gerry. I urge Maryland to commemorate this anniversary by eliminating the tortuously drawn boundaries of Congressional District 4.

August 6, 2011 *Baltimore Sun* article

Democrats eyeing Western Maryland
By Annie Linskey, The Baltimore Sun

AUGUST 6, 2011, 7:45 PM | POINT OF ROCKS

Ed Coile and his husband are true-blue Democrats. But they were thinking about saving money, not their congressional representation, when they decided to move from Washington to conservative Frederick County last year.

"Politics just didn't play a role," said Coile, 52, after getting off the commuter train at the tiny red-brick MARC station in Western Maryland on the Virginia border. "This is where we could afford to buy a house."

Democratic strategists in this part of the state, however, are thinking an awful lot about transplants from the Washington area such as Coile and husband Barry Stampler.

The strategists see them as part of a steady northbound population migration that will color this part of the state more Democratic over time. They want to radically redraw Maryland's congressional map to transform the 6th District, which has sent conservative Republican Rep. Roscoe G. Bartlett to Washington for 10 terms, into a toss-up.

Or, in the words of Frederick County Democratic Chairwoman Myrna R. Whitworth, testifying at a recent redistricting hearing: "My job is to turn Frederick blue."

Conversations about maps will intensify over the next two months as Maryland politicians turn their attention to congressional redistricting, the once-a-decade process of adjusting political borders to accommodate changes in the state's population.

A five-member panel appointed by Democratic Gov. Martin O'Malley is crisscrossing the state to hear opinions about redistricting. The panel, which includes state Senate President Thomas V. Mike Miller and House Speaker Michael E. Busch — both Democrats— is charged with recommending a map to O'Malley.

O'Malley could submit that plan or a map of his own to the General Assembly, which will meet in special session this fall to approve new districts.

The 9 percent growth recorded in Maryland in the 2010 Census means the state will retain its eight seats in the House of Representatives. But that doesn't mean the Maryland delegation will remain static: Redrawing the borders could give the state's majority Democrats a chance to unseat one of the two Republicans—or at least make their re-election much more difficult.

Rep. Steny H. Hoyer, the No. 2 Democrat in the House, has hinted that freshman Rep. Andy Harris, the Baltimore County Republican who represents the 1st Congressional District, would be the target.

Adding Democrats to the district could give former Rep. Frank M. Kratovil Jr. a shot at taking back the seat he held from 2009 to 2011. Kratovil has said he would consider the shape of the district in deciding whether to run again.

But after a series of redistricting meetings, it is clear that there is no consensus on that idea. Leaders in Prince George's County, a rich potential source of Democratic voters, have made it clear that they don't want to be part of the 1st District, which now is made up of the Eastern Shore and parts of Baltimore, Anne Arundel and Harford counties.

Western Maryland Democrats, meanwhile, want the mapmakers to target Bartlett.

The Cook Political Report, a nonpartisan newsletter that tracks congressional and other elections, gives Maryland a 50-50 chance of drawing a new Democratic seat in the House.

Maryland is one of the few states nationwide in which Democrats have the power this year to redraw congressional districts in their favor. Republicans control the process in 18 states. Democrats oversee it in six. Others are either divided between the parties or use a nonpartisan commission.

With Republicans here largely sidelined—one of the five panel members is a former GOP lawmaker—the real argument in Maryland is between different segments of the Democratic Party.

At first blush, Western Maryland isn't an obvious place for Democrats to seek inroads.

The 6th District, made up of Allegany, Carroll, Frederick, Garrett and Washington counties plus parts of Baltimore, Harford and Montgomery counties, has been the most reliably Republican district in the state over the past two decades.

Even in years that were difficult for GOP candidates elsewhere, Bartlett, a member of the House Tea Party Caucus, has routinely won re-election by 20-point margins.

But Bartlett, 85, is a lackluster fundraiser, which has led some Democrats to argue that he would not have the means to introduce himself to a new group of voters should his district take a different shape.

Helping to fuel their optimism is the victory last fall by Democrat Ronald N. Young, a former Frederick mayor, over conservative Republican state Sen. Alex Mooney in Frederick and Washington counties.

Democratic Party strategists say the influx of 48,000 transplants from the capital area over the past decade is leading fast-growing Frederick County to tilt toward the politically liberal Washington suburbs.

About one-third of the 131,000 people who moved to Frederick County in the past 10 years came from Montgomery County, according to Internal Revenue Service data.

The MARC's Brunswick line, which runs from Washington's Union Station to Martinsburg, W.Va., has seen a 34 percent increase in train ridership in the past decade, and there are roughly 10,000 more cars per day on Interstate 270 than 10 years ago.

Nowhere is the growth more apparent than in the rolling developments in Urbana, the first exit off I-270 in Frederick County.

Ten years ago, local Realtor Mary Richeimer said, the community was "a tiny crossroads." Then a developer turned a stretch of corn and soy fields into The Villages of Urbana, a 3,000-unit planned community that includes hiking trails, tennis courts, two pools, a library and a shopping strip with a grocery store.

It's not the only one. Half an hour down the road is Brunswick Crossing, another gleaming development sprouting out of farmland.

"The county's population has changed so much," said Boyce Rensberger, a Democratic activist who spoke at the redistricting meeting.

The picture is disputed by Republicans, including the one who represents the district.

"I have a very rural, agricultural district," Bartlett said in a recent interview. "It has nothing to do with the suburbs of Washington. ... Small towns, volunteer fire companies."

Bartlett said redrawing his district to take away the Central Maryland portion and include more of Montgomery County would be "crazy."

"What in the heck relationship does Garrett County have to the Washington suburbs?" he said. "Or Allegany County or Washington County?"

One person who could benefit from a more Democratic 6th District is state Sen. Robert J. Garagiola, a Miller favorite who represents northern Montgomery County.

Garagiola said he's "watching closely" how the congressional district is being redrawn as he decides whether to challenge Bartlett.

"I would not run for the sake of running," Garagiola said. "If I ran, it would be to win."

A glance at the spaghetti-like tangle of congressional lines in Central Maryland shows that the state's Democratic mapmakers haven't minded cutting through communities to consolidate political power. And the Republican Party will have little voice in the process.

The current districts were drawn 10 years ago under then-Gov. Parris N. Glendening. He said in a recent interview that he was guided by two objectives: Keep the four influential Democrats from Maryland who were in office at the time and add more.

"There is no way to describe them other than political goals," Glendening said. "Redistricting, by definition, involves partisan politics."

He asked for a map that would flip two of the four seats held by Republicans from red to blue.

The "real challenge," said Glendening, was persuading the Democratic incumbents to accept districts that would be slightly more difficult to hold—a neces-

sary sacrifice to make the Republican districts more winnable.

"They were used to winning 70 percent of the vote and still wanted that," Glendening said. "We had to sit down with them and say, 'In order for [then-Baltimore County Executive C.A. Dutch Ruppersberger] to have a real running shot, you need to give up some of these areas.'"

In the end, Glendening's map did what he wanted. Ruppersberger beat Republican former Rep. Helen Delich Bentley in 2002 to win the district held until then by GOP Rep. Robert L. Ehrlich Jr., and Democratic state Sen. Chris Van Hollen beat Republican Rep. Constance A. Morella to give the Democrats six of the state's eight House seats.

Glendening had considered a plan to make Western Maryland more Democratic by pulling the district down into Montgomery County. But he decided against it, in part because it would have been difficult to draw without disrupting every other congressional district.

And that will be the challenge for mapmakers now: Reshaping the district would upset the delicate balance that has kept at least six Maryland Democrats in the House for each Congress of the past decade.

Altering the 1st District does not trigger the same domino effect in the rest of the state.

Raquel Guillory, a spokeswoman for O'Malley, said the governor is waiting to hear from the redistricting panel before he makes any decisions.

The group has heard a consistent set of messages.

As Western Maryland Democrats plead for a more competitive district, Democrats in Central Maryland are playing defense: They do not want to be corralled into a newly redrawn and sprawling 1st District.

Sharon Taylor of Bowie summed up the sentiment at a recent hearing in Prince George's County. She drew applause when she said African-Americans shouldn't be used as "filler" to help elect far-flung congressional representatives.

"Prince George's County cannot be the sacrificial lamb," she said.

July 12, 2011 *Center Maryland* article

Josh Kurtz — Sources: Congressional Delegation Dems Eye Bartlett As Redistricting Target

Rep. Steny Hoyer (D), the dean of the Maryland Congressional delegation and the No. 2 Democrat in the House of Representatives, is a wily legislative veteran, a master of the deal, and used to getting his way.

Rep. Donna Edwards (D), a fiery liberal with three years of Congressional experience under her belt, is known more for her political passion than her insider prowess.

But Edwards appears to be trumping Hoyer, according to multiple sources, when it comes to convincing their Democratic colleagues in the delegation which of the state's Republican-held seats to target in the upcoming redistricting process. And for now, at least, it looks as if a consensus is forming that they ought to go after Rep. Roscoe Bartlett (R) rather than Rep. Andy Harris (R).

Gov. Martin O'Malley (D) recently appointed a redistricting commission to help state lawmakers draft new Congressional and General Assembly maps. The governor and legislative leaders will have plenty of say over how the state's new boundaries will look.

But when it comes to Congressional lines, which will likely be adopted in a special legislative session that will convene in mid-October, the six Democrats in Maryland's House delegation will be accorded much sway.

And at the moment, sources say, despite Hoyer's plea to make the 1st District more Democratic to pave the way for a comeback for former Rep. Frank Kratovil (D), the delegation—with Edwards as one of the prime advocates—is close to signing off on a map that would

instead give Democrats at least a 50-50 chance of capturing Bartlett's district in the near future.

In Annapolis and in Washington in recent months, it's become accepted wisdom that Maryland Democrats, under pressure from national party leaders looking for the two dozen seats they need to retake the House in 2012, will attempt to move the delegation to a 7-1 seat Democratic advantage, up from the current 6-2.

The question for Democrats has been whether to go after Bartlett in the Western Maryland-based 6th District, or whether to go after Harris' Eastern Shore-based 1st District seat.

Both districts are Republican strongholds as currently drawn. Both gave Barack Obama just 40 percent of the vote in the 2008 White House election as he was racking up 62 percent statewide. But with clever manipulating, Democrats figure they have a decent shot of stealing one of the Republican seats, with minimal risk to their incumbents.

Hoyer has urged his colleagues to facilitate a comeback for Kratovil, who held the 1st District seat before being ousted by Harris in 2010—and who, by the way, is an old family friend of Hoyer's. The minority whip argued that Kratovil was a talented member who took some tough votes for the Democrats—including supporting the cap-and-trade bill—and deserved a chance to represent a friendlier district.

But Edwards made the case, according to sources, that Kratovil's 2008 win was a fluke—and that even bringing the 1st District across the Bay Bridge into Prince George's County or Baltimore City might not provide enough Democrats for Kratovil to win. She also argued that that adding African-American voters into an Eastern Shore district was the wrong thing to do, especially with the city losing one-twentieth of its pop-

ulation over the past decade. And she pointed out that Kratovil's voting record may not have been sufficiently progressive—he voted against health care reform, for example—to captivate base Democratic voters.

Edwards has apparently been working with a redistricting expert as the delegation has been deliberating the redraw. She also is reportedly willing to take on deep Republican territory in Anne Arundel County (while keeping turf in Prince George's and Montgomery counties) to help the Democratic cause. It's easy to be magnanimous when you won your last election with 83 percent of the vote.

So for now, the fragile consensus in the delegation seems to be to draw a new 6th District that runs roughly from Rockville to Oakland, a driving distance of about 170 miles. The 1st District would then take in all of the Eastern Shore and extend into conservative Carroll County, all but guaranteeing Harris a safe seat for the next decade.

A new 6th District would present a golden opportunity for some Democrat—presumably state Senate Majority Leader Rob Garagiola—to run and win. Democratic leaders feel that if they set up a tough general election, Bartlett, who will be 86 on Election Day 2012, and last faced a tough Democrat in 1992, will choose to retire. And they believe that Maryland Republican Chairman Alex Mooney, at this point the nominal frontrunner in any GOP primary to replace Bartlett, is beatable.

Even if they fall short in 2012, Democrats believe that with the cities of Frederick and Hagerstown trending slowly their way, a "Western Maryland" district anchored by Rockville and Gaithersburg is gettable sooner rather than later. And there's precedent for it: after all, the district that the Byrons—Goodloe and

Beverly—represented from the early 1970's to the early 1990's was not dissimilar.

A decade ago, Democratic leaders hotly debated whether to split Montgomery County roughly the same way, to create opportunities for Mark Shriver, the protégé of then-Maryland House Speaker Casper Taylor (D), and Chris Van Hollen, the protégé of state Senate President Mike Miller (D).

Ultimately, then-Gov. Parris Glendening (D) chose instead to create a Democratic-leaning district based in Baltimore County, a reward for term-limited County Executive Dutch Ruppersberger (D). Shriver and Van Hollen had a dramatic showdown in the principal Montgomery County district—with Van Hollen pulling the upset.

If a new 6th District is created, it'll be interesting to see whether any name Democrats besides Garagiola take a shot at it—though no names have circulated at present. It'll also be very interesting to see how Bartlett, who just announced his intention to seek reelection last week, will react. As of March 31, he had $247,000 in his campaign account.

As for Kratovil, with the option of running for his old seat cut off, he'll have to decide whether he wants to run for something else in the near future—like attorney general or comptroller. There's also the possibility that he could be tapped to be Maryland's next U.S. Attorney, assuming there's a second Obama administration.

Nothing is written in stone until the legislature passes a bill and O'Malley has signed it. Even then, the Congressional map could be subject to a legal challenge.

But for now, at least, it looks as if Donna Edwards has outmaneuvered Steny Hoyer—and that Frank Kratovil, as a result, may be the odd man out.

Emails from Sharon Strine

From:	Allyson McMahon <allymcmahon@verizon.net>
Sent:	Tuesday, April 08, 2014 12:31 PM
To:	Maria Pycha; Sharon Strine
Subject:	exec letter draft
Attachments	ExecLetter.docx; CampaignInfo.docx

[BLANK IN ORIGINAL]

Bongino For Congress
2014 Campaign Information

Campaign Organization:

The Bongino for Congress campaign's top tier staff consist of the following individuals: Campaign Manager—Sharon Strine; Finance Director—Maria Pycha; Media Director—Karla Graham; Communications Director—Jim Petit; and Director of Operations—Ally McMahon.

In addition, Team Bongino includes a Volunteer Coordinator, Campaign Coordinator, Deputy Finance and Operations Managers, Political Directors, Grassroots Coordinator, Precinct Analyst, and County Coordinators for each of the 5 counties represented in the district (in whole or in part), as well as over 200 active volunteers who have committed to staffing Bongino campaign events and grassroots efforts.

Fundraising Profile:

The District:

Maryland's 6th Congressional District comprises all of Garrett, Allegany, and Washington counties, as well as portions of Montgomery and Frederick counties. According to the Charlie Cook Partisan Voting Index in 2012, it is a D+2 district due to redistricting. It is worth noting that it was D+2 when President Obama was at the top of the ticket. From 1982- 2012, Republican Roscoe Bartlett represented the district, winning re-election overwhelmingly each year. Despite the D+2 registration rating, analysis of voter registrations shows a larger than average number of Independents who typically identify as fiscal conservatives.

The Opponent:

John Delaney is a first-term congressman with no prior political experience. He won both the Democrat Primary and General Election by presenting himself as a fiscal and social moderate and political 'outsider'. Since his election, Delaney has maintained a liberal voting record, voting with Nancy Pelosi and Harry Reid over ___% of the time. His steadfast support of the Affordable Care Act, even in light of its striking unpopularity, is seen as a primary weakness during his 2014 re-election bid.

It is important to note that while he has touted himself as one who would like to reach across the aisle on fiscal policy as it relates to Wall Street, Delaney has been unable to move his proposed legislation forward due to his minority party status. This is seen as an area of weakness, as the House or Representatives is expected to remain firmly in Republican hands through the next several election cycles.

While he maintains a relatively small individual donor profile, Delaney has the ability to self-finance. We will

need significant resources to compete in the expensive media market of Montgomery County.

Earned media:

Dan has garnered national attention through book sales, guest hosting talk radio programs such as WMAL's Mornings On The Mall and The Chris Plante Show, as well as nationally syndicated shows such as the Sean Hannity and Mark Levin Radio Shows. Dan has also maintained his role as a pundit and security expert for several Cable News channels. Dan was named a Top Conservative Under 30 by the American Conservative Union, and was asked to speak at the 2014 CPAC Convention. His was touted one of the best Thursday speeches, and has been widely viewed online and shared throughout social media outlets.

Dan's public statements can be seen here:

Links to Dan's speeches

From:	Bob Farmer <bofar@comcast.net>
Sent:	Wednesday, June 26, 2013 5:15 PM
To:	Sharon Strine
Subject:	Re: Dan's residence?

Sharon, Congressman Bartlett did live in the old D6 & that's what I'm referencing in my email.

Bob

On 6/26/2013 3:33 PM, Sharon Strine wrote:

Hi Bob,

To be honest, no one who ran including Congressman Bartlett lived in the newly redistricted D6 in 2012. The

redistricting is a major issue for all of us. Thank you for getting back with me.

Sharon Strine
Deputy Campaign Manager
www.bongino.com
sharon@bongino..com
301-293-1281

From: Bob Farmer [mailto:bofar@comcast.net]
Sent: Wednesday, June 26, 2013 3:30 PM
To: Sharon Strine
Subject: Re: Dan's residence?

Sharon, I did get a response & I am disappointed that my cong. rep. does not have to live in my district. I must have assumed that all of the previous rep.s did live here in the 6th district & that it was a requirement. I'll have to think about my support for Dan now. I'm sorry that he is not my senator now.

Bob

On 6/26/2013 12:22 PM, Sharon Strine wrote.

Hi Mr. Farmer,

I just wanted to check if you had received a response. If not, I would be happy to answer your question. It is not a requirement that you live in the district to run. As a matter of fact, your current Congressman does not live in District 6. Dan loves Western Maryland and his supporters are over the top excited for him to become their next congressman.

Please let me know if I can help you with anything else.

Thanks so much for asking!

Sharon Strine
Deputy Campaign Manager
www.bongino.com
sharon@bongino..com
301-293-1281

From: Bob Farmer [mailto:bofar@comcast.net]
Sent: Tuesday, June 25, 2013 4:30 PM
To: finance@bongino.com
Subject: Dan's residence?

It's my understanding that my congressional representative must live in my congressional district, #6. If Dan still lives near Severna Park, that is another district. I'd be happy to contribute to Dan's campaign needs, but only if he can meet the necessary requirements for congressional representative.

Bob Farmer

* * *

From: Jeff MIller <rjefmiller@comcast.net>
Sent: Monday, August 26, 2013 5:54 PM
To: Sharon Strine
Subject: Re: Are you free August 30th?

Sharon,

Please call me at 301-363-7100...

I had a conversation with Dan earlier, and I am not going to hit a "pinata with hornets coming out of it". I'm not at all sure this would be in my best interest, and would like to discuss.

Jeff Miller...

"When we walk to the edge of all the light we have and take the step into the darkness of the unknown, we

must believe that one of two things will happen. There will be something solid for us to stand on, or we will be taught to fly."

Patrick Overton

"Gun control is like trying to reduce drunk driving by making it tougher for sober people to own cars."

From: "Sharon Strine" <sharon@bongino.com>
To: "Jeff MIller" <rjefmiller@comcast.net>
Sent: Monday, August 26, 2013 5:43:57 PM
Subject: RE: Are you free August 30th?

Hi Jeff,

Would you happen to have Ted Weaver's phone number? I talked to Dan about our conversation today and he told me to schedule a follow-up. He and Ted talked about 2 months ago on 2A and other issues. Dan would like to call him and get his opinion on some policy.

Thanks for the great conversation today!!

Sharon Strine
Deputy Campaign Manager
Bongino for Congress
P.O. Box 1330
Frederick, MD 21702
www.bongino.com
sharon@bongino.com
301-748-6197

From: Jeff MIller [mailto:rjefmiller@comcast.net]
Sent: Monday, August 26, 2013 12:00 PM
To: Sharon Strine
Subject: Re: Are you free August 30th?

If you wish to speak with me, I can be reached at 301-363-7100 after 1:00 PM.

I will share what I can, but you may have misunderstood what I wrote. This was a Second Amendment group that wanted to support Dan. Before they would, they asked for a Second amendment stance in writing. When they asked if Dan would support their efforts, the response was that after they held a fund raiser he would consider it. To me, this is just "pay to play", a standard political trick.

As I was presenting him as a man of honor who did NOT play this way, and was a man of conviction, this not only went against what I believed was true, but made me look foolish at the same time.

I received this information in confidence, and am unsure how to share this information with you, but I am willing to give you my thoughts. I am also in Delaney's MD 6th district, which was gerrymandered by O'Malley to remove Roscoe Bartlett. At this point my trust in Government and Specifically Maryland representation is so low that I am considering moving from the state.

I am a Second Amendment Voter who is somewhat disappointed in the fact that no strong WRITTEN statement seems to be made by the candidate. I have listened to him speak, but at this point I feel if it's NOT in writing, It doesn't hold any commitment.

Having been lied to for so long, Cynicism is becoming a way of life when dealing with ANY candidate.

Jeff Miller...

"When we walk to the edge of all the light we have and take the step into the darkness of the unknown, we must believe that one of two things will happen. There

will be something solid for us to stand on, or we will be taught to fly."

Patrick Overton

"Gun control is like tying to reduce drunk driving by making it tougher for sober people to own cars."

From: "Sharon Strine" sharon@bongino.com
To: "Jeff MIller" rjefmiller@comcast.net
Sent: Monday, August 26, 2013 11:02:16 AM
Subject: RE: Are you free August 30th?

Good Morning Mr. Miller,

I would be interested to talk with you regarding the organization you are associated with. We are not working with any other groups. That being said, organizations that support Dan may be supporting him by sending the information about this fundraiser.

If you would like to meet Dan in a non-fundraising setting he is all over Garrett, Allegany, Washington, Frederick and Montgomery Counties. I would be happy to let you know when he will be near your home for future events.

Please give me a call if you would like to talk.

Thanks!

Sharon Strine
Deputy Campaign Manager
Bongino for Congress
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Frederick, MD 21702
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sharon@bongino.com
301-748-6197

From: Jeff MIller [mailto:rjefmiller@comcast.net]
Sent: Monday, August 26, 2013 10:53 AM
To: campaign@bongino.com
Subject: Re: Are you free August 30th?

Dan,

While I am free on August 30, I will NOT attend any more of your events. If it cost me $100 to see you, I cannot afford to support Dan. I was also appalled when another organization I am associated with, asked for your support and received a response that after they held a fund raiser for him, he would consider it.

If we have to BUY support, then this is just Chicago Style "Pay to Play" wearing a different suit.

I cannot express how much this soured me... I don't know if this response came from Dan, or was the advice of staff, but either way, I am VERY disappointed.

Jeff Miller...

'When we walk to the edge of all the light we have and take the step into the darkness of the unknown, we must believe that one of two things will happen. There will be something solid for us to stand on, or we will be taught to fly."

Patrick Overton

"Gun control is like trying to reduce drunk driving by making it tougher for sober people to own cars."

From: "Dan Bongino" campaign@bongino.com>
To: rjefmiller@comcast.net
Sent: Monday, August 26, 2013 10:09:23 AM
Subject: RE: Are you free August 30th?

Are You Free August 30th?

My Invitation

Dear friend,

The kids may be heading back to school and the warm days of summer coming to an end, but my campaign for Congress is just getting started. I'd love to have the chance to meet you and tell you about my plans to return common sense to its rightful place in the halls of Congress.

Are you free to join Paula and me this Friday, August 30th, for a night of conservative fellowship and fun? We have a terrific evening planned, and we want you to join us.

When: Friday, August 30, 2013
7:00 p.m. - 9:00 p.m.

Where: Whiskey Creek Golf Club
4804 Whiskey Court
ljamsville, MD 21754

Please go here to find out how you can take part in this event. I want you to be a part of my campaign from the very beginning.

Like you, I am just an ordinary citizen who is fed up with the steady stream of nonsense - and worse - that is coming out of Washington every day.

I have spent the last few years talking at length with passionate conservatives like you. As a result, I am taking a radical approach that surely will not sit well with the political class.

Through my recently announced Citizen Contract, I have pledged to:

- Serve in Congress for only three terms

- Donate half my Congressional salary to charity
- Reject spending your tax dollars on Congressional junkets
- Vote down any piece of legislation that exempts the political class

You and I have a choice to make. Are we content to sit back and complain? Or are we going to fix this mess?

Let's gather in Ijamsville this Friday to discuss how we can work together to craft meaningful change for Maryland and our fellow Americans.

It's time that We the People give the DC elites a one-way ticket out of town.

If you can't join us this Friday, would you please consider making a generous donation today of $25, $50 or even $100? These early days are when your donation can have the greatest impact. Of course, if you could dig a little deeper and send $250, $500, or $1000, we'll be that much closer to taking back Washington, D.C.

I can win this race. I will win this race. But I need your help today to do it.

I hope to see you in Ijamsville this Friday!

Sincerely,

Dan Bongino

P.S. I've gone ahead and attached the invitation to the Ijamsville event—I'd really appreciate if you'd help spread the word about this event and about my campaign. These early days are so important in setting up the foundation on which we will build a grassroots victory in November of 2014. Thank you for your support!

* * *

Dan Bongino was the 2012 Republican Nominee for the United States Senate in Maryland. He served for over a decade in the United States Secret Service as a special agent and is currently a small businesses owner with his wife Paula.

Q. Good morning, Mr. Eyler.

A. Hi.

Q. My name is Jennifer Katz, and I'm an Assistant Attorney General with the Attorney General's Office, and I represent the defendants in this case.

A. Um-hum.

MS. KATZ: I'm going to have your counsel introduce themselves for the record.

MR. STEIN: Micha Stein from Mayer Brown representing the plaintiffs and the witness.

MR. MEDLOCK: Stephen Medlock from Mayer Brown representing the plaintiff and the witness.

Q. Okay. I'm just going to show you—I think [6] we're doing this in order, and I think we're up to number 14.

MR. MEDLOCK: Yes.

MS. KATZ: Exhibit 14. Is that correct?

MR. MEDLOCK: That's right.

Q. I'm just going to show you what's going to be marked as Exhibit 14 and give a copy to your counsel. Have you seen this document before?

A. Yes.

Q. Okay. And are you the subject of this deposition notice?

A. Yes, I am.

Q. Okay, great. Just do you still reside at this address that's listed here, 13249 Creagerstown Road—

A. I do.

Q. —in Thurmont? Okay, great. Thank you, very much. Mr. Eyler, have you ever been deposed before?

A. No.

Q. Okay. So I'm just going to go over a couple of brief housekeeping rules. So because the Court [7] Reporter is trying to take down everything that we say, I'm going to ask that you wait until I finish a question to give an answer, and then I'll wait until you're done giving an answer to ask another question. In other words, we won't talk over each other. And I'm going to ask that you provide verbal answers to questions for the benefit of the Court Reporter. If you don't understand a question that I ask, please ask me to clarify. If you don't tell me that you don't understand I'm going to assume that you do.

And we're going to try to make it through without a break, I don't think this will take very long, but to the extent you need to take a break, please let me know and we will find a good place to stop.

So I just want to make sure that you feel that you're able to testify today. Are you taking any medication that may affect your ability to testify or recall matters?

A. I'm taking medication for a disease that I have, but it is not anything that affects my mental [8] ability.

Q. Okay, great. Thank you, very much. So we just sort of went over your current address in Thurmont. How long have you lived there?

A. Since 1976.

Q. Oh.

A. At the same address.

Q. Okay.

A. And before that—I was born there and lived there till I went away to college.

Q. At that same address?

A. No, at a different address. My parents' home. But I've lived in Thurmont—except for college and graduate school I've lived there all my life.

Q. Where did you attend college?

A. Catawba College and then Penn State.

Q. Where is Catawba College?

A. Salisbury, North Carolina.

Q. Oh, okay. All right. So you started in North Carolina and you finished at Penn State?

A. Yes, I did.

Q. And what did you get your degree in? [9]

A. Music and theater. And then I just did the technical theater at Penn State.

Q. Wonderful. And you mentioned graduate school. Where did you attend graduate school?

A. That was Penn State.

Q. Oh, that was Penn State.

A. That was graduate school.

Q. Sorry. And are you currently employed?

A. No, I retired in 2014.

Q. What did you retire from?

A. I taught for 16 years in the public school system and then I started a business and had that for—well, it overlapped with the teaching, but I did that for over 30 years. And then after 2007, which affected all of us, it took a long time, but I finally retired in 2014.

Q. Okay. What kind of business did you run?

A. Actually I ran the first closet organizing business in Western Maryland.

Q. Oh.

A. It started in 1982 and continued that till [10] 2014.

Q. That's fascinating. And what did you teach?

A. I taught music and theater.

Q. What grades? Just out of curiosity.

A. Seven through 12, but mostly high school.

Q. I bet that was a fun job.

A. It was a fun job that I finally had to give up when my children were born because it's a lot a lot of hours, many hours.

Q. We all can relate. Do you recall when you first registered to vote?

A. When I came back from college, and I think it was for sure 1972. I believe we have records to that.

Q. Okay. And so you said when you came back from college. Were you living in Thurmont at that time?

A. No, I came back from college—we lived in Frederick at the time, and we rented in Frederick.

Q. Okay. And do you recall what congressional district you were living in at that time?

A. I think it was all in the 6th District at [11] that time. I believe.

Q. And do you recall who your congressional representative was at that time?

A. I believe it was Beverly Byron. She was a Democrat.

Q. When you first registered to vote in 1972 do you recall how often you voted?

A. With a few exceptions, and I'm not even sure if there are any exceptions, I voted every year. Every cycle.

Q. Up to the present?

A. Yes.

Q. And when you say every cycle does that include primary elections?

A. I was registered as an Independent from '72 until approximately 2001. And my wife and I both decided at that time that we—in order to be able to vote in the primaries we decided to register as Republicans.

Q. So between 1972 and 2001 when you were registered as an Independent, I just want to make sure I understand your testimony, during that time [12] you believe that you voted in every general election?

A. That's correct.

Q. Okay. And does that include presidential—general presidential elections?

A. Certainly.

Q. And gubernatorial elections?

A. Certainly.

Q. And do you recall if you always voted for your—for a congressional representative?

A. Yes, certainly.

Q. Okay. Since 2001 when you've been a registered Republican have you voted in the primary elections?

A. Yes.

Q. Do you think all of them that you've been able to vote in?

A. Yes. We are very good at voting.

Q. Do you recall ever missing an opportunity to vote?

A. Not really, no.

Q. Okay. [13]

A. I mean it's possible, but in the last 40 some years, I don't think so.

Q. So just so I'm clear, did you vote in the 2012 primary election?

A. Yes.

Q. And the 2012 general election?

A. Yes.

MR. STEIN: Can you clarify which primaries?

MS. KATZ: I think I said 2012 primary election.

MR. STEIN: I mean presidential or—

MR. MEDLOCK: Congressional.

MR. STEIN:—congressional.

A. I voted in both the Maryland and the congressional and the presidential. I voted in all of the categories in that cycle of 2012.

Q. And would you say the same for the 2016 cycle?

A. I would.

Q. And in 2014 did you vote in the primary election for governor?

A. Yes. [14]

Q. And did you also vote in the primary election for congressional representative in 2014?

A. Certainly.

Q. And did you vote in the general election in 2014?

A. Yes, ma'am.

Q. Okay. Thank you. So I believe you told me that from the time you registered to vote in 1972 until 2001 you were registered as an Independent?

A. That's correct.

Q. Throughout that entire time you were registered as an Independent?

A. I was.

Q. Okay. And since 2001 to the present you're a registered Republican?

A. That's correct.

Q. And has that changed from 2001 to the present?

A. No.

Q. Have you always been registered as a Republican?

A. Yes. [15]

Q. Have you ever voted for a candidate who was not a Republican?

A. Yes.

Q. Do you recall when?

A. Do you mean recently or do you—

Q. Let me ask you this. Do you recall the first time you voted for a candidate who was not a Republican?

A. Yes. And I can't tell you exactly what year, but I voted for Beverly Byron who was the Democratic representative. Other than that I can't think of another Democratic candidate that I voted for on that level.

Q. On the level of congressional representative?

A. Yes, ma'am.

Q. Okay. And do you recall ever voting for a Democratic candidate that was not a candidate for your congressional representative?

A. For presidential candidates I voted for two Democrats recently, Obama and Clinton. Obama twice and Clinton. I don't recall ever voting for a [16] particular party while I was an Independent, if you see what I'm saying. I can't remember exactly who I voted for, but it was possible that I voted for a Republican in one cycle and a Democrat in the next at that point.

Q. And I just want to clarify. When you said Clinton in your prior answer are you referring to Hillary?

A. Hillary Clinton.

Q. Do you recall if you voted for Bill Clinton?

A. I don't think so.

Q. Okay.

A. I'm almost certain that I voted Republican then. I can assure you actually that I didn't.

Q. Do you recall if you voted for Beverly Byron more than once?

A. I don't. But I think it was probably more than once because I recall when she was defeated in the primary, which was a big upset, and when Roscoe Bartlett. That's been quite awhile ago, though.

Q. Okay.

A. But I voted for either her husband or her in [17] that time period from '72. I mean they were the only Democrats that I recall voting for as congressional representatives.

Q. And just to be clear, when you referred to her husband did you mean Goodloe Byron?

A. I did.

Q. Okay, thank you. Why did you vote for Goodloe Byron?

A. I knew the family. I grew up, of course, above northern—in the northern area in Maryland above Frederick, but I knew many people, of course, in Frederick County. And the Byron family was one of them. As a matter of fact, I knew many of the kids in the area because I was about the same age.

Q. And when you recall voting for Beverly Byron do you recall why you voted for her?

A. I do because she was a Frederick County native, and she had strong support even as a Democrat in the county because she was—she and her husband were both proficient at providing good representation.

Q. How do you define that, providing good [18] representation?

A. They were familiar with—as natives they were familiar with the county, the residents both north, east, south and west, and the city of Frederick. And they were very aware of—they were very aware of the groups and types and I guess of who they were representing. I think that's probably it. In other words, they could tell you specifically what went on in this town and that section and the farms over there. In other words, they knew the area because of their background. And we all knew that they knew us.

Q. Okay. You referred to Beverly Byron's primary defeat?

A. Um-hum.

Q. Do you recall if in that year if you voted in the general election for Roscoe Bartlett?

A. I did.

Q. Okay. And do you recall whether you voted—ever voted for someone other than Roscoe Bartlett when he was on the ballot?

A. No. [19]

Q. Okay. In 2012 do you recall who you voted in the general election to be your congressional representative?

A. I voted for the Republican candidate at that time.

Q. The same question for 2014.

A. The same.

Q. And then the same question for 2016.

A. Yes, ma'am, the same.

Q. What are the qualities that you look for in a political candidate?

MR. STEIN: Object. Vague.

A. I think their knowledge of the communities that they are going to serve is paramount and certainly their—the approach to their representation. In other words, are they going to be able to recognize in their district all of the segments and be able to give each of those proper representation. I believe that's a big—a very large part of this, being able to cover the area that they are elected to cover.

Q. Thank you. Have you ever attended an event [20] held by your congressional representative?

A. Well, not by congressional, no. I have attended state representative events but never congressional, no.

Q. And I realize that you've been represented by a congressional representative for a number of years now.

A. Yes.

Q. So I'm asking you to think back into the 1970s if you can recall ever having attended an event.

MR. STEIN: I will object as vague.

Q. Yeah. Do you recall ever having attended an event held by either your congressional representative either when you first registered to vote up to the present?

A. No. I'm certain of that.

Q. Okay. Have you ever volunteered on a campaign for a political candidate?

A. I have. David Brinkley is a friend of mine. And I believe he started his political career about 20 years ago. He's currently, of course, the—[21] well, you know who he is. He's the one that pays you. Or gives you your budget.

Q. Was that the only campaign?

A. Yes. Really it is.

Q. Okay. And so you probably inherently answered this. But have you ever worked as a paid employee on a campaign?

A. No, I have not.

Q. Have you ever worked as a paid employee for a politician in any form?

A. No, I have not.

Q. Okay. And again, I'm asking you to recall a significant period of time. But do you recall ever contacting any of your congressional representatives constituent services?

A. I would say that in the period of 40 plus years that my wife and I have sent letters or responses to our congressional representatives. I can't tell you now what the objective was at that point, but we have, in fact, responded to whatever the issue was at the time.

Q. Can you recall with specificity any of those [22] letters that you may have sent?

A. No. There have been so many issues that I simply couldn't put into words which ones were specific.

Q. And when you say issues, I'm just trying to get a sense of what that means. Does that mean issues that were personal to you, things that you may have needed help for from your representative?

A. Well, let's say the redistricting issue. That's the type of thing that I would respond to and ask my

congressional representative to pursue the reason why it is what it is at this moment.

Q. So when you say issues do you mean political?

A. I mean political issues, yes.

Q. Thank you.

A. That all are aware of. And that become issues. Hot issues. The issue of the day.

Q. At the very least, issues that were important to you, right?

A. Yes, that's correct.

Q. Okay. And so you mentioned redistricting. [23]

Do you recall—do you recall specifically writing a letter about redistricting?

A. I do not.

Q. Okay. And you don't recall any particular issue specifically that you may have—

A. On redistricting at this moment? Well, you have to realize that during the '70s, especially in the '80s and the '90s—let's face it, every decade has its issues, but I think that these were broader issues, national issues, things that many people responded to. I would not say that these were something that I wrote to and said a tree just fell on my house. Can you help me?

Q. Okay, great. Thank you. Do you recall if you've written any such letters since 2012?

A. No, I have not.

Q. Do you recall if you've contacted your congressional representative in any way since 2012?

A. No, I haven't. And I guess I could skip to the fact that I was almost assured that it didn't matter if I contacted them because they probably wouldn't

know who I was, where I lived or what I was [24] asking about anyhow.

Q. Okay. Do you recall when was the first time you became interested in redistricting as an issue?

A. I would say from the beginning of the current redistricting and as it was looked—as it was looked into and finally got to the referendum. I mean all of that was an issue that I was interested in, of course, because I felt it was unfair to our community.

Q. And prior to the redistricting in 2011 that you're referring to did you have an interest in redistricting?

A. No.

MR. STEIN: Object as vague. Sorry. Go for it.

A. No. Frederick County as far as I know the 6th District had been in pretty much the same configuration for—I have no idea how many years.

But, you know, the 2011 redistricting was should I say much exaggerated from anything else I had ever seen or heard of. So it was quite a shock to me to see that the patterns that were evolved were there. [25]

Q. And when did you first find out about the 2011 congressional redistricting plan?

A. I read the newspaper, the local newspaper. And it was complete with the redistricting maps and so forth.

Q. Okay. Do you recall when you might have first read about it in the newspaper?

A. I do not. I will tell you that, of course, the latest was probably in what, the beginning of 2016, after this initial trial that this law firm handled before the Supreme Court I understand. I read the papers

and the same argument, not argument but the same models and the same patterns, the same maps and so forth that were being discussed at that time were just—well, they were presented basically the same way.

Q. Did you testify before the governor's redistricting advisory—

A. No.

Q. —committee? Did you post any public comments after the plan was revealed to the public?

A. No. [26]

Q. Do you recall if you voted—how you voted on the referendum involving the redistricting plan?

A. Well, I will tell you that the referendum as presented on the ballot was so manipulated, I guess is the term I might use, certainly was confusing. And if I can give my opinion I would say that most of the people that voted for the referendum didn't know if they were voting for or against it because it was so difficult to understand what your point was. In other words, did you say yes to not having it or no to having it? You see what I'm getting at? And I believe the referendum would have gone—I believe we would have voted—I say we. I think especially the voters in our district would have certainly voted against this current redistricting if we would have had a yes or a no answer to that.

Q. Do you recall if you voted—how you voted on that referendum?

A. I can't tell you if I voted yes or no, because I'm not sure to this day if I understood. When I walked out of the voting booth I had no idea, and I realized that no one else did. [27]

Q. Okay.

A. Have you read that paragraph?

Q. I have.

A. It's very tough.

Q. Do you recall—do you recall if before you stepped into the voting booth to vote on the referendum, do you recall knowing that the referendum was going to be on the ballot?

A. Yes.

Q. Okay.

A. I was pleased that it was.

Q. Great. Other than joining this lawsuit have you taken any action about redistricting after the passage of the 2011 plan?

MR. STEIN: Object. Vague.

A. No, I haven't taken any action except voting for the referendum, for or against or.

Q. Got it. Mr. Eyler, how did you first hear about this lawsuit?

A. Actually my son was a neighbor and a classmate of Michael Kimberly who is an associate of this law firm and—[28]

Q. I know him well.

A. Right. So this came up in a discussion at a family get-together, neighbor get-together, and I was aware that Michael had done the first—the Supreme Court part of this and that it's been kicked back to this point. That was all I was aware of until Michael said, "You're from the 6th District". Because he had been to my house and he knew that that's where we lived. And he said, "Would you be interested in being a plaintiff in this?". And I said certainly.

Q. And the Michael you're referring to is Michael Kimberly?

A. Michael Kimberly.

Q. And you may have talked about this to some agree. But why did you decide to join the lawsuit?

A. It's fairly simple. I'm still very much opposed to the redistricting of our area, and I thought if this is a means to an end that I would gladly help out.

Q. You said that your son was a neighbor of Michael Kimberly's? [29]

A. Yes.

Q. Who is your son?

A. Gus Eyler. He's also an attorney by the way. That's another—they all stick together.

MR. MEDLOCK: I'm going to object to your characterization.

THE WITNESS: Okay. Yeah, well.

Q. Do you think you were harmed by the 2011 congressional redistricting?

MR. STEIN: Object as vague and ambiguous.

A. I do.

Q. You can answer.

A. I do.

Q. How so?

A. I think that our region, if that's the right term, our community has not had the representation, may I say a more human level of representation, than when the 6th District was more inclusive and did not have that incredible attachment to Montgomery County which now exists.

Q. When you say human level of representation what do you mean by that? [30]

A. I mean that the representative of that area actually understands the area, visits the area, talks to the people. I'm talking about a background of understanding the—not just the geography but the sentiments more or less of the population in that area, which is something that had happened since I can recall living in Frederick County all my life. We always had a representative who was, may I just say, local and understood the county and the district. Now we have someone that certainly isn't too interested in our area because as a politician he understands that we are—we don't contribute anything to his wellbeing and I would say that it's just—he doesn't represent much to our wellbeing.

Q. Who are you referring to right now when you say he?

A. I think Van Hollen at this point.

Q. And on what do you base your statement that he isn't too interested in the area?

A. Because we're typically a Republican conservative group in the area and he has an overwhelming majority in Montgomery County. I don't [31] know what Montgomery County is, the percentage of Democratic voters, but I would say that it's—the amount of Democrats registered in Montgomery County far outweighs any Republicans registered in our small area in northern Frederick County. And the redistricting certainly split all of that up. I would say divide and conquer would be kind of the term I'm looking for.

Q. And you were just speaking about Chris Van Hollen; is that right?

A. Yes.

Q. Have you had any interactions or communications with him?

A. No. Chris Van Hollen, as far as I know, has been to our area one time. I wasn't able to make it, but he did have a sort of a town hall meeting at the library.

Q. And when you say our area, do you mean Thurmont?

A. I mean northern Frederick County and Thurmont specifically.

Q. Okay. And I know he was just sworn in [32] recently. But what about your new representative, Jamie Raskin, have you had any interactions with him?

A. I have no idea of what he has done or will do.

Q. Okay.

A. Yeah.

Q. You just know—what do you know about him?

A. Not that much to be perfectly honest with you. And that's I think the difference.

Q. Okay.

A. I don't know much about him.

Q. So you stated that somebody who is local or understands the area, visits the area, talks to the people there, those are the—is it correct to say that those are some of the qualities you look for in a candidate?

MR. STEIN: Object. Mischaracterizes the testimony.

A. I think that's actually what a politician is supposed to do.

Q. And so do those qualities matter more to you [33] than someone's political party?

A. Well, let me just state it this way. The political party in national elections, for instance, the presidential election, doesn't have as much gravity as local elections especially when you have neighbor-

hoods, or in this case an area. Let's say northern Frederick County and the old 6th District, which included Washington, Allegheny, Garrett. The people residing in that area are much more—well, they're certainly not the urban or suburban grouping that you might find in Montgomery County. So there is such an immediate difference to those who've lived here all their life. I've made 256 trips to Kensington in the last five years to visit my grandchildren. We figured it up the other day. But I don't in other terms have any dealings with Montgomery County, if you follow what I'm saying, and I think the reverse is true of the politicians and the people that deal with the district as it stands now.

Declaration of Andrew Duck

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

LINDA H. LAMONE., *et al.*,

Defendants.

Case No. 13-cv-3233

DECLARATION OF ANDREW DUCK

I, Andrew Duck, under penalty of perjury, declare and state:

1. I am over the age of 18 and am competent to testify to the matters stated below.

2. I reside at 216 N. Delaware Avenue, Brunswick, Maryland 21716, which is located in the southwest corner of Frederick County within Maryland's sixth congressional district ("sixth district").

3. My family moved to Frederick County in 1976, around which time I was entering high school.

4. Prior to that time, my family owned property in Frederick County, which my family and I visited frequently.

5. I first registered to vote in 1980, at which time I continued to reside in the sixth district. In the 1980 primary and general elections, I voted for Beverly Byron, a Democrat, to represent the sixth district in the United States House of Representatives.

6. Shortly thereafter, I entered the Army at age 19, and I did not return to Frederick County on a permanent basis until I left the Army at age 41. For the

first four years of my Army service, I voted by absentee ballot in the sixth district, and I consistently voted to reelect Beverly Byron.

7. When I returned to Frederick County in or around 2004, the sixth district was drastically different and had drastically different representation in the House of Representatives than it had when I previously resided there.

8. I came to learn that after the 1990 census, Maryland had enacted a redistricting plan that changed the composition and structure of the sixth district, such that the district no longer included a significant portion of western Montgomery County. I further learned that after the 2000 census, the sixth district was redrawn to span from Western Maryland across the northern border of Maryland into Baltimore and Harford Counties. As a result of these changes to the composition of the sixth district, the sixth district had become heavily slanted to Republican voters.

9. From 1992 through 2012, the sixth district was consistently represented in Congress by a Republican, Roscoe Bartlett.

10. I was unsatisfied with Congressman Bartlett's representation in Congress. I disagreed with his support for tax cuts which most benefited the richest among us combined with a desire for extreme cuts in government spending that benefited working and middle class citizens. His blind support for Bush Administration policies in Iraq was damaging the Army to which I had dedicated much of my life. As a Soldier who had served in Bosnia, Congressman Bartlett's opposition to participation in United Nations peacekeeping activities was also contrary to my beliefs. In particular, he represented a vast departure from the moder-

ate members of Congress who had represented the sixth district prior to the 1990s.

11. For example, Beverly Byron, who represented the sixth district for many years, and her husband Goodloe Byron who represented the district before her, were considered moderate Democrats who effectively represented the sixth district in Congress. Congresswoman Beverly Byron had supported the military while also supporting the common sense programs that support working and middle class citizens.

12. The sixth district had a long history of such representation. Notably, Congressman David John Lewis, a Democrat, represented the sixth district from 1911 through 1917, and again from 1931 through 1939 during which time he introduced the Social Security bill in the House of Representatives in 1935.

13. Because I was unsatisfied with my congressional representative and the make-up of the sixth district, I engaged in various political activities centered on returning the sixth district to its prior politically-moderate climate.

14. Beginning in or around 2004, I became actively involved in registering new Democrats to vote in the sixth district, and I actively recruited Democrats to become involved in local Democratic politics. Between 2006 and 2010, efforts to register voters increased the number of registered Democrats in the sixth district from 146,227 to 159,715, an increase of 9%.

15. I also engaged in other efforts to bring attention to Democratic voters in Western Maryland. For example, in 2005, I helped create the Western Maryland Democratic Summit, an annual event aimed at promoting Democrats in Western Maryland. This event has helped draw attention from legislative leaders in

Annapolis to Democratic voters in Western Maryland. Democratic candidates for statewide office attend the Summit each year, including Democratic candidates for Governor, Comptroller, and Attorney General, and usually the Democratic candidates for United States Senator.

16. In addition, I ran to represent the sixth district in the House of Representatives in 2006, 2008, and 2010. I ran for Congress even though I knew the sixth district had an entrenched Republic congressman, because I believed it was important to show State leaders that Western Maryland had an active and strong Democratic electorate.

17. At the time I was running for Congress, the former sixth district spanned over 220 miles from east to west, making voter contact across that entire district quite difficult. Despite those difficulties, during my campaign in 2010, I traveled across the sixth district, from Garrett County to Harford County. My experiences campaigning for office in the sixth district exposed me to various differences among communities located in the former sixth district.

18. There are vast differences between the mountainous region of western Maryland and central Maryland. For example, the residents of Garrett County do not live in the Chesapeake Bay drainage area, while residents of Harford County live right next to the Chesapeake Bay. Communities in Harford, Baltimore, and the eastern part of Carroll County tend to center around the Baltimore region, while communities in Garrett, Allegany, and the western part of Carroll County do not. I also experienced that voters in Frederick and Washington Counties were more closely aligned with the Washington, D.C. suburbs, similar to Montgomery County.

19. These differences increased the difficulty of campaigning for office in the sixth district. The sixth district spanned three media markets, the Baltimore media market, the Washington, D.C. media market and the Pittsburg media market in the west, making advertising for a congressional campaign very expensive. Because many people in the eastern part of the sixth district worked and attended recreational events in Baltimore City, while many people in the western part of the sixth district never traveled to Baltimore, it was hard to find locations for campaign events that would attract significant numbers of voters from both parts of the sixth district. When advertising for events, advertisements placed in Baltimore would attract too many non-residents, while advertising in western Maryland would fail to capture significant numbers of voters who resided in Harford, Baltimore, and the eastern part of Carroll County.

20. On July 23, 2011, I attending a hearing conducted by the Governor's Redistricting Advisory Council ("GRAC") in Frederick County. During my testimony at that hearing, I relayed my experiences campaigning in the former sixth district and offered testimony about the differences in communities encompassed within the former sixth district. I testified that in order to make it more viable for candidates for office to reach all of the voters of the district and to better represent the population as a whole, the GRAC should reorient the district to include more of Montgomery County, less of Carroll County, and none of Harford and Baltimore Counties.

21. I consider my testimony at this hearing, along with similar testimony at other GRAC hearings, to have been an essential part of the political process related to redistricting.

22. I have supported John Delaney as he has run to represent the sixth district since 2012. I consider Congressman Delaney to be a Democrat in line with the historical representation of the sixth district prior to 1992. I have found Representative Delaney to be a significant improvement from the previous Congressman in representing the district's constituents. He regularly hosts constituent events in Frederick, Hagerstown, and Cumberland, Maryland.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

22 April 2017 /s/ Andrew Duck
Date

April 3, 2012 *Washington Post* article

Delaney defeats Garagiola in Democratic primary for House seat from Maryland

By Ben Pershing April 3, 2012

A wealthy newcomer defeated the Democratic establishment's pick for a redistricted House seat in the Washington suburbs Tuesday, the biggest victory in Maryland's primaries.

In the closely watched Democratic primary, financier John K. Delaney beat state Senate Majority Leader Robert J. Garagiola (Montgomery) by a wide margin in a race that had been expected to be close.

Delaney will now face Rep. Roscoe G. Bartlett (R), whose district was redrawn to be tossup territory in November. Bartlett fended off state Sen. David Brinkley (Frederick) and six other Republican challengers in a battle for the night's most contested seat.

Garagiola was the pick of much of the state Democratic Party establishment, which tailored the district lines to make them favorable to their candidate, while Delaney was a first-time candidate whose prodigious spending helped level the playing field. Delaney's win was a repudiation of the party leaders and traditional Democratic interest groups that threw their weight behind Garagiola.

David Wasserman, the House editor for the nonpartisan Cook Political Report, blamed Garagiola's loss in part on the fact that he chose not to go on the airwaves, while Delaney was a heavy presence on television and radio.

"Delaney's win is confirmation you need a modern ad campaign to win a primary in the D.C. suburbs, where the cost of name recognition is steep," Wasserman said. "It's also confirmation that drawing the lines is no guarantee of electing a certain candidate."

As former Massachusetts governor Mitt Romney won the state's Republican presidential primary and Sen. Benjamin L. Cardin (D) easily beat back an intra party challenge, all of the state's eight U.S. House members won their primaries, and all but Bartlett appeared on track to win in the general election.

At the Potomac Community Center, Terry Ao said she supported Garagiola because she felt he echoed her social values.

"I am a civil rights attorney working for a nonprofit in D.C., and I felt that he spoke the most to my issues and concerns," she said. Ao said she is particularly focused on the needs of the region's "vulnerable communities" and felt that Garagiola "would be a champion for them."

George Guess, 67, voted for Delaney. Guess said he was impressed by the strong grass-roots presence of Delaney's campaign, with volunteers who came through neighborhoods to knock on doors.

"He struck me as close on the issues to Garagiola, but Delaney was endorsed by [former president Bill] Clinton, and he had all those guys on the ground rather than just calling," Guess said. "I thought that was more sensitive to the people, less canned."

At Hillcrest Elementary School in Frederick, Henry Brown, 71, said he voted for Delaney because, "If it's good for Bill Clinton, it's good for me."

Turnout across the state appeared to be "relatively light," said Donna Duncan, a spokeswoman for the Maryland State Board of Elections.

"We'll be lucky if we reach 25 percent" of registered voters, she said, a level which would roughly match turnout in the state's 2004 primaries.

The story of Delaney and Garagiola's months-long fight followed an unusual arc.

When Annapolis Democrats redrew the state's congressional map, they decided to target Bartlett by adding the western portion of Democratic-leaning Montgomery County to the more conservative Maryland panhandle. And at the urging of state Senate President Thomas V. Mike Miller Jr. (Calvert), a close Garagiola ally, they drew the 6th Congressional District to include Garagiola's Germantown home but exclude those of several other prominent Montgomery Democrats.

U.S. House Minority Whip Steny H. Hoyer (D-Md.) threw his weight behind Garagiola, as did every major union and such liberal groups as MoveOn.org and the League of Conservation Voters. Maryland Gov. Martin O'Malley (D) also endorsed Garagiola in the closing days of the race.

But Delaney, the founder of the Chevy Chase commercial lender CapitalSource, was able to leverage some of his own political connections, winning the backing of Clinton as well as Comptroller Peter Franchot and Rep. Donna F. Edwards of Prince George's County.

Delaney raised roughly double what Garagiola did in the first quarter of the year from outside donors, and Delaney also put about $1.7 million of his own money into his campaign. He ran a host of television and radio ads, while Garagiola was silent on the airwaves.

The tenor of the race was often negative. Delaney branded Garagiola an Annapolis "insider" and criticized him for not reporting outside income from a lobbying job on state disclosure forms. Garagiola accused

Delaney's business of unsavory practices and pointed out his contribution to the congressional campaign of Rep. Andy Harris (R-Md.) in 2010.

Bartlett, meanwhile, was leading a field that included Brinkley and Del. Kathy Afzali (Frederick). Although the redrawn district includes territory he has never represented, and some state Republicans had privately expected him to retire, Bartlett appeared to benefit from the fact that the anti-incumbent primary vote was split several ways.

At Potomac United Methodist Church, Republican Roger Thies said he supported Bartlett because he felt he was the GOP's best bet at retaining control of the competitive seat.

"Clearly the Democrats have tried to gerrymander [the district], and I think Bartlett has the best chance to hold it, on name recognition alone," Thies said. He said it was the "sole reason" he cast his ballot for Bartlett.

In the Senate contest, Cardin easily deflected a primary challenge from state Sen. C. Anthony Muse (Prince George's) and seven other Democrats. With roughly a quarter of the precincts reporting, Cardin led Muse by more than 50 percentage points and had been declared the winner by The Associated Press.

"We are extremely pleased by our results in all parts of the state," Cardin said in a brief interview. "We're ready for the general."

Muse, who is black, made the case that Prince George's needed a better voice in Congress and pointed out that the Senate has no African Americans. But Cardin, who won an early endorsement from President Obama, was better known around the state and far better funded than Muse.

Walking out of the polling site at Bethesda-Chevy Chase High School, Don Allen said he voted for Cardin. Although he said he thinks there should be more African Americans in Congress, he thought Muse—who opposes same-sex marriage—"was too far to the right on social issues."

Cardin is also favored in November against the eventual Republican nominee, particularly with Obama atop the ballot. Former Secret Service agent Daniel Bongino led ex-Defense Department official Richard Douglas in a tight race to face Cardin.

On the House front, author Ken Timmerman was the Republican pick to take on Rep. Chris Van Hollen (D). Republican activist Faith Loudon prevailed in the contest to face Edwards, while Del. Anthony J. O'Donnell (Calvert) won the GOP nod to oppose Hoyer.

November 8, 2014 *Frederick News-Post* article

Why U.S. Rep. Delaney should thank Blaine Young

Frederick News-Post Editorial Board
Nov 8, 2014

U.S. Rep. John Delaney (D) has won a razor-thin victory over Dan Bongino in his re-election bid to the 6th Congressional District seat.

And for that he might want to send Blaine Young a thank-you card. We'll tell you why in a minute.

Delaney's victory wasn't assured until absentee ballots were counted Thursday. The congressional race — which turned into a nail-biter Tuesday night — wasn't supposed to be this close.

After all, the Martin O'Malley administration had shamefully gerrymandered the congressional district (which includes a large chunk of Frederick County) in order to push former Republican congressman Roscoe Bartlett out of office two years ago and solidify it as a safe Democratic seat for years to come.

But that strategy nearly backfired this week.

When district-wide voters showed up at the polls they voted heavier than expected for Republican candidate Bongino. He trailed by about 2,000 votes election night.

But now that we've had a few days to digest this race, it has become abundantly clear that the only reason Delaney isn't a one-term congressman is because of his support from Frederick County. Without Frederick County, Delaney would have gone down in Maryland history as one of only a handful of "one and done" congressmen.

In a historic election that doomed almost anyone with a "D" after their name, Delaney and a handful of other Democrats on the Frederick County ballot were able to survive in a county with a 6,500-voter registration edge for Republicans. When all the votes are finally tallied next week, Delaney will likely defeat Bongino by at least a 1,700-vote margin in the county.

That's significant because Delaney was hammered by 2-to-1 and 3-to-1 margins in the other three Western Maryland counties where voter registration favors the GOP. For example, in neighboring Washington County, Delaney lost to Bongino by more than 10,000 votes. Delaney also lost by nearly 5,400 votes in Allegany County and 4,400 votes in Garrett County.

Fortunately for Delaney, he was able to wipe out those losses by taking Montgomery County, a heavily Democratic county. But his 20,000-vote victory there would not have been enough to put him back in office had Frederick County voted along similar party lines as the other three Western Maryland counties.

Even Chris Van Hollen, the Democratic congressman who represents northern Frederick County, was pounded by local voters. Van Hollen, who was easily reelected to a seventh term, trailed a relatively unknown Republican candidate by more than 10,000 votes in Frederick County.

So why did Delaney fare better in Frederick County than expected?

We think it's because Frederick County's voter turnout (51 percent) was not only higher than the state average of 45 percent, but also higher than any of the other counties in the 6th District, including Montgomery County (39 percent).

And one of the main reasons it was higher was the county's intense interest in electing its first-ever coun-

ty executive in a race that pitted the Republican Young against Democrat Jan Gardner.

As we now know, Gardner trounced Young on Election Day, in large part because Democrats in Frederick city precincts turned out in large numbers to make sure Young didn't rise to the county's highest elected position. And an examination of those same precincts showed they also voted heavily for Delaney — in many cases in the 60 percent or higher range. In other words, Delaney benefited greatly from a surge in voters who supported Gardner — and we're safe in assuming they weren't conservative Republicans.

To give Delaney credit, it does help that he is seen as pragmatic and not political, and there's no question he has represented the county well during his first term in office. And for that, voters rewarded him with another two years as their congressman — with some help, of course, from Gardner supporters who turned out in large numbers.

Deposition of Plaintiff O. John Benisek

Q. Can you please state your full name.

A. O. John Benisek.

Q. I'm going to give this to you.

(Deposition Exhibit Number 14 was marked for identification.)

BY MS. KATZ:

Q. Just take a look and tell me if you [6] recognize this document.

A. I do.

Q. Was this the Deposition Notice that you were served with?

A. I do not recall getting it by mail. Okay?

Q. Sure.

A. But I have seen it.

Q. Okay. Great. Your lawyer showed it to you?

A. Yes.

Q. Have you ever been deposed before?

A. I don't think so, no.

Q. I'm just going to go through a few housekeeping rules. This court reporter is trying to take down everything we say. So we should be careful not to try to talk over one another.

I will wait for you to finish an answer before I ask a question. And I'll ask you to wait until I finish a question to give an answer. Also to give verbal answers for the benefit of the court reporter.

If you do not understand a question that I [7] ask you, please tell me. I'm happy to rephrase it or give you a different question. If you don't ask me to rephrase something, I'll assume that you understand the question. Okay?

A. Okay.

Q. Great. We're going—this shouldn't take very long. Try to make it through without a break. But if you need a break for any reason, please let me know and we'll find a good place to stop.

A. Okay.

Q. Are you taking any medication today that might affect your ability to recall events or to testify today?

A. No.

Q. Thank you. Where do you live?

A. Right. As the Notice of Deposition states, 11237 Kemps Mill Road, Williamsport, Maryland.

Q. How long have you lived there?

A. 1990.

Q. What is the highest level of schooling you attained? [8]

A. That would be an MBA.

Q. Where did you attend high school?

A. Aberdeen High School.

Q. Near the Proving Grounds?

A. Yes. Aberdeen High School is the only one.

Q. Where did you attend college?

A. University of Maryland, College Park. I missed the riots.

Q. Okay. It's a beautiful campus. Was it beautiful when you were there?

A. Oh, yes.

Q. Where did you attend graduate school?

A. George Washington University.

Q. Just to be clear, that's where you got your MBA?

A. Yes.

Q. What year was that?

A. Do I have to answer that?

Q. If you can't remember, that's fine. No problem.

A. Maybe '72 I think. [9]

Q. What kind of work do you do?

A. I do property management.

Q. Are you self-employed?

A. Yes.

Q. How long have you been self-employed by property management?

A. Over 20 years.

Q. Oh, wow. Okay. Great. Prior to that, what did you do?

A. I worked for different contractors, at times state inspector, State of Maryland, building project in Hagerstown. And at the same time, self-employed during that time too.

Q. Is it sort of all involving different areas of real estate?

A. Yes.

Q. Have you ever been employed in any other field?

A. Just about a year and a half in engineering.

Q. Oh, okay.

A. My major was in civil engineering, so I [10] gave it a try.

Q. Understood. Do you recall when you first registered to vote?

A. It was probably when I was 21 years old. Okay?

Q. Uh-huh. Do you recall what year that would have been?

A. I'm like a woman who doesn't want to divulge her age. 1965, '66 maybe.

Q. In the mid '60s. Where were you living at that time?

A. College Park. I was a student.

Q. Were you registered to vote in College Park or where your home was? Or were they one in the same?

A. I don't recall.

Q. Do you recall what congressional district you were in at that time?

A. Whatever College Park is in perhaps. If not that, it would have been Harford County.

Q. Harford?

A. Yes. [11]

Q. Is that where you grew up?

A. Yes, Aberdeen, Belcamp.

Q. Do you recall the first election you voted in?

A. I think so. It was probably Nixon.

Q. It would have been a presidential election?

A. Oh, yes.

Q. That would be the first time he ran? Do you recall what year it was when you first voted?

A. No.

Q. After you registered to vote—

A. We can figure it out if you want to. Like Kennedy took over—Johnson was back in '64, so it would have been the election of '68 probably, presidential election. McGovern was running at the time. He got plowed under. Enough. Go ahead.

Q. Do you recall if when you voted in that presidential election you also voted for your congressional representative?

A. I do not recall.

Q. Do you have any reason to believe that you [12] wouldn't have voted for every office?

A. No. Because the ballot has a lot of candidates on it. I probably voted for the rest of them too.

Q. Is that how you tend to vote, vote for all the choices on the ballot?

A. I try to stay informed of the candidates and vote for the different candidates. But don't take me back 40 years, 45 years.

Q. How about just—if we talk somewhat generally about your voting habits at the time. Do you recall being a regular voter during the 19—

A. I voted pretty consistently for the major office, yes.

Q. That would have been true from the time you registered up through the present day?

A. Yes.

Q. Do you recall when you first moved to a residence that would have been in the Sixth Congressional District?

A. It would have been in 19—well, I started working in the Hagerstown area, Sixth [13] Congressional in 1976. And I moved into that area in '78.

Q. Do you recall who your congressional representative was at that time?

A. Probably Goodloe Byron. Then he passed away. Then Beverly took over. Roscoe Bartlett might have been in at the time too. I do not recall.

Q. Do you recall ever voting for Goodloe Byron?

A. I don't recall. Just trying to think.

Q. Do you recall ever voting for Beverly Byron?

A. I don't think I voted for Beverly. I think I voted for the opponent.

Q. When you say opponent, do you mean the Republican candidate?

A. I kind of was—grew up in a Republican philosophy. I would question the reasoning of it. I found the candidates were solid for the most part and I voted in that direction. So predominantly Republican. [14]

Q. Do you recall ever voting for a candidate who was not a Republican?

A. I certainly did. Over recent times, especially in the local elections where I—when I study the candidates and I perhaps know them from their activity or their success, if it's LeRoy Myers down in Annapolis or some other. And they're candidates with a good solid philosophy, conservative, I would vote for the democratic candidate. Yes.

Q. Who is LeRoy Myers?

A. LeRoy Myers is a contractor/builder in the Clear Spring area who was also a delegate in the Maryland General Assembly.

Q. So you recall voting for him to be a state delegate?

A. I think he was in my election district. Okay?

Q. Okay. Sure.

A. It's amazing you see all these people on the ballot. All the sudden you go to your precinct to vote and they're not in there because they're [15] not in your precinct. They're in your district.

Q. Do you recall ever voting for any other democratic candidates?

A. No.

Q. So he would be the only one you think?

A. One or two local candidates if it was a school board or county commissioner or something like that. The party affiliation didn't matter. It was what they represented that mattered.

Q. We spoke a little bit about this, but can you go into more detail about when you say what they represented that mattered, what does that mean?

A. I find on a local level, you get to know a person if he is BS'ing you. If he wants to loot the local treasury for a lot of frivolous things, which I would call frivolous.

Case in point, we have a lot of public housing in Washington County. We have several prison systems too. And a lot of the prisoners and their families will tend to stay there. And they are on the public dole. [16]

I in my property management have to buy property, maintain it, rent it out and compete with tenants who get subsidized into public housing. I pay for that public housing. That's what I call just bad politics to me.

Why should I be competing with people, political people who want to spend our money on something that I don't agree with?

Q. Can you think of other examples of I think you used the word "frivolous"—

A. Yeah. Sure.

Q. —frivolous spending?

A. They were going to tear down the municipal stadium in Hagerstown a few years ago and spend close to $15 million, most of it would have been taxpayer's money, to put up a new one.

And luckily they decided to interest the public in what their project was going to be, so they ran tourists through the existing city and they had a big campaign to show you what they were going to build in its place.

And those of us who had any common sense [17] realized that was a waste of money. Sure enough, they didn't get their funding. The administration was voted out of office, partially because of that. And the state of its standing, it's still used by the Hagerstown sons, things we don't feel should be wasted—money wasted on.

Q. When you say the administration was voted out of office, who were you referring to specifically?

A. Well, Bob Bruchey and several members of the city council. Also some of the Washington County representatives were voted out.

Q. Local politicians?

A. Uh-huh. But you know, this also works on a state level. When we have money that is not allocated based on the—they have to use a parity to allocate money, and we do not get a parity of 100 percent, but rather a 70 or 60 percent of money, tax money that was put out comes back to Washington County.

Our voice, our elected power, doesn't have a chance to bring back the appropriations that [18] should be coming back to Washington County.

Q. What upsets you about that?

A. What's that?

Q. What upsets you about that circumstance?

A. If I'm paying taxes, the money we pay should be coming back to our area, and it isn't. It's going

perhaps to the urban areas, Rapid Transit in Baltimore, something like that, Montgomery County.

Q. Are you registered as a member of a political party?

A. I am.

Q. Which one?

A. Republican.

Q. Have you ever registered with a different party?

A. Yes, independent.

Q. When were you registered as an independent?

A. Probably just prior to the election of 1984. Do you remember that one by any chance?

Q. Sure. I was 10, but I definitely remember [19] it.

A. And the candidate was—

Q. In 1984, it would have been Reagan and Mondale.

A. Right.

Q. Yeah.

A. And I wanted to vote for—they were having a runoff between Reagan and Anderson I think. So I changed party affiliations then to independent.

Q. I see. So you became an independent then?

A. Uh-huh. And then back.

BY MS. KATZ:

Q. And then back?

MS. WEBB: Objection; mischaracterizes his testimony.

BY MS. KATZ:

Q. When did you become an independent?

A. Probably 1984.

Q. And when did you then return to being registered as a Republican?

A. Prior to 2011. [20]

Q. So you were an independent from about 1984 to 2011?

A. Yeah. Voting Republican.

Q. Sure. But you were registered as an independent?

A. Uh-huh, for a good while.

Q. I know we've talked about local politicians that you—or one local democratic politician that you voted for. Do you recall ever voting for a democratic candidate on the state level?

MS. WEBB: Objection; asked and answered.

A. I don't recall.

BY MS. KATZ:

Q. You don't recall? Or on the federal level?

MS. WEBB: Same objection.

A. I'll go with the objection.

BY MS. KATZ:

Q. No. You have to answer the question, unless she directs you not to answer.

A. On a state level? No, I don't recall. [21]

Q. On the federal level?

A. Well, that would probably be Goodloe Byron, right? He was a democrat.

Q. Right. So do you remember voting for Goodloe Byron?

A. I think so.

Q. Do you remember if you ever voted for Beverly Byron?

A. I think I said I didn't.

Q. Do you recall if you voted for Goodloe Byron more than once?

A. No. I think he passed away shortly thereafter. So I think I would have had only one election cycle.

Q. Did you vote for Roscoe Bartlett when he first ran for office?

A. I did, several times.

Q. Did you ever vote for someone other than Roscoe Bartlett when he was on the ballot?

A. I don't think so. There weren't any good alternative candidates.

Q. Did you vote for him because of the lack [22] of other good alternative candidates?

MS. WEBB: Objection; vague.

BY MS. KATZ:

Q. Well, let me rephrase. You just noted that you thought there were a lack of other good alternative candidates. Are there other reasons that you voted for Roscoe Bartlett?

A. I think he represented western Maryland very well.

Q. How is that?

A. In trying to get, I'll call them earmarks or capital spending to go towards western Maryland. And I could contact him through the correspondence or phone calls. Of course, you get somebody besides him on the phone. But they dealt with you decently. I found that acceptable.

Q. Do you recall when you contacted Roscoe Bartlett's office, were you calling to talk about a political issue?

MS. WEBB: Objection; vague.

A. I don't know exactly what a political issue would be. If you have—you want a [23] Congressman to look into somebody's Social Security check not coming through, you know, for him to look into it. Because they do a good job of pushing that bureau-

cracy sometimes. That's probably the kind of stuff I would call on behalf of perhaps tenants.

BY MS. KATZ:

Q. Do you recall with any specificity why you would have contacted his office?

A. That would be one reason.

Q. So you said you would call on behalf of a tenant regarding a Social Security check?

A. Yeah.

Q. Any other specific things you can recall?

A. I cannot recall any specific things besides that.

Q. Anything specific to yourself?

A. I generally didn't ask anything of myself.

Q. Do you remember who you voted for in 2014 to be your congressional representative?

A. I think—I'm not sure about this, if Dan Bongino was on the ballot at the time. I would [24] have voted for him. I'm pretty sure I didn't vote for John Delaney.

Q. Why are you pretty sure of that?

A. Because I don't think he was reflecting the values we have in western Maryland. He's more for Frederick and Montgomery County philosophy.

Q. What does that mean to you—

MS. WEBB: Objection; vague.

BY MS. KATZ:

Q. —that he's more for Frederick and Montgomery County values? What does that mean?

MS. WEBB: Same objection.

A. Well, originally he wasn't in our district. Okay. Do you recall the way the Sixth District was changed?

BY MS. KATZ:

Q. Uh-huh.

A. We have a population in Washington County of approximately 220,000 people. So that when this new redistricting occurred, 65,000 Republican—registered Republican voters were taken out of our district. And 30,000 democrats were brought in. [25] That's 95,000 voters that we lost representing our district.

Now, Delaney did not get the majority in Washington County. I think he got everything else, Montgomery County and the rest of the contiguous areas. Okay. So that he didn't reflect our values and conservatism.

Q. What does that mean that he didn't reflect our values?

A. Well, let's face it, when a candidate is representing maybe half a million people, voters, he is going to be inclined to do a good representation for the majority in that area. When you take out all those registered voters out of our area, he doesn't see much need to pay a lot of attention to a smaller group of voters that probably didn't vote for him.

Q. Have you ever—

A. My vote was watered down because of this. Let's just put it plainly.

Q. Have you ever contacted Congressman Delaney's office? [26]

A. I did. I tried to on—I know by an email. And I got a response of like the pat political thing. We're representing this and that. We're doing this and that. It was, well, quite frankly pretty much what you get from the Speaker Boehner or somebody like that, which I've always done in the past. You get just a little stereotype answer.

Q. Do you recall what the subject matter of your email that you sent to John Delaney's office?

A. I do not recall right now. I think I was asking about one of the issues about the spending for our area.

Q. Do you recall the specific issue about spending?

A. No.

Q. Do you recall what your concern was about spending, what prompted you to send the email?

MS. WEBB: Objection; asked and answered.

A. Huh-uh. A lot of things. It could be for roads. It could be for schools, disagreement with the common core, something like that, okay. Or if [27] they wanted to build another prison in our area, I would have probably gotten in touch with them objecting to that. Those things come to mind.

BY MS. KATZ:

Q. The qualities that you look for in a political candidate?

A. How many do you want?

Q. Start from the top.

A. Okay. Let's just start with the major one. If you're going to make some campaign promises, stick by them. Don't get corrupted once you get into office and do a self-serving just for perpetuating your stay in office.

I'd like to see the quality in a candidate that lives by the same rules we have to live by. Okay. If we have to pay for our insurance, let them have the same insurance that we have, same insurance plan.

If they get a high pay based on—maybe the pay should be according to their productivity, okay,

like in business, civilian business. I don't see that happening. [28]

A lot of perks that they get that we do not, and I'm not going to name them. I think you're aware of them, perks that are bestowed upon the political arena.

Q. What sorts of perks?

A. Huh?

Q. What sorts of perks?

A. Well, perhaps a certain amount of immunity, being able to use state or federal transportation. It could be even having bodyguards, then telling us we don't have a right to protect ourselves, First Amendment. Second Amendment rights, right to own a gun. Okay. They try to breach that from us. Yet they have bodyguards to protect them. That's a perk. Okay.

Q. Before we were talking about candidates, you mentioned the word "conservatism." What does that mean?

A. It's a belief. Anytime you have an "ism," it's a belief.

Q. What does that mean to you as a belief?

A. I'm glad you asked what it means to me. [29] Okay. I feel we are being overtaxed. I feel this tax money is being wasted. Like I mentioned, public housing building, which competes with my private business. Okay. I don't like that.

I feel that when a person makes certain kinds of statements when electioning, they ought to go and stick by them. Call it profiles and courage to be able to stand up beyond what the general modality of opinion is and stick with the convictions. Have some ethics.

Q. Are you thinking of anything specific when you're talking about sticking by campaign promises?

A. Sure. I just mentioned taxing, spending. Can you be more specific than that?

Q. I'm sorry, I meant specific to a particular candidate who may have made a campaign promise that you feel he or she then abandoned.

A. To a degree, a lot of them. Perhaps most of them have done that to get elected. I don't think that Republicans, nor Democrats are immune from this. So therefore, you have to pick very specifically certain ones. Perhaps Neil Parrott, [30] delegate from our area and the Maryland legislature, has these characteristics, these traits, okay, good ones.

Q. Thank you. Have you ever attended an event held by your congressional representative that you recall?

A. Yes.

Q. Can you tell me what those were?

A. Are you talking about the federal congressional?

Q. Yes.

A. Probably just get together like where they meet the candidate or a debate, okay. That would be a congressional event. We've had debates in the Washington County. The Congressmen have been there to debate, given questions, how they answered them. Of course, that helps us make up our minds.

Q. Do you recall when that was?

A. Well, there would have been one two years ago when Dan Bongino ran. At the time, Delaney didn't bother showing up. I think I've seen several others before that. Yeah. [31]

Q. Do you recall who you voted for in 2016 to be your congressional representative?

A. That would have been Dan Bongino. Am I right on that?

Q. I think you said you voted for him in 2014. Do you recall who you would have voted for in 2016?

A. Who ran? I'm so infused with the presidential election that I lose track of the congressional ones. I'm pretty sure he didn't win because Delaney is in our area. He got it.

Q. So you recall that you did not vote for John Delaney?

A. Yeah.

Q. Do you think you would have voted for the Republican candidate in that race?

A. Yes.

Q. Have you ever volunteered on a campaign for a political candidate?

A. Just local, Washington County Commissioners and the state delegate, like Neil Parrott. Hillary didn't ask me, neither did [32] Donald.

Q. Did you vote in the general election for President in 2016?

A. I did. And I would like to make America great again.

Q. Does that indicate that you voted for Donald Trump?

A. Isn't it obvious?

Q. I'm asking.

A. Yes.

Q. When was the first time you became interested in the topic of redistricting?

A. When I first got wind of it, that the state of Maryland wasn't going to do this, I volunteered for the petition for a referendum to that. And I think I managed to get about 100th of the total votes signing on that petition. And some friends of ours got equal amounts. Seriously think that this is a joke, this redistricting, after I saw the maps.

Q. So that was after the law was passed?

A. Actually the law was passed, but it had to [33] be voted on still.

Q. Right. So it was petitioned to referendum?

A. Yeah.

Q. So you became involved—I just want to be clear. You became involved or interested in the issue after the governors had signed the bill into law?

A. Yeah. Because you know it didn't get much attention. There was a committee elected, I think five, four Democrats, one Republican, Kane, who was a one-term Republican who was not in office at the time the governor appointed. Kane never checked with the representatives, the Republican party to get their point of view on this.

Q. How do you know that?

A. I stay informed a little bit perhaps.

Q. How were you informed of that?

A. Well, once you start associating with people who are wanting to challenge this gerrymandering and you are out garnering votes, signatures for the referendum, you start to meet [34] people. And you see the different flavor of western Maryland, what their values are.

Q. What people informed you about James Kane not talking with any Republicans?

A. Should I have not known that?

Q. I'm just trying to gauge the depth of your knowledge.

A. I don't know. But you start to wonder—I don't believe if they had a—for some things like for the common core, they had public hearings around the state of Maryland. If Columbia Gas wanted to raise the rates, they had to have public hearings, which came into our area.

I don't recall any public hearings on the redistricting in our area. Do you recall? Were there any in our area?

Q. So are you telling me that you didn't know about any public hearings?

A. I don't think there was a good public representation and disclosure about this prior to the governor's enacting this.

Q. So I take it then you did not testify [35] before the Governor's Redistricting Advisory Committee?

A. No.

Q. Did you post any public comments after the plan was revealed to the public?

A. I was willing to go ahead and take the petition to garner signatures. It's a pretty public comment.

Q. Do you think that you were harmed by the 2011 congressional redistricting plan?

A. Yes.

Q. How so?

A. Do you recall my mentioning 95,000 voters that had switched? So if I was one of the voters, Republican voters, and all of a sudden there are four democratic votes, that's a dilution. I don't have as much political sway in my opinion.

What is worse than that, once you get a party entrenched in government after this redistricting, what incentive have those politicians to make a correction to this redistricting? They don't have any incentive. [36] They're in office. They're getting the benefits of office, be it financial. You know, they can become lobbyists afterwards and continue in their life afterwards, and honor and everything else that is bestowed upon a politician so to speak. Yeah. I agree with your expression.

So there is no reason—it's not self-correcting once it's implemented. What's worse, it's going to be almost impossible to make a correction to it by the voters, because their vote still is not there to count. It's been diluted.

So you have an issue that is bad. It's not going to be corrected by the politicians. It's going to be terribly hard for the people to make correction.

I'm harmed by that. It's awfully hard to make a change, a correction. Do you follow that?

Q. Sure.

A. Okay.

Q. If Governor Hogan is reelected and is involved in this process, do you think that there will be greater likelihood that you'd be pleased [37] with the next round of redistricting?

MS. WEBB: Objection; vague.

A. I'm kind of confused by that question. That's kind of a speculative way of answering. Can you make it more direct?

BY MS. KATZ:

Q. Well, as you were talking about political parties being entrenched as a result of redistricting, and now Maryland has a Republican governor, so I'm

trying to gauge whether you would be more likely to vote for Governor Hogan so that he will be involved in the redistricting, the next round of redistricting?

MS. WEBB: Objection; calls for speculation, vague.

THE WITNESS: Do you need me to answer?

MS. WEBB: Yeah, you should answer.

A. Listen. If it's a Democrat or Republican and they start to gerrymander and take away the value of a citizen's vote, then I'm against it. I don't care what party they are. They're scoundrels. [38]

But right now, Hogan stands for something that Candidate Brown did not. Plus he had an albatross around his neck O'Malley. If he was going to follow O'Malley's track record in what he had started, no wonder he lost. We had enough of tax and spend.

I believe—I was against starting the casinos in Maryland. I thought it brought a lot of heartache and grief for people to just gamble away thinking that they'll make it, spend their money that's supposed to go for medicine, food, rent, housing. And that money was supposed to go to schools.

Where did the money go? O'Malley put it a general fund to spend to try to balance the budget. He didn't spend it for schools. So if that's the ilk of a politician, he should be out of office, and he was; not eligible to run again probably. But his protege Brown was. We saw through that.

BY MS. KATZ:

Q. How did you become involved in this [39] lawsuit?

MS. WEBB: I just caution you not to reveal any communications you may have had with your attorneys. Other than that, you can answer.

A. I had a chance—I think Neil Parrott passed around a paper saying that there is—well, after the initial petition for referendum, I was incensed and feeling it sure would be a nice way to get involved. What can I do to stop it. And then Neil Parrott passed around a paper saying, Are there any people who would like to represent Washington County in this. I said, Yeah. I'll stick my neck out.

BY MS. KATZ:

Q. And that was when you originally filed the lawsuit in November 2013?

A. I think it was. I think it was.

Q. Just to be clear, that was in response to Neil Parrott soliciting your involvement?

A. No. He passed around a flyer to different groups saying, Anybody interested. He didn't come out, speak to me directly or anything like that. [40]

Q. I see.

A. No. I just picked up on the information there and I called him back, said, Yeah. I'll sign in on this. When you start to get incensed and there is a deep burning anger in you with what's going on in the federal and state legislatures, some people just give up and accept it. My vote doesn't count. Well, I don't feel that way. I feel we can do something.

Q. Do you recall the pleadings that were first filed in this lawsuit in November 2013?

A. I got copies of them sent to me because I was on this. Yes.

Q. So you weren't involved in drafting the initial Complaint in this case?

A. No.

MS. WEBB: Objection. I'm not sure where you're going with this.

MS. KATZ: Is that a—not a valid objection.

MS. WEBB: I don't want to get into any attorney-client—[41]

MS. KATZ: They were pro se.

BY MS. KATZ:

Q. Were you represented by an attorney when you first filed this lawsuit?

A. Personally?

Q. Any of the plaintiffs have a lawyer when you first filed this lawsuit?

A. I do not know.

MS. WEBB: I'm unclear on the time frame.

MS. KATZ: November 2013.

BY MS. KATZ:

Q. Pro se lawsuit that was filed, do you recall that?

A. I remember the date because I was getting the papers. I would read it and sign because I was a plaintiff.

Q. Do you recall who was responsible for drafting those pleadings in November of 2013?

MS. WEBB: Objection. I think this is calling for speculation and getting into legal terms that he may not be familiar with.

MS. KATZ: He was a pro se plaintiff in—[42] three pro se plaintiffs in a Complaint filed in Federal District Court of Maryland.

BY MS. KATZ:

Q. I'm just asking about whether you were involved in drafting those pleadings. But I think you said no.

A. No.

Q. Do you recall the substance of those pleadings? What was being alleged in that first Complaint that was filed in November 2013?

A. Basically they're taking away our rights by diluting our votes, by having a thin thread of line—making certain areas contiguous that were not.

Q. Sure. Were you provided any spreadsheets [9] by the attorneys?

A. Spreadsheets? No.

What I did request was access to a person who was doing technical GIS work for one of the other experts in this case. And I said if this person can process or organize the data that I want to have in the form that I want it for me, which would require GIS skills and technology, basically, he could be fulfilling my needs for data at the same time he was fulfilling the needs for another expert in the case.

Q. And who was that expert? Who was that person?

A. That was the political scientist, Michael McDonald.

Q. Sorry. Who was the GIS expert?

A. Oh, the GIS expert, I'm blocking on his name. His name was—his last name was Amos. First name, I'm trying to remember.

Q. Did he end up providing you with material?

A. He did. He is a Ph.D. student who works with Professor McDonald and had—based on my [10] discussions with him, I could tell that he had extensive experience extracting the data that I normally use and organizing it in the form that I normally want it.

In this case I wanted it organized in a particular form that I would have normally gone to my GIS guy, because it required GIS skills that I understand but don't actually possess. So I gave him detailed instructions on how to do it.

MS. RICE: Okay.

A. And that was the person I guess that was arranged through the attorneys. So you could consider that to be something that they arranged for me to have.

* * *

Q. Okay. Let's turn to page 67, Table 3.

A. All right. So we don't need to go back over the testimony that you already gave about what Mr. Amos provided you with. But I was wondering: Is there anything else about—to say about how you came up with the data in Table 3?

MR. MEDLOCK: Objection. Vague.

A. I have nothing further to add other than to say I took the data and I tabulated it in the way that I wanted to tabulate it. And I identified the total number of census places, and I distinguish between the incorporated and the unincorporated so that I could get some sense of what kinds of places were being split.

There is a very stark pattern throughout. There is no doubt in my mind that established [137] communities of interest were split to a remarkable degree far more than they were before redistricting occurred and far more than could possibly have been necessary in order to simply equalize the population.

Q. Were you aware that the Census prepares tables of census-designated places by congressional district?

A. Yes, I'm aware of that.

Q. And did you examine those tables?

A. I did not examine those tables on the retail side because I knew that I needed them both with respect to the congressional districts that exist-

ed—would have existed in the present—that is to say, when I would have looked at the retail side of the Census Bureau's data provision.

But I also needed to know where they were before the census—before they were in the current district. In other words, the Census Bureau will tell me, for this particular census place: What is its current congressional district? And the answer is: It's the 113th Congressional [138] District.

And I say: But I want to know what was it before that. The answer would be: Well, that is a historical fact that we don't publish on our website. That is something you have to assemble yourself with a GIS system and go through the tedious task of showing where it was with respect to prior boundaries.

So I wouldn't normally think of going to the Census Bureau for both parts of the table. I could only get half of what the table was. And even then, it would not be an effective use of my time because I was not a GIS person. I would have to do it place by place. It would be a very tedious task.

* * *

[140] * * *

Q. What year was the 111th Congress elected?

A. I don't really recall.

MS. RICE: Okay.

A. It was before the 113th. I know that.

Q. And what year was the 113th Congress elected?

A. Again, it's not something that comes to mind immediately.

Q. Okay. Why did you choose those two congresses?

A. Because that was, it's my understanding, the pre-redistricting and post-redistricting.

Q. There were several congresses pre-redistricting. Is that correct?

A. Right. Right. Right. The—this—I'm trying to remember why we picked that. That may be it was closer to the 2010 census. There was a reason for doing that. I don't recall exactly why.

* * *

[148] * * *

Q. Certainly. That might lead to a question that I had in understanding the table. Are the cities, towns and census-designated places the ones that were identified in connection with the 2000 census or the 2010 census?

A. My understanding is that they were identified with reference to the 2010 census. But, again, I would have to check and see how—what the—you know, what the documentation shows that Mr. Amos has provided me with.

* * *

[151] * * *

Q. But you can't provide me now with the definition that you used to prepare that table?

A. Not without going back and reviewing Brian Amos' technical documentation, which I would want to do first.

* * *

Q. —of Exhibit 202?

Do you know which cities were included within the 111th Congressional District 6?

A. Not offhand. I would have to check back with the spreadsheet that I used to assemble the data

that I used that went into Table 3. I don't [153] have that with me.

Q. Is that also true for the 113th Congressional District 6?

A. Yes, it is.

Q. And is that the same answer for towns?

A. Correct.

Deposition of Michael P. McDonald, Ph.D.

Q. What do you understand vote dilution as used in this question to mean?

A. I used a paradigm that is common in the racial gerrymandering litigation world where that's something I've been involved with in prior cases, and so, to my knowledge, no one has looked at vote dilution in a partisan context. So it seemed natural to me that the vote dilution context for racial gerrymandering, which is a group of people that we are talking about, races or ethnicities, could be applied to another context of groups we are talking about, Democrats and Republicans.

The vote dilution, usually what we are [16] talking about is taking the votes of a group, identifying a group of people and drawing the district in such a way that denies that group the ability to elect a candidate of their choice. So that's the legal meaning, not the legal, that's how I understand it in terms of my expert work in racial redistricting cases, how, what the meaning of vote dilution is.

* * *

Q. I'm sorry. I'm sorry. I'm sorry. I skipped. That was my reading.

Let's start over.

"This vote dilution had a concrete impact on the electoral outcomes because Republican voters in the adopted district have, as a consequence, been unable to elect a candidate of their choice."

Is that vote dilution?

MR. STEIN: Objection. Vague.

A. That's moving from the vote dilution to the facts. So one way to measure whether or not [19] the vote dilution has had an effect, which is the question that was posed up in the first part of it, is to look at whether or not the affected group has been able to elect a candidate of their choice. And in the three congressional elections that have occurred since the adoption of the redistricting plan, the Republican voters in the Sixth Congressional District have been unable to elect a candidate of their choice. And one of those elections, in particular, 2014, was an exceptional year for the Republicans. There was a national wave in their direction. If there was going to be an opportunity for the Republicans to be able to win or be able to elect a candidate of their choice in that particular election year, that would have been it, and they were unable to do so.

So in the best electoral circumstances, even in the best electoral circumstances, Republicans have been unable to elect a candidate of their choice in the Sixth Congressional District.

* * *

[24] * * *

Q. Sure.

I think that, and I don't mean to mischaracterize your testimony, so please correct me if I misunderstood, I think that you mentioned, when speaking about vote dilution analysis in the racial gerrymandering context, that a district may or may not have been drawn to protect the voting rights of minorities.

Would that same analysis of why the district was performative for Republicans be something that you would examine?

* * *

A. * * * So the vote dilution analysis is really about sort of the relative polarization that is happening and the level of support that the Democrats and the Republicans have in this context for their candidates.

The effect part of it is talking about, so once we know that vote dilution is occurring or there's racial polarization that's occurring, a district has been drawn in such a way that because there's not sufficient crossover voting to elect a candidate of choice, what adverse effect it is having on the group that's in question. In this case, the Republicans.

And we have two different districts. We have a change where we actually dramatically changed the composition, the parts and composition of a district. [27]

And so looking at the—we actually do have a counter factual in a way because it's a district that should have been very similar or could have been very similar to the one that could have been enacted. So that provides some evidence about what was possible in the prior plan versus what was actually adopted.

And as additional information, I'm sure we'll get to it in the course of our discussion today, there's also an alternative plan I put forward on how you might go about drawing the Sixth Congressional District and the Eighth Congressional District in a different manner that would not result in vote dilution.

* * *

Q. And did you do any probabilistic analysis of effect in this report?

MR. STEIN: Objection. Vague.

A. I did a deterministic analysis because we were able to look at the three elections, and the endogenous elections, and the seven exogenous elections, and it came to an overall, formed an overall opinion about the concrete adverse effect that the changes had brought upon Republicans [35] within the Sixth Congressional District. It's not a statistical analysis in the fact there's some sort of regression analysis or something of that nature. It's one that's based on the actual election results. So in that way it's a deterministic, not a probabilistic analysis.

* * *

Q. Did you undertake any analysis of whether Republicans are historically unable to form blocs with crossover voting from non-affiliated voters in Maryland?

A. Within Maryland, no. Within the Sixth Congressional District, also, I did not do that. However, one could infer, if one wished to do that sort of analysis, you could look at Table 2 or simply look at the election results.

When I draw my opinions about whether or not Republicans are able to elect a candidate of their choice, I'm essentially doing that sort of analysis, although it's not framed exactly in crossover votes from Independents, separately from Independents or from Democrats.

In order to be able to elect a candidate of their choice in the 2012, '14, or '16 election, we would have been able to observe, if there were sufficient crossover votes, that a Republican candidate would have been elected. And so I can infer from the fact that a Republican was not elected

in any of those three [49] Congressional elections that there were insufficient crossover votes from any source, be it from Independents, or from Democrats, to the elected Republican candidate of choice.

* * *

[50] * * *

Q. Did you undertake any analysis of non-affiliated voting behavior in Maryland?

MR. STEIN: Objection. Vague.

A. Well, there are some numbers sitting here in Table 2. So there is some, there is an analysis there.

As I said previously, I'm drawing inferences about crossover votes would have been from any source, either Independents or Democrats.

* * *

[52] * * *

Q. Okay. And did you look into any of the electoral circumstances of any of the individual races?

A. No, I did not, other than the underlying partisanship measure we have in the district.

Q. Did you examine incumbency effects in your analysis?

A. I did not.

* * *

Q. Do you know whether the populations of the districts are the ideal population?

MR. STEIN: Objection. Vague as to districts.

Q. The alternative districts.

A. Yes. I did not say this earlier, so I need to correct now, Mr. Amos created this map at my di-

rection. And it's the concept and an idea that I had and I directed him what to do.

He did produce reports of the district. He did, as I recall, zero out, what we call [54] zeroing out the population. It would have been within one point of the ideal, one person of the ideal, not point.

If it's not, you can create a similar, substantially similar map by adjusting that line. That is, if we look at figure 8 on page 25, in my vast experience of drawing maps, it would not be difficult to make trades between these two districts to balance that out. And I would also say that this is one map, among many, that could be created that has this concept embedded in it.

Q. What did you—we talked about one thing that you directed Mr. Amos to do. What were the other things that you directed Mr. Amos to do in constructing this alternative plan?

A. I just had him merge together the Sixth and the Eighth Congressional districts or basically wipe them out so that we just had a cookie cutter then of just the western portion of the state that was formally the Sixth and the Eighth Congressional District, and then I directed him to draw a line through Montgomery [55] County that would, as straight of a line that was possible, knowing that census geography doesn't really necessarily have straight borders all the way. You have to have a nice road or something like that to make a perfectly straight line often. So knowing that that didn't exist, I asked him to do it as good as he could while equalizing the population between the two districts.

Q. And what software did Mr. Amos use?

A. He used Maptitude.

Q. What data did Mr. Amos consider?

MR STEIN: Objection. Vague.

A. He only considered the census data. * * *

* * *

Q. Sure.

For Democratic residents of the portion of Montgomery County that under the 2002 plan was in the Eighth District, who are now moved into the Sixth District, are their votes diluted under this alternative plan?

MR. STEIN: Same objection.

A. Yes. So you are asking me to draw a legal conclusion, why counsel is pointing out—

Q. I don't mean to be asking you to draw a legal conclusion. I just mean under your understanding and how you use both dilution in these analyses.

A. The Democratic voters that were formerly within the Eighth District would have their [63] ability to elect a candidate of their choice diminished, yes. You would be correct.

Deposition of Plaintiff Jeremiah DeWolf

Q. Could you please state your name for the record?

A. Yes, ma'am. Jeremiah DeWolf. [6]

Q. And today I think we're probably going to try to make it through without a break because I don't think it will take very long.

But if you need a break for any reason, just let me know and we can stop and take one. The only thing that I ask is that you answer whatever question I've just asked before we take a break.

A. Okay.

Q. But let me know if you need one.

Please let me know if you don't understand a question that I ask you. If you don't say something to me, I'm going to assume you knew what I said and you understand.

Please also try to give verbal answers. And we'll both try not to talk over one another to make sure that the court reporter can hear us.

And have you taken any medication today?

A. No.

Q. And what's your current occupation, Mr. DeWolf?

A. I'm a field service representative for Gettinge USA. [7]

Q. I'm sorry, I didn't hear the name of the company?

A. Gettinge USA.

Q. And what do you do as a field service representative?

A. It's electrical mechanical work with biosurety aspects.

Q. And can you tell many biosurety is?

A. It's for biological containment, infection—infectious disease control. So equipment, stuff like that.

Q. Okay. So do work for a—or do you do works for a lab, I guess? Is that—

A. The company that I work for is contracted by the different, you know, entities and we do work on behalf of the customer at the customer's facility.

So I work at Fort Detrick. So we do what the customer needs for biocontainment and biosurety.

Q. Okay. Great. And what was the highest level of education that you've achieved? [8]

A. Well, I finished high school, grade K through 12. And—but I've had a lot training in the Navy. So—

Q. Great. Excellent. And when did you serve in the Navy?

A. July 1999 through July of 2007.

Q. And what was your the highest rank that you attained?

A. E-6.

Q. When did you first register to vote?

A. In—

Q. Just period.

A. I registered to vote in—that would be in 1999, when I graduated high school. I registered from my high school at the age of 18.

Q. And where did you live then?

A. I lived in Lyons, New York.

Q. And when did you first register to vote in Maryland?

A. In 2007, shortly after I moved here.

Q. When you moved to Maryland, where did you moved? [9]

A. I moved to my current location at Mount Briar. 4709 Mount Briar Road in Keedysville, Maryland.

Q. And I am going to admit my kind of ignorance of western Maryland. Can you tell me where Keedysville is?

A. Sure. That's in south Washington County.

Q. And what Congressional district is that?

A. The 6th.

Q. And in 2007, who was your Congressional representative?

A. It was Roscoe Bartlett.

Q. And you said it was Roscoe Bartlett. Did your Congressional representative change?

A. In 2007?

Q. No. Just at all in time.

A. I'm sorry. Yes.

Q. And when did that change?

A. That changed after the 2012 elections.

Q. And who is your Congressional representative now? [10]

A. John Delaney.

Q. When you first registered to vote, how often did you vote?

A. Every election. Every possible election.

Q. General elections?

A. And primary.

Q. And primary.

And did you ever have the opportunity to vote in special elections?

A. I voted in every election possible, every election available.

Q. Okay. And has that—I asked you—originally, my question was about when you first registered to vote.

A. Uh-huh.

Q. Has that habit stayed the same to the present day?

A. Yes, ma'am.

MR. MEDLOCK: Objection, vague. Sorry. Go ahead.

Q. So from 2007 to 2016, have you ever missed an opportunity to vote? [11]

A. No, ma'am.

Q. Are you registered as a member of a political party?

A. Yes, ma'am.

Q. Which one?

A. The Republican Party.

Q. And when did you first register with the Republican Party?

A. In June of 1999.

Q. Was that when you first registered?

A. When I first registered to vote, yes.

Q. And have you ever registered with another party?

A. No.

Q. Have you ever undertaken any activity on behalf of another party?

MR. MEDLOCK: Objection, vague.

Q. Have you ever affiliated with another party in any other way?

A. No, ma'am.

Q. Have you ever voted for a Democrat?

A. Yes. [12]

Q. When?

A. Oddly enough, an absentee ballot when I was in the military, I voted for a county coroner. He was listed as a Democrat. He was the only one voting—running in that category and I voted for him. For some reason I checked the box, so he was my first Democrat I voted for.

And the second I just voted for was in the last election, for Judge Viki Pauler of Washington County. And she is a registered Democrat, although it was an unaffiliated election.

Q. Okay. And the county coroner that you spoke about, what jurisdiction were they running for county coroner in?

A. They were in Wayne County, New York.

Q. And did you vote for Roscoe Bartlett in the 2010 primary?

A. Yes.

Q. Do you consider yourself to be politically active?

MR. MEDLOCK: Objection. Vague.

A. Yes. [13]

MR. MEDLOCK: Go ahead. You can answer.

A. Yes, ma'am.

Q. And why?

A. Well, politically active now. I never used to be. But politically active because I feel that it's my best chance to effect change and make a difference and help choose the representatives in office that I would like to see win those offices.

Q. So you said that you never used to be a politically active.

When did you first become politically active?

MR. MEDLOCK: Objection, vague.

Q. You can answer.

A. It was after the re-districting is when I first really started. Around—so I never helped with any candidates for office, I never tried to volunteer for anyone, I didn't know how to do that. I was never inclined to do that. I didn't have that in my nature to do so.

And in—after the—or right before—or that—I'm sorry—in that year, 2012, when [14] it—the referendum came up with for the Congressional district, I actually signed—I heard about the petition, I signed the petition to not effect the change of the Congressional district.

And then after the election in which the Congressional district changed, I started to become politically active by—meaning I went out and I—I went and I contacted my State delegate and then I met Don Bongino running for 6th Congressional District and I joined his campaign to try to effect change.

And so from then on, I became politically active, as I would call it.

Q. You said that you contacted your State delegate.

Who was your—which State delegate?

A. Delegate Neil Parrott, Washington County.

Q. And I know you said what timeframe. But do you specifically remember what month you contacted him in?

A. I—actually, I don't know, ma'am. [15] Sorry.

Q. But did I understand you correctly to say that it was after the election of 2012?

A. No. It was before then. He was working on the Maryland Petitions organization and I actually

contacted him and I wanted to sign the petition for the gerrymandering, or the changing of the district.

So I signed his petition. That was when I first reached—as far as I know, reached out to him.

Q. You said the organization, Maryland Petitions. Do you mean—is that the name of the organization or is it just an organization about petitions?

A. I believe it's Maryland Petitions.

Q. Okay. And other than contacting Delegate Parrott at that time in connection with the petition drive, did you do anything else to help in the petition effort?

A. No, ma'am.

Q. And I think you also said—let me know [16] if I don't get this right—that you then met Candidate Dan Bongino and joined his campaign; is that right?

A. Yes.

Q. And how did you join his campaign?

A. Well, I met Dan Bongino at a fundraiser for Delegate Parrott and I talked with Dan and his campaign manager, Sharon Strine, and they said they were looking for volunteers.

And I said, and I quote—I'll never forget this—I don't know what I could do, but if I could help in some small way, I would be happy to help, end quote.

And I joined their campaign. The—Sharon talked with me a couple of times and asked if I would be their Washington County coordinator. I didn't really have an idea what that was, but I told them I'd help any way they needed me to.

And I accepted the position and I became their Washington County coordinator for the—their Congressional campaign.

Q. Do you remember when the fundraiser for [17] Delegate Parrott was?

A. It was his pie and ice cream social at then Antietam Battlefield. And the exact date escapes me. But it was sometime September—I believe it was August or September of that year - I'm sorry—2013.

Q. That reminds me. When you said that you joined Dan Bongino's campaign, do you mean his 2014 campaign for Congressional District 6?

A. Yes, ma'am.

Q. Okay. He also ran for Senate, so I just wanted to make it clear.

What were the duties of the Washington County coordinator?

A. My job was to help coordinate or help recruit volunteers, coordinate activities with the volunteers. So organizing sign waving, knocking on doors, introducing ourselves to voters, different events that we'd have throughout the county, parades, things of that nature.

So—and interacting with other officeholders in Washington County, attending [18] meetings or things of that nature.

Q. What kind of meetings?

A. Well, let's say, for example, the Hagerstown Tea Party, you know, had a meeting. I would go to their meeting on behalf of the campaign and help try to recruit, you know, volunteers for his campaign there. Or the Washington County Republican Club or, you know, different events.

If other Republican or conservative candidates in Washington County was having activities, I would go to those activities on behalf of his campaign as a way to get his name recognition out there and introduce myself and meet other candidates—volunteers. Sorry.

Q. And do you know how many volunteers there were in Washington County?

MR. MEDLOCK: Objection, vague.

Q. For the Dan Bongino campaign, how many volunteers?

A. Not off the top off my head. No, ma'am. We had quite a few.

Q. So could you estimate it for me? [19]

MR. MEDLOCK: Objection. Calls for speculation.

Q. You can answer.

A. I don't know the number, ma'am. Well over a dozen or so.

Q. More than or less than 100?

A. Less than 100.

Q. More than or less than 50?

MR. MEDLOCK: Calls for speculation.

Q. You can answer.

A. I would speculate less than 50.

Q. When you were knocking on doors for Dan Bongino, what was the typical reaction of a voter?

MR. MEDLOCK: Objection, vague.

Q. You can answer.

A. So I would go all over Washington County in different communities. Every community in Washington County, all over Hagerstown city and you name it.

And the reaction was varied. We would target Republican voters, particularly trying to get contacts so that they knew to vote for Dan, [20] trying to get the Republicans out.

And most of the time, it was optimistic, upbeat. People were very happy that we were there reaching out to them. in many cases, people had never had a Congressional candidate or their campaign knock on their doors.

A lot of people were—felt—I felt—I really like knocking on doors because I got to connect with a lot of people who felt just like me. A lot of people were demoralized and really downtrodden about the results of the previous election and the campaign—the Congressional district change.

So folks in, even in Washington County felt that they were, they felt discouraged because—I mean, speaking for myself and relating it to them, we seemed to agree that we just couldn't believe that the district could change in such a—in that manner.

I mean, it's been the, you know, same for decades and decades and then all of a sudden, it changed. And a lot of people were angry when I [21] talked to them on their doorsteps or when I knocked on their doors or called them on the phone.

That was a common, you know, answer they had. They were angry about it and lot of them wanted to do something about it.

Q. What did they want to do about it?

MR. MEDLOCK: Objection, calls for speculation.

A. Some of the people that I talked to, they wanted to—they want to figure out a way to get the Congressional district back, to change it back. But they

were helpless, they didn't know what they could do.

And, you know, I tried to encourage people to vote. A lot of people said that their vote didn't matter, it didn't count. They were—you know, they voted Republican their whole lives, but now it didn't matter because of the change.

So a lot of people didn't know what to do. But they wanted to do something but they didn't really know what they could do. The only thing we encouraged them to do was to get out and vote. [22]

Q. Have you ever attended an event in Maryland—just talking about your time living in Maryland—that was held by your Congressional representative?

A. No.

Q. Is Dan Bongino's campaign the only political campaign for which you've served and volunteered?

A. No, ma'am.

Q. What other campaigns have you volunteered for?

A. Well, more along the same lines, I was Terry Baker's campaign manager in the primary. In the last election, he ran for 6th Congressional District primary. I was his campaign manager.

And then previously, also while assisting Dan Bongino's campaign, in the 2014 election cycle, I helped Neil Parrott's campaign as a volunteer. I put up signs, I would knock on doors for him.

And I did the same for Delegate Brent Wilson in the City of Hagerstown. I do sign waving for them. A lot of times, we'd do dual sign [23] waving. You know, we'd have signs for Bongino and for, you know, Brent Wilson when we were in his district,

or Dan Bongino and Delegate Neil Parrott when we were in his district.

Additionally, I would help some of the county commissioners put up signs or sign wave or just volunteering in small ways like that.

Q. Which county commissioners?

A. Terry Baker, Jeff Klein, that was it. Just them two.

Q. So I heard you mention Terry Baker, a Congressional candidate and a county commissioner candidate, Neil Parrott, Delegate Wilson, and Jeff Klein.

Were there any other campaigns?

A. Yes. I also helped David Craig's campaign for governor. My wife and I put up—we went some of his events and we also put up a lot of yard signs for him around Washington County. And we sign waved for him.

And the lastly, not as a volunteer for the campaign, but I did provide some assistance to Amie [24] Hoeber in her campaign in the last election cycle. But I was a member—I'm currently I'm member of the Washington County Republican Central Committee and a member of the Washington County Republican Club.

So I was helping her campaign really as -through my duties as those two organizations, not really working on under the campaign, per se.

Q. Okay. So just going back to Terry Baker and the 6th Congressional District primary, you said you served as the campaign manager; is that right?

A. Yes, ma'am.

Q. What were your duties as campaign manager?

A. As campaign manager, I helped find volunteers, organize fundraisers and help him with policy and public affairs, media presentations, and answer questionnaires, and direct all aspects of the campaign.

Q. Do you know how many volunteers served on the campaign?

MR. MEDLOCK: Calls for speculation. [25]

A. I don't have an exact number, no.

Q. Can you give me an estimate, please?

MR. MEDLOCK: Same objection.

A. I would say we probably had about 50.

Q. And you said you served with him through the primary?

A. Yes, ma'am.

Q. And—but Amie Hoeber was the eventual candidate?

A. Yes, ma'am.

Q. Do you know what share of the vote Terry Baker received?

MR. MEDLOCK: Objection. Vague as to the election.

Q. In the Congressional District 6 primary?

A. I'm ashamed to admit I do not recall that number at this moment. I know he came in second. So it was a six-person race. Amie Hoeber won and Terry Baker came in second place.

Q. When you spoke to voters about Terry Baker, what was the reaction?

A. A lot of the people that I talked to were [26] encouraged that he was running for office. A lot of people felt that Terry Baker was the most conservative candidate there and a lot of people were looking for a conservative candidate.

He was a people person. He's—we—our campaign slogan, he was a compassionate conservative. And you know, very fiscally, very socially conservative and a lot of people liked that.

They liked his message on lower government and, you know, accountability without compromising public services.

But at the same time, people were still disgruntled, I should say, about the state of the Congressional district. They were very discouraged. They hoped that he could effect some sort of change and win the district seat back.

But there was a lot of people who still continued to say that they didn't think that their vote mattered or their vote counted. And we had a hard time trying to convince them to come out and vote. [27]

Q. What do you mean when you say conservative candidate?

A. Well, I would say that even within the Republican Party, there are various degrees of conservative—conservativeness. And along the spectrum, Terry was, you know, a little bit more to than right than center.

So in my opinion, you know, he was one of most conservative candidates there in the Republican primary.

Q. What, in your mind, would make Terry more conservative than the other candidates?

A. Terry had a proven track record of being fiscally conservative. And with his track record and his policies on fiscal conservatism and social issues, particularly, his stance on abortion, he—there was another candidate in the district Congressional race that wasn't against abortion.

And I, you know, thought that that candidate wasn't as conservative as Terry, who clearly said abortion is wrong, abortion is murder, and he wouldn't, as a representative in the U.S. [28] Congress, vote to do any thing that advanced the abortion agenda.

So that particular issue, along with some others, was why I would say that he was more conservative than the others. I always go with the most conservative candidate in any election, regardless of which candidate—or office they're running for. And that's why I chose Terry Baker.

Q. What does fiscally conservative mean to you?

A. Fiscally conservative means, you know, keeping taxes low, minimizing the cost of government, and maintaining essential services.

Terry Baker, with his track record as a three-term county commissioner of Washington County had enjoyed more than 16 years without a property taxes increase. And they weathered the financial storm of the Great Recession without affecting any essential services and without cutting employees.

So he was very conservative. He kept the debt ratio down and maximized, you know, the—kept the borrowing down and tried to keep the tax [29] base—tried to raise revenue through increasing the tax base, but not increasing the taxes on a constituents. So that's what I considered to be fiscally conservative.

Q. When you were speaking about Terry Baker's position on abortion, you mentioned other issues. What were those issues?

A. Well, I'd say that one of the things was on gun rights. The Second Amendment issues was a big thing. Terry Baker was very much pro Second

Amendment and was unashamed about it. You know, he went to a lot of gun clubs and sporting clubs.

I mean, we're from Western Maryland, Washington County and a lot of conservatives and Republicans there really like the right to, you know—hunting and use of firearms without burdensome restrictions. And Terry, you know, fit well into that category.

And additionally, I felt some of the other issues were, you know, foreign policy. I felt that Terry had a really good grasp on how the United States should handle foreign issues, like the [30] Iranian, you know, nuclear deal.

And I thought that Terry and everyone—o n that issue and a lot of the others always took the most conservative approach, which I felt was what was best for, you know, myself and for everyone else.

Q. On foreign policy issues, what do you identify as the most conservative approach?

A. Well, one of the first things is I think that we have to do what's right for Americans. And I think that personally I—I identify that - like for example, like with Iran, you know, we shouldn't have given them, you know, billions of dollars and lifted their restrictions. You know, it should have been a more conservative approach.

You know, Iran being a—one of the leading state sponsors of terror and, you know, targeting Americans and some of their organizations and entities, you know, that they operate out of, you know, I just don't agree with, you know, what they did. And especially their—their leadership. And so that's one issue.

Other issues were foreign policy, how we engage our military in use around the world. I was a very appreciative of Terry's stance on the military. You know, he wanted to increase support and funding for the military and rebuild our military.

And I was, you know, in the last election cycle and even right now, you know, we had the lowest number of ships in the Navy's ever seen. I've been in the Navy myself, we have the lowest number of Navy ships since before World War II, the lowest number of soldiers in the army since, you know, the end of World War I, I think it is, somewhere in there.

I mean, we're at the lowest levels and yet we're trying to maintain, you know, several theaters of operation around the world. And try to be relevant in the world and be the most powerful country in the nation.

And, you know, we're facing increasing threats from China. And, you know, we have seen a lot Russian aggression. [32]

And, you know, I think that, you know, Terry Baker's approach and some of his ways that he was going to deal with, you know, some of those issues I thought was the most conservative approach to that.

Q. Going back to talk about the—oh actually, one last thing.

As campaign manager, was that a completely volunteer position?

A. Yes.

Q. Okay. Going back to Amie Hoeber's campaign, that was Congressional District 6 in the general election; is that right?

A. Yes.

Q. So what kind of support did you lend to that—to her?

A. So we helped with sign placement in and around Washington County. And we also, as a member of the Republican Central Committee and a member of the club, I helped rally the Republicans and conservatives in Washington County to come out and help her. [33]

To put up signs, to hand out palm cards, to knock on doors for her campaign, to make sure that the polling locations and the—on election night were covered that had Amie Hoeber signs. And just general support like that.

Q. And do you know how many people volunteered with you in those efforts?

MR. MEDLOCK: Calls for speculation, vague.

A. I'd say fewer than 50.

Q. Have you ever volunteered for a national campaign other than the Congressional District 6 races?

A. No, ma'am.

Q. Have you ever contacted—or did you ever contact Roscoe Bartlett for a constituent services issue?

A. No, ma'am.

Q. Did you ever contact Roscoe Bartlett's office to help you with any matter?

A. No, ma'am.

(A discussion was held off the record.) [34]

(E-mail was marked Exhibit 50 for identification and was attached to the transcript.)

Q. Have you seen this document before?

A. No, I have not.

Q. Is that From line up at the top there, is that your E-mail address?

A. Yes, ma'am.

Q. And who is Donna DeWolf?

A. That is my stepmother.

MR. MEDLOCK: Just for reference, we're talking about Exhibit 50.

Q. We're talking about Exhibit 50. Yes. I'm sorry.

And do you see here at the sort of end of the top of the first line there, it says, R slash J?

A. Yes.

Q. Would you sign your E-mails like that?

A. Yes.

Q. Do you have any reason to believe that this E-mail was not written by you?

A. Nope. No, ma'am. [35]

Q. I don't have any stunning questions and this is not a memory test, but did you have a chance to read Exhibit 50?

A. Yes, ma'am.

Q. And do you see that it looks like a response to your inquiry about a Capitol tour?

A. Yes.

(A discussion was held off of the record.)

Q. Do you remember if you took a Capitol tour in 2008?

A. Yes, I believe we did. My stepmother and my father came to visit. And I—I remember doing Capitol tours, I don't remember when it was.

And I would like to say that I thought that I had reached out to one of the senators, but I didn't remember this at all.

Q. No. That's totally fine. I don't think I would remember something like that either. It's not a memory test.

A. I know I have reached out to Senator Cardin's office in the last years to try to get tickets to the Capitol Building. And I've always [36] thought I went through the senators. So—

Q. Okay. And have you ever contacted Congressman Delaney?

A. Yes.

Q. And on what matter?

A. Actually, I don't remember the matter. But there was a instance when I had heard about a bill that was trying to be passed.

And I remember them—it was on the radio, please contact your Congressman and encourage them to vote no on the issue. And I remember calling his office, telling him who I was, where I lived, and saying I encourage him to vote no on that bill.

And that was just a few years ago. But I don't remember what the issue was.

Q. Okay. And did you request a response from the Congressman?

A. No, ma'am.

Q. Did you get any response from him?

A. No, ma'am. I spoke with a lady on the phone, but that was it. [37]

Q. All right. And have you ever contacted Congressman Delaney's office for a constituent services issue?

A. No, ma'am.

(E-mail was marked Exhibit 51 for identification and was attached to the transcript.)

Q. You can take a minute to look at this. Just let me know when you're done.

MR. MEDLOCK: Just so we're clear, there's no To line in the E-mail. I'm not sure—

MS. RICE: That's right.

MR. MEDLOCK: It's just a weird set-up.

MS. RICE: Yeah. I don't know why.

BY MS. RICE:

Q. But I was just—what I was going to ask Mr. DeWolf is if he recognizes this document?

A. Yes.

Q. And what is it?

A. Just recently, I had reached out to—I did—well, I guess it is a constituent service.

I reached out to Congressman Delaney and Ben Cardin's offices, the senator, to try to get [38] tickets to the inauguration.

Q. Were you successful in getting tickets?

A. No, ma'am. Not from either Congressman Delaney. And I received a similar E-mail back from Senator Cardin.

Q. Okay. And did you—I think in the third paragraph it says, following the drawing, we will contact you to inform you if you were selected. Do you see that there?

A. Yes, ma'am.

Q. And were you contacted at all after you received this E-mail?

A. I believe that they sent me an E-mail saying that I didn't—I wasn't selected.

Q. Okay. That's fine.

When was the first time that you became interested in redistricting?

A. I was—it was before—right before the 2012 election. I was—Delegate Neil Parrott had sent out an E-mail. He had talked about upcoming events or something of that nature. And he had—on there, it had talked about the petition—sign [39] the petition for referendum on the redistricting.

So I went on and I signed that. But it was that time when he had sent it. So I learned about it through Delegate Parrott before the 2012 election.

Q. Did you ever know about the legislative redistricting process in Maryland?

A. No, ma'am.

Q. So we talked about your role in the petition drive.

Did you take any other action related to the 2010-2011 Congressional redistricting?

A. No, ma'am. I just signed the petition.

MR. MEDLOCK: Other than filing this case, of course. Is that what your question is?

MS. RICE: Other than filing this case.

Q. I know you signed the petition.

Did you vote against the referendum?

A. Yes, ma'am.

Q. And other than filing this case and other than signing the petition and voting against the referendum, have you taken any actions related to [40] Congressional redistricting after the passage of the last plan?

A. No, ma'am, not that I'm aware of. I mean, just this lawsuit and supporting my candidates for office.

Q. How did you first hear about this lawsuit?

A. I was contacted by Maria Pycha. I worked with Maria on the Bongino campaign. She was the finance director, county coordinator.

And she approached me and—or sent me an E-mail about it, I think, or called me. And asked—you know, told me that there was a lawsuit and that they were looking for people like myself who was, you know, very conservative, lived in the 6th District and that would be interested in signing on as a plaintiff.

So that was the very first time I had heard about this lawsuit was from Maria Pycha.

Q. And do you know that Ms. Pycha is no longer a plaintiff?

A. Yes.

Q. Do you know why she chose to voluntarily [41] withdraw?

MR. MEDLOCK: I'll caution you not to reveal anything that you heard about that from your attorneys. That's privileged.

But if it's something you heard from Maria or a source other than your attorneys, you can testify about that.

A. No, ma'am.

Q. And why did you decide to join the lawsuit?

A. Well, like most of the—or all of the other reasons that I joined any of the campaigns for office for any of the candidates. I wanted to effect change and make a difference. I wanted the most conservative outcome possible. And I have a hard time saying no when asked to help.

So if somebody asks me to help in a matter regarding, you know, supporting conservative candidates or conservative policies or positions, I want to

jump in and I want to help. So that was the crux of the reason.

And I—somebody asked if I would be [42] willing to help support this cause. And I wholeheartedly supported it and I wanted to help.

Q. How do you think this lawsuit will help conservative causes?

MR. MEDLOCK: Calls for speculation.

Q. What's your belief?

A. Well, my belief is that if—my belief that this lawsuit, I'm hoping that it would affect change in the way that the Congressional districts are drawn so as not to use political influence of people to draw the Congressional lines.

And by that I mean, I had never really been involved in politics before. And I never really—I mean, I've always paid attention, always watched the news, I was engaged. And when I say I engaged, I mean that's the really extent. I discussed it, you know, with my friends and family.

But then, you know, seeing what happened talking about the change in the Congressional district, I saw that it was going to happen, and I saw it happen and I was kind of demoralized.

I was very devastated. I didn't realize [43] that it could have really happened. I didn't really understand the effects that it had.

And so for me, I lived in a, you know, very rural conservative area. And I've always been conservative. I've always been—my—most of my family is conservative. And not just Republican. The most, you know, conservative candidates.

And I had this understanding that I was—you know, had conservative representation in the 6th

Congressional District in the candidates that I voted for.

And then this change happened in the district and, you know, I kind of went through a grieving process with it. And that grieving process was literally just like, you know, five stages of grief.

At first, I was shocked and I didn't believe that it was really happening. I didn't understand how it was—how that could happen, you know, so—so much. I mean, I understand redistricting and I understood the, you know, cursory, you know, what they explain in schools and [44] things.

But what—when I saw that it changed so much and that the district switched from, you know, Republican to Democrat, you know, by—by so much, you know, it really angered me. And I didn't, you know—so I went, you know, from shock and disbelief to anger.

And, you know, I was really demoralized for a long period of time about this. And I—you know, a lot—I complained to my family and friends. And a lot of people said, you know, what difference does it make. How are you going to -you can't do anything about it. You know, there's—the powers that be made it happen. There's, you know, it was a game changer they changed the game. There's nothing you can do.

And I stewed on that for months and months after the election of 2012. And it was many months, probably mid-Summer is when I finally started realizing that maybe there was something that I could do to help usher about a change from what I had gone through. [45]

So when I finally accepted that that's what it is and, you know, I have to deal with it, that's when

I, you know, started reaching out. And I went to one of Delegate Parrott's fundraisers and met Dan Bongino.

And that's when I started thinking that maybe there's—you know, we've got to get people out, we've got to encourage them to vote. And along the way, I met so many people like me who were so demoralized and so, you know, discouraged about the redistricting and about how, you know, everything was the way it was for so long and then all of a sudden, the game was changed and we -it's a whole new ball game now.

And you know, we have to work, we have to get out and we have to do something. We have to work to try to effect a change and, you know, for the candidates that we want. So that's—I hope that answers that question.

Q. You mentioned that you wanted—one of the things you hoped to get out of the lawsuit was a change in the process of redistricting, if that's [46] what you said.

Is that what you said?

A. Yes.

MR. MEDLOCK: Mischaracterizes his testimony. Go ahead.

Q. What kind of change would you like to see in that process?

A. Well, I think that I'd like to see it change back to the—the district that's similar to the make-up and composition that it was.

You know, the five western counties, you know, Garrett, Allegheny, Washington, Frederick, and Carroll are all, you know, fairly rural similar like

demographics and, you know, geographical, you know, composition.

And, you know, adding in Montgomery County right outside of, you know, Washington, DC and some of the very rich areas, and I mean, everything is drastically different.

And one of the—I mean, I would hope to see the change that, you know, others that I've talked to and Dan's Congressional campaign, [47] Terry's, Amie Hoeber's, you know, there's a similar thread, you know, among all three of them.

And even in the county commissioners and the state delegates, everybody has this sort of belief that I've talked to—a lot of people do -that well, the game's been changed. You know, things are not equal now. They're not—it's completely unequal, there's not much we can do about it.

And, you know, we looked—on Dan Bongino's campaign, you know, we really worked hard—we worked very, very hard. And, you know, we tried so hard to encourage people to come out and vote even when they said that their vote didn't matter, their vote didn't counted.

And it's not the normal. It's—they were saying that because of the redistricting. That's what they were saying. And I believe that.

And so it was like we had to work extra hard to convince people to come out and vote instead of just, you know, they were lazy and didn't want go to the voting box or the ballot box. [48]

So the change that I wanted to see is to go back to, you know, similar ways that it was and for everyone to have that same sort of feeling that they used to have that, you know, the expectation that their vote mattered, their vote counted.

A lot of people in Washington County and even in the western counties that I've encountered don't think that it matters or that it counts. And so the effect of the change for the Congressional district would be just that; that people get their voice back or their feeling that their vote matters and counts.

And then along the same, you know, geographical boundaries that I talked about that people in like communities. You know, it's drastically different.

Q. How often do you go to Baltimore County?

A. Very rarely now.

Q. How has the 2011 redistricting harmed you?

MR. MEDLOCK: Objection, vague.

Q. You can answer.

A. Well, like I was just saying, I would say [49] that harm is a—you know, to measure the harm that it had on it, I tell you I really experienced the stages of grief.

You know, the disenfranchisement grief. You know, the shock, the disbelief, the—the anger, the depression, the acceptance. I went through each one of those stages when I learned that this has happened.

I really didn't understand—I mean, I knew that—that it was necessary every 10 years per the Constitution, you know, populati[illegible] changes, the Census. And then we—we moved the Congressional districts according to population.

I understood that at the time. And I understood that it was necessary for them to be redrawn, you know, slightly here and there.

And—but I had no idea and I was never prepared that it would such a—such a huge change. And

that huge change corresponded to a huge change in representation and it was a game changer.

And that game changer was devastating [50] because when I look back, you know, I'll start back—give you a little back story of that.

In 2008, I was devastated with, you know—very devastated with the Presidential election. President Barack Obama had the White House, very strong leads in the Senate and the House of Representatives. And it was a huge, huge change and I was really demoralized by that.

But then in 2010, there was a referendum on President Obama's policies. We saw huge changes in the House of Representatives. And then, you know, even more so in 2012, there was uptick in people who were coming out and there was—people were coming out, the conservatives, the Republicans, and they were starting to pay attention, like myself.

And I thought, well, surely, you know, even, you know, 2012, when we were talking about the conservative district changes, you know, I realized that, you know, it was being talked about and we had the referendum.

But I said to myself, well, surely, you [51] know, other conservatives out there will see what's happening on the national stage, the beginning of the Tea Party movement, you know, and the conservatives were, you know, really coming out in full force. And I said, well we're making progress. It's a step in the right direction.

And, you know, we had a chance of continuing this movement. And I was—I was sort of calm about it. Roscoe Bartlett was still my Congressman. I still had a Republican in the House of Representatives.

And he was, you know, still voting for conservative principles that I wanted him to vote for and that others, you know, like me in our district.

And then when the 2012 election happened, and on the referendum that the question about the district, it changed it. And then overnight, literally overnight, we went from—I wasn't in the same district that I lived in—I mean, physically I was, but it wasn't the same representation. [52]

It wasn't the same thing for me. It was, oh, my goodness, now I'm in a district that is, you know—went from strong Republican and conservative to strong, you know, Democrat. And my representative was now a Democrat.

And I wasn't sad that it was—that—it wasn't about the person. It was about the principles and the philosophies that went along with who that person was—John Delaney was representing in Congress.

And I felt like I no longer had a representative in Congress. So my expectations were completely changed from when, you know, from everything up to that point.

That election changed my life dramatically. It changed me from, you know, just being—just paying attention to what was going on and complaining about it and yelling at the television, like I tell everybody, to uh-oh, we need—it's not enough. You have to do something about it.

Because I was just—the—I felt that [53] the State of Maryland, whomever made those decisions—I had no idea who—how it happened or, you know, how it came about. But the district was—all the districts were re-drawn. And I—it was—it was an

overwhelming shock to me that that could happen like in the magnitude that it did.

And so how did it harm me? It harmed me in the fact that I was shocked, I was horrified, I felt overwhelmed that this happened. And it really—it led me into a state of anger and then, you know, despair. Kind of depression, because I just—I felt like, well what—what could I do about it.

I had this hope that we were going in the right direction in our country and then it was a total game changer, unforeseen. It's like they changed the rules of the entire game that we were playing.

And here I thought if we could just encourage people to come out and vote, that in our communities—because historically, you know, [54] Washington Country and Western Maryland, 6th District was historically conservative. And now all of a sudden it's not, overnight.

And so the harm was the devastation that came to that. That the level of that feeling. And it lingered for months.

And like I said, after the election—that was in November—it wasn't until mid-Summer, probably July or August, that I really started coming about. And people asking me all the time, well, why are you complaining about it, what can you do you about it.

It was a feeling of hopelessness and despair of them saying—people saying over and over again, you just have to deal it, there's nothing you can do about it, what can you do.

And people kept asking me that and asking me that. And it was—it was awful. It's hard to describe. Those are the only adjectives I can think of is, you know, despair and hopelessness.

And then finally I said, you know, I got to see what I can do. What can I do about it. I [55] didn't know. I had no idea. No idea what it meant to be politically involved or to help with campaigns.

I had never done that before, I never had any inclination to do that before. I didn't know who those people were that I seen on television knocking on doors or answering phones or things of that—or you know, calling people.

And so that's when I went to one of Neil Parrott's fundraisers. And that's when I met Dan Bongino. And that's when I said—and I quote -if there's any small way I can help your campaign, I'd would be happy to, end quote.

I mean, I remember that because I didn't know what I could do. Because everybody kept saying, well, what can you do about it, you can't do anything about it.

And so I guess that's the answer to the question, what harm did it cause me. It caused me to be in this state for—for so long.

MS. RICE: Okay. Those are all the questions I have. [56]

MR. MEDLOCK: Okay. I have maybe two.

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS BY MR. MEDLOCK:

Q. Sir, you've mentioned the 2012 redistricting referendum.

Do you remember that testimony?

A. I'm sorry, could you repeat that?

Q. Do you remember your testimony that there was a 2102 redistricting referendum in Maryland?

A. Yes.

Q. Can you describe what the referendum question looked like on the ballot?

A. I don't remember the exact vernacular of it. But I will tell you that when Delegate Parrott had said that there will be one question on the referendum, I thought to myself, oh, great, well at least we'll get to vote on it and people will vote no because they don't want to redistrict and bring in this large swath of, you know, other populations from other areas.

But then when I was at the—the first time I believe I saw it was at the voting box. And [57] the only thing I remember it saying was, do you support—it was something like, do you support the Constitution of the United States.

And I thought, my God, is this the question that I voted on the referendum, you know, to oppose? Is this the question that I had—you know, we had been talked about that was going to change the Congressional district lines. What does this mean, you know.

In accordance with the Constitution, if I vote no, then is that saying that I don't support the Constitution? It was a—I was in shock. I stood there and I literally read the question again and again several times.

And I convinced myself this is the question that, you know, is the referendum on the redistricting. And I voted no on it.

But the wording of the question was a huge slap in the face to me. I just couldn't believe that it was written in that way. I felt incredibly ignorant reading it because, like I said, I had gone in thinking that this is, okay, it's going to [58] be an easy thing.

Do you vote to—you know, are you going vote against the redistricting. But the way it was worded, I felt, you know, like, my God, it's going to be awful to vote against this, because I wouldn't support the Constitution.

Deposition of Plaintiff Kathleen O'Connor

Q. Would you please state your name for the record?

A. Kathleen O'Connor.

MS. KATZ: And I'm going to show you something. We are sequentially numbering documents. So this is going to be document 52—Exhibit 52. [6]

(Whereupon, O'Connor Deposition Exhibit 52 was marked for identification and attached to the transcript.)

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. It's a Notice of Deposition.

Q. Okay. This is the Notice of Deposition that you were served with in this case?

A. Yes.

Q. Have you ever been deposed before?

A. No.

Q. Okay. So I am just going to over a few housekeeping rules. Because the court reporter is trying to take down everything we say, I won't talk over you. I will wait until you finish answering a question to ask a new one.

I just ask that you wait until I finish answering a question—asking a question to begin your answer. Also, please provide verbal responses—

A. Yes. [7]

Q. —for the record. Great. If you do not understand a question I ask, please let me know and I will try to rephrase it so that you do understand it. If you don't ask me to rephrase a question, I will assume that you understood it.

A. Okay.

Q. And we are not going to be here for very long, I would certainly hope. But if you need a break at any time, please let me know, and we will find a good stopping point to take a break.

A. Okay. Thank you.

Q. Sure. Just for—are you—before we get started, I was going to ask are you taking any medication today that may affect your ability to testify or recall events?

A. No.

Q. Thank you. Where do you currently live?

A. My current address is 9321 Watkins Road, Gaithersburg, Maryland. The zip is 20882.

Q. And how long have you lived there?

A. Since August of 2003. [8]

Q. Okay. Prior to that, prior to August of 2003, where did you live?

A. I lived in Germantown, 11411 Seneca Forest Circle in Germantown, Maryland.

Q. And how long did you live there?

A. Five years.

Q. Okay. So like 1998 to 2003?

A. Yes.

Q. Do you happen to know, is that in the 6th congressional district?

A. Germantown, I believe so.

Q. And where did you live prior to that address in Germantown?

A. I lived in Damascus prior to that.

Q. For how long?

A. Probably about two years.

Q. So about 1996 to 1998?

A. Yes.

Q. And was that also in the 6th congressional district?

A. I do not know. I was probably not even registered to vote at that time. So I don't know. [9]

Q. Do you recall when you first registered to vote?

A. I was trying—I thought it was 1994, but I don't recall exactly.

Q. Okay. But around 1994 you think?

A. I think so. I'm just not sure what my congressional district was when I was living in Damascus. Therefore, it makes me wonder if I was actually registered to vote at the time. I apologize.

Q. No. Please don't apologize. Do you recall if you voted in the 1996 presidential election?

A. I do not recall.

Q. Okay. So is it possible—

A. Which election was that?

Q. So in 199—this is going to be history. Clinton, Dole. Clinton was running for re-election.

A. I do not believe I voted in that election.

Q. Is it possible you were not registered at that time? [10]

A. It's possible.

Q. You may have registered after 1996?

A. Shortly thereafter. Yes, it's possible.

Q. Do you remember the first election in which you voted?

A. I'm sorry. No, I just don't.

Q. No problem. What is the highest level of schooling that you attained?

A. Just paralegal school after high school.

Q. Where did you attend high school?

A. Paint Branch.

MS. KATZ: I grew up in Montgomery County. I went to Kennedy.

THE WITNESS: Oh, yeah.

Q. Not far. And where did you attend paralegal school?

A. It was Katharine Gibbs School in Rockville at the time.

Q. What kind of work do you do now?

A. Now I am a firearms manufacturer and dealer.

Q. What sort of firearms do you manufacture? [11]

A. Well, I have a manufacturing license. So we manufacture—it's—actually, we are not manufacturing. We are an assembler, technically. We don't make any components. We just assemble. But mostly AR-15s.

Q. And how long have you been doing that?

A. Almost three years.

Q. What did you do before that?

A. I was a stay-at-home mom and professional volunteer for my children.

Q. Did you ever work as a paralegal?

A. Yes, I did.

Q. Do you recall when that might have been?

A. That would have been—it was five years at Shulman Rogers in Montgomery County. Let me think when my daughter was born. I'm sorry. I didn't think about this ahead of time. She was born in '99. Probably '93 to '98.

Q. Is that the sign you see when you drive over the bridge Shulman Rogers?

A. I was not there at that building. Yeah. We were down in Rockville. [12]

Q. Other than the firearms manufacturing and dealing and working as a paralegal, have you had any other professional jobs?

A. Prior to that, I was a legal secretary while I was going to school. Oh, and I worked at Fullman Daney in Bethesda prior to going to Shulman Rogers as a—pretty much a legal secretary.

Q. Got you. Do you recall if, when you were living in Damascus from 1996 to 1998, if you voted in any elections during that time period?

A. I just—I don't recall, because I don't know where my precinct would have been. I'm trying to recall where I would have gone to vote, and I just don't recall.

Q. Okay. What about at the—in the Germantown address at Seneca Forest Circle, I believe you said?

A. Yes. Yes.

Q. So you moved there in 1998. Do you recall voting when you lived at that address?

A. Yes, I do.

Q. Okay. Did you vote in both primary and [13] general elections—

A. I would have, yes.

Q. —during that time? Do you think that while you were living at that address, you ever missed an opportunity to vote?

A. I don't believe so.

Q. And do you recall during that time period from 1998 to 2003 who your congressional representative was?

A. It was Roscoe Bartlett.

Q. Then from 2003, you said, to—I think is when you said you moved to the address where you live now in Gaithersburg?

A. Yes.

Q. Have you voted in every election in which you have been able during that time?

A. Yes.

Q. And does that include primary elections as well?

A. Yes.

Q. Okay. And do you know who your congressional representative was or is or has been [14] from 2003 to the present?

A. Yes. It was Roscoe Bartlett and then went to John Delaney.

Q. When you voted in the elections from 1998 to the present, do you always vote for your congressional representative?

A. As far as my party affiliation?

Q. No. I'm sorry. Do you—sometimes people go in, they vote for president, they vote for governor, but then they don't mark off other candidates on the ballot.

Do you recall if you always marked one of the candidates running for congressional representative when you voted?

A. Yes. I always voted for a congressional candidate, yes.

Q. Thank you. Are you registered as a member of a political party?

A. Yes.

Q. Which party?

A. Republican.

Q. And do you recall when you first [15] registered your party membership?

A. When I registered to vote. It would have been the same time.

Q. And have you always registered as a Republican?

A. Yes.

Q. Have you ever voted for a candidate who was not a Republican?

A. Yes.

Q. When was that?

A. I don't know the year, but I voted for a candidate who was running for Register of Wills in Montgomery County who was not a Republican.

Q. Do you know what party that person was?

A. Democrat.

Q. Do you happen to recall around what year that might have been?

A. It would have been while I was working at Shulman Rogers between, I guess, '93 and '98.

Q. Okay. Is that the only non-Republican you recall voting for?

A. That I recall, yes. [16]

Q. Did you ever vote for someone other than Roscoe Bartlett when he was on the ballot?

A. I don't believe so.

Q. So you believe you voted for him in all the primaries?

A. I believe I always voted for him when he was on the ballot.

Q. Okay. What are the qualities that you look for in a political candidate?

A. Honesty, integrity, someone who is going to listen to the voters and consider the people in their district and their concerns.

Q. If a candidate emulated those qualities, would it matter to you what party they were affiliated with?

A. No.

Q. Are you a member of any political organizations?

A. I am an elected member of the Republican Central Committee, if that counts.

Q. You said you are an elected member. Is that the Montgomery County Republican—[17]

A. —Central Committee, yes.

Q. What is your title or status?

A. I'm just a member right now. I was former communications chair. But I stepped down from that position probably six months ago.

Q. And how long were you the communications chair?

A. From October of 2013 until probably summer of 2016.

Q. Okay. And do you recall when you—I don't know what the right word is—but like joined that committee?

A. Yes. It was October of 2013.

MS. KATZ: Okay.

A. I was appointed for a vacancy. And then I ran for election and was elected in 2014.

Q. Got it. And what do you do for the committee now as an elected member?

A. Not very much right now, to be honest. I'm not very active and involved right now.

Q. And what did you—what were your major responsibilities as the communications chair? [18]

A. I handled media requests. Anyone who wanted to speak to the chairman or ask for opinions on something that was happening politically, they wanted to—I handled social media.

Q. Okay. And why did you—I know you said that you were appointed in October of 2013.

A. Uh-huh.

Q. Why did you decide to become involved with that organization?

A. Well, there was an opening in my district. And I felt like that would be a good place to be involved and active, because I had spent so many years not involved and not active.

Q. So would you say that before October of 2013, you were not active in any political organizations?

A. Before 2010, I was not involved at all. And then I just slowly started becoming involved after 2010.

Q. What changed in 2010 that got you slowly getting involved?

A. I felt like the direction of our state was [19] going in a direction that was concerning me. And I wanted to be more informed and involved in perhaps the direction. I'm a lifelong Maryland resident. So, you know, I care about my community.

Q. Was there something specific about the direction Maryland was moving that concerned you?

A. Away from my personal values, I felt.

Q. What are those?

A. Just conservative—typical conservative values.

Q. What are those? What do you consider to be typical conservative values that you share?

A. Well, I—I—I think smaller, more accountable government, fiscal responsibility. I'm concerned about

our debt. You know, there is a lot of social issues in Maryland that are—do not align with my values that, you know, just concern me.

Q. Were you involved in Dan Bongino's congressional campaign in 2014?

A. Yes.

Q. How were you involved? [20]

A. I'm trying to think of—I had a title. I can't think. It's probably like an honorary title. What was my title in his campaign? I honestly can't remember. I basically helped get events, fundraising events, get people to events. I handled social media. I did a lot of photography and parades and door-knocking. I wasn't the Montgomery County coordinator so much, but I did a lot of those activities, just normal campaign canvassing, community events and things like that.

Q. Were you—were you a paid staffer?

A. No.

Q. So this was all volunteer?

A. Yes.

Q. Okay. Had you volunteered on any campaign before Dan Bongino's?

A. Not before his. I did volunteer on his Senate campaign. Prior to that, I had no political experience at all.

Q. Okay. Why did you get involved with the Bongino campaign? [21]

I met Dan at a conference and he had just become a candidate. I just really connected with him. I liked his message. I liked his energy and his concerns.

And it wasn't until a few months later that I joined his campaign. The first time I saw him speak, I really—I really liked his candidate platform.

Q. I'm sorry. I wasn't specific. Was this his 2012 Senate—

A. This was the Senate the first time I met him, yes. I liked him as a candidate, as a person.

Q. And is that why you decided to volunteer again in 2014?

A. Yes. I felt like that campaign was worth time and effort.

MS. KATZ: I'm going to mark this. Would you take a look at this?

(Whereupon, O'Connor Deposition Exhibit 53 was marked for identification and attached to the transcript.)

A. Yes. [22]

Q. Do you recognize that document?

A. Yes.

Q. What is it?

A. That is one of my e-mails.

Q. Do you recall in what capacity you sent this e-mail?

A. What is the date? 2013. It's—I don't know if I had officially joined the campaign at this time. But I was part of a women's group. So I could have been out canvassing, you know, as part of that group. I'm not sure.

Q. Who is the recipient up there of the e-mail?

A. It looks like Brad Botman.

Q. Who is that?

A. I don't know if he was on the central committee. He was like the support person. I'm not sure if he officially was on the committee.

Q. In the first sentence—I'm sorry.

A. I'm sorry. I think it's just a friendly exchange. But—

Q. In the first sentence of the e-mail, you [23] reference Dan.

A. Yes.

Q. Is that Dan Bongino?

A. Yes.

Q. Okay. In the e-mail, you reference that you talked to about 25 people while canvassing, and that only two had any idea who their congressman was.

Do you recall those conversations?

A. I mean, I did a lot of canvassing over the years. And conversations like that where just people who had zero political involvement, I don't know if they ever voted, they just—not only did they not know who their congressman was at that time, they never knew. That was my take-away from that.

Q. Okay. Thank you. Other than as part of your work as a volunteer on Dan Bongino's campaign, have you ever attended an event held by your congressional representatives?

A. No, I have not.

Q. Do you recall ever contacting your [24] congressional representatives' constituent services?

A. I have not.

Q. Have you ever contacted your congressional representative about a particular issue?

A. I probably would send representative Bartlett thank-you messages after a big vote. I just don't

recall. I don't think I have ever contacted John Delaney's office about anything.

Q. Why haven't you contacted him?

A. John Delaney's office? I just feel like it's not worth the time and effort. His mind is made up on every issue, and my time would be wasted by contacting him.

Q. What leads you to believe that his mind is made up on every issue?

A. I feel like he is going to vote—whatever the Democrats are going to put forward, he is going to vote with them on that issue. There is no leeway. I can't imagine—I don't really know that he ever did not do that, in fact.

Q. Do you recall when you first became [25] interested in the subject of redistricting?

A. I do not.

Q. Do you recall when you first learned about the 2011 redistricting plan? I'm talking about the 2011 congressional redistricting plan.

A. Obviously, I knew about it. I was not involved or—I had no—you know, I was involved in other things. I did not have any—I didn't put any effort into supporting or really not supporting it.

I really had no knowledge of what was going to happen or what the plan was.

Q. Did you take any action regarding the 2011 congressional redistricting plan?

A. I don't believe so, no.

Q. You didn't testify before the governor's redistricting advisory committee?

A. No.

Q. Did you post any public comments as to the plan revealed to the public?

A. I don't believe so. I wasn't on social media or anything. I don't think I did, no. [26]

Q. Are you aware that the congressional redistricting plan was petitioned to referendum?

A. Yes.

Q. Do you recall if you helped gather signatures for that petition drive?

A. I did not help gather signatures. I may have signed it. I probably most likely did sign it. I don't recall. I'm sure if there was one, I did sign it.

Q. Do you recall voting on the referendum?

A. Yes.

Q. Do you recall how you voted?

A. I'm sure I voted against—you know, I wanted to stop the redistricting. So however it was worded.

Q. Got it. Aside from joining this lawsuit, have you taken any other action about redistricting after the 2011 cycle?

A. No.

Q. How did you first hear about this lawsuit?

A. I believe information about it was sent to our central committee. And some of us did live in [27] the district and probably met the criteria.

Q. Do you know who sent the information to the central committee?

A. I do not. I'm sorry. I would guess it was another member on the committee was circulating it to our group.

Q. Why did you decide to join the lawsuit?

A. Because I think it's important. I live in Montgomery County. I have no Republican representative at the state or local county level, anywhere.

After this redistricting, I was left with—my one, you know, sort of piece of comfort in the political realm was taken away, I think intentionally.

Q. Do you think you were harmed by the 2011 congressional redistricting plan?

A. It ensured that I will no longer have representation. And I do not believe it's even a competitive district at this point.

Q. When you say it ensured that you will no longer have representation, what does that mean? [28]

A. I had a representative that shared my values and my views before the redistricting. And after, I don't see any way for any Republican candidate to win that district again because of the influx and the change in the voter make-up of that district.

MS. KATZ: I'm going to take a short break.

(Thereupon, there was a recess taken at 1:24 p.m.)

(Thereupon, the proceedings were resumed at 1:30 p.m.)

BY MS. KATZ:

Q. You had testified that you didn't think a Republican could win in the 6th congressional district.

A. Uh-huh.

Q. Did you believe that at the time you were volunteering for Dan Bongino's campaign?

A. I believe deep down, yes, I did believe that a Republican could not win, although Dan was a fantastic candidate, and he already had name [29] recognition from the Senate campaign.

And he had become a consultant for MSNBC, I believe, CNN, Fox News. He had great national exposure. And people across the country knew who he was. I thought wow, if anyone can, Dan could do it.

But I think it actually proved the point that even the best Republican candidate with that kind of exposure, which will probably never happen again, cannot win in that district.

Q. Do you think it hurt his campaign that he didn't live in the 6th district?

A. No. Because I don't think Mr. Delaney lives there either.

Q. And can you tell me why specifically you don't think a Republican can win in that district?

A. Because the numbers of voters for each party are wildly—you know, there is just too much of a gap between the number of voters in that district, the different parties.

Q. Do you actually know the numbers of the voters in that district? [30]

A. I don't. But I have seen the maps, and I know Montgomery County pretty well as far as their political views. And that big chunk of Montgomery County that was placed in that district just overwhelms the population, the density. Being out in Western Maryland, there is just not the population and the density to overcome that.

March 21, 2017 *Washington Post* article

BATTLES CONTINUE IN ANNAPOLIS OVER THE USE OF BAIL AND REDISTRICTING - THE WASHINGTON POST

By Ovetta Wiggins

The Maryland Senate gave preliminary approval Tuesday to a bill that would allow bail for criminal defendants even if they cannot afford to pay, potentially undoing a recent decision by the state's highest court and setting the stage for a battle with the more liberal House of Delegates and members of the state's Legislative Black Caucus.

After a prolonged debate, the Senate voted to advance the measure despite objections from Attorney General Brian E. Frosh (D) and advocates who say the legislation will lead to more poor defendants remaining in jail because they can't afford to post bond.

The Maryland Court of Appeals issued a rule change last month that required judges to impose the "least onerous" conditions when setting bail for a defendant who is not considered a danger or a flight risk.

Also Tuesday, after a short but lively debate, the Senate delayed action on another bill that is certain to lead to a showdown with Gov. Larry Hogan (R) over redistricting changes.

Democratic legislative leaders have backed a bill that would try to set up a Mid-Atlantic regional compact with New York, New Jersey, Pennsylvania, Virginia and North Carolina on redrawing congressional districts.

On Monday, a House committee voted against Hogan's redistricting proposal, which would have created

a nonpartisan commission to determine the boundaries for the state's congressional and legislative districts.

Sen. Craig J. Zucker (Montgomery), the lead sponsor of the Democratic bill, said redistricting is a national problem that has not been addressed on a federal level. The bill attempts to address it on a regional one, he said, adding: "This presents an opportunity for Maryland to take the lead."

The bill is contingent on the other states enacting similar legislation and would become void if the compact is not created by 2032. It is an attempt to circumvent political opposition to the idea of lawmakers in a heavily Democratic state, like Maryland, giving up control over redistricting while lawmakers in neighboring, Republican-majority states are allowed to keep that power.

"Congressional redistricting is a national problem that deserves a national solution," Senate President Thomas V. Mike Miller Jr. (D-Calvert) said. "However, when the federal government fails to lead, it is our responsibility to take the charge."

U.S. House Minority Whip Steny H. Hoyer (D-Md.) said in an interview that he supports the concept of the bill being pushed by Democratic state lawmakers, calling it "a step in the right direction but not as far as it ought to go."

Hoyer favors a bill pending in Congress that would institute a bipartisan redistricting commission in every state. An identical bill did not advance in the previous session and has yet to get a hearing this year.

"Now let me make it clear, I am a serial gerrymanderer," Hoyer said. "As long as North Carolina, Pennsylvania, Ohio and Florida, Texas, other states that I could name, pursue partisan redistricting, there's no reason to expect that those of us who are in

Democratic states won't do so as well. But what we ought to have is a national mandate that redistricting is to be done in a fair, balanced way through nonpartisan commissions."

State Senate Minority Leader J.B. Jennings (R-Baltimore County) called Zucker's bill "a joke" and asked why Democrats are "kicking the can down the road until other states do something."

"It's our state. It's our lines," Jennings said. "Why can't we just fix our problem right here in Maryland?"

A spokeswoman for the governor said the Democratic bill was a "political ploy designed to give the appearance of supporting redistricting reform while ensuring that it never actually happens."

On the bail bill, the Senate rejected several amendments that would have kept the rule set by the Court of Appeals in place. The court issued the rule change after Frosh raised questions about whether the state's use of cash bail was constitutional.

Sen. Robert A. Zirkin (D-Baltimore County) said the legislation, sponsored by Sen. C. Anthony Muse (D-Prince George's), gives discretion back to individual judges, allowing them to issue bail when they think it is appropriate.

Frosh and members of the Legislative Black Caucus had been pushing the legislature not to take action on any bail legislation this year and let the court's decision remain in place.

Last week, Del. Curtis S. Anderson (D-Baltimore), the House sponsor of the bail bill, withdrew his version of the Senate legislation after talking to court officials and deciding that lawmakers should wait and assess the impact of the rule change over the coming year.

In other action, the Senate gave initial approval to a bill that would prohibit school districts from suspending and expelling 4-year-olds. The measure would also limit other young students in kindergarten through second grade from receiving similar discipline.

Opponents of the bill argued that the measure will tie the hands of local districts; its supporters said young students should not be suspended or expelled unless they pose an "imminent threat."

More than 2,200 students in that age group were suspended or expelled last year, many because they were disruptive or disrespectful.

Nov. 3, 2015 *Baltimore Sun* editorial

The questions are simple, fundamental and almost as old as America itself: How, together, do we citizens end partisan gerrymandering and the political polarization it creates? In a two-party system, how do we check the General Assembly majority's incentive and ability to determine the partisan make-up of our state's congressional delegation by putting a heavy hand on the scale to get it?

Maryland steps to the center of a long, national search for answers this week. Today in Annapolis, a commission that spent the last two months examining the way Maryland draws congressional and state legislative districts will vote on their final recommendations to Gov. Larry Hogan. Tomorrow, in Washington, the U.S. Supreme Court will hear arguments in Shapiro v. McManus, a lawsuit I and two Republican voters filed to challenge the congressional lines state legislators and then-Gov. Martin O'Malley drew in 2011.

A century ago, the states ratified the 17th Amendment to the Constitution, giving voters the power to directly elect our U.S. Senators, who previously were appointed by the legislatures. Now, many states — not just Maryland — alter district lines to effectively determine the partisan make-up of their House delegations; they do so without the authority of a constitutional amendment giving them this role in lieu of the voters.

The underlying argument I and my co-plaintiffs are pursuing invites the justices to recognize minimum standards for redistricting based on the First Amendment and Article 1 of the Constitution. This would break the partisan stranglehold that has been exploited by Republicans in "red" states and by Democrats

here in Maryland and other "blue" states across the country.

Small segments of voters should not be tied by ribbons with very different voters from distant parts of the state — just because those voters have a history of supporting candidates inconsistent with the majority in the legislature. The poor quality of representation afforded by such districts cannot be justified by the desire of the legislature to so firmly determine the make-up of our House delegation.

Here in Maryland, the governor and legislature drew congressional districts that pretty much guarantee Democrats a 7-1 edge in the state's congressional delegation. As the district judge noted in his opinion in our case, Republicans have done almost exactly the same thing in states where they control the legislature. However, the Supreme Court has already held that in regulating congressional elections, the legislatures may not unduly influence the outcomes.

The specific issue before the court on Wednesday is whether our lawsuit and others like it can go forward in the first place. Congress has established special three-judge district courts to hear such cases, with direct appeals to the Supreme Court. However, a decade ago, the Fourth Circuit Court of Appeals, which covers Maryland, decided that a single judge must first decide if our legal theory is valid. In other states, the three-judge court makes that decision, followed by immediate review by the Supreme Court.

I'm a Democrat and proud of it. I served as the chair of my precinct in Bethesda for several years. I testified before the Governor's Redistricting Advisory Committee after the 2010 Census, but the districts that former Governor O'Malley and the legislature's presiding officers drew in 2011 offended me. We should

not so mute the political voices of our neighbors in other parts of the state; we are all Marylanders. I then worked with former Montgomery County Council member Phil Andrews, who was leading the effort in Montgomery County to bring the map to referendum in 2012 — as part of the state-wide effort started by Del. Neil Parrott.

I know that in Republican majority states, GOP legislatures have split neighborhoods and manipulated boundaries to give their party an unfair advantage. So I went to court, representing myself and co-plaintiffs in the U.S. District Court and the Court of Appeals, even without a legal education. Working on the case increased my interest in law, to the point that, at age 55, I'm now a first-year student at American University's Washington College of Law.

If the high court agrees with our argument, limits on gerrymandering would apply to congressional maps across America, reducing the incentive for legislatures to do this in the first place.

Common Cause and other citizen advocacy groups working on this problem picked up a key ally last year with the election of Governor Hogan, who made good on a campaign promise by appointing the reform commission and seems committed to pushing its proposals through the legislature. It was heartening to hear a member of the Democratic leadership like Sen. Conway suggest support for compact and contiguous districts, even if not for the full recommendations of the commission.

As a litigant and a proud Common Cause member, what's most exciting about all this is that the impetus for change is coming from citizens who've seen a problem and have resolved to tackle it. America was founded on the principle that power should flow from "we the

people." That's what our Constitution says. The growing redistricting reform movement is evidence that that idea remains relevant today.

Defendants' Second Supplemental Responses to Plaintiffs' First Set of Requests for Admissions

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, ET AL.,
PLAINTIFFS,
V.
LINDA H. LAMONE, ET AL.,
DEFENDANTS.

CASE NO. 13-CV-3233

DEFENDANTS' SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants Linda H. Lamone and David J. McManus, Jr., state as follows for their responses and objections to Plaintiffs' First Set of Requests for Admissions.

PRELIMINARY STATEMENT

The following responses are based on the Defendants' knowledge, information, and belief, and are complete to the best of their knowledge at this time. The Defendants assume no obligation to supplement or amend voluntarily these responses beyond applicable legal requirements to reflect information, evidence, documents, or things discovered following service of these responses. Furthermore, these responses were prepared based on the Defendants' good faith interpretation and understanding of the Plaintiffs' requests and are subject to correction for inadvertent errors or

omissions, if any. These responses are given without prejudice to subsequent revision, amendment, or supplementation based upon any information, evidence, and documentation that hereinafter may be discovered.

The Defendants reserve the right to refer to, or to offer into evidence at the time of trial, any and all facts, evidence, documents, and things developed during the course of discovery and trial preparation, notwithstanding the reference to facts, evidence, documents, and things in these responses.

The Defendants reserve all objections or other questions as to the competency, relevance, materiality, privilege or admissibility of evidence in any subsequent proceeding of their responses and of any information or documents produced in response thereto.

The Defendants state that, except for facts explicitly admitted herein, no admission of any nature whatsoever is to be implied or inferred from their responses. The fact that the Defendants have responded to a request should not be taken as an admission, or a concession of the existence of any fact set forth, inferred or assumed by such request, or that such response constitutes evidence of any fact thus set forth, inferred, or assumed.

The Defendants' decision to respond to any request, notwithstanding the objectionable nature of any of the requests themselves, is not: (a) an acceptance of, or agreement with, any of the characterizations or purported descriptions of the transactions or events contained in the requests; (b) a concession or admission that the material is relevant to this proceeding; (c) a waiver of the General Objections or of the objections asserted in any specific response; (d) an admission that any such information exists; or (e) an agreement that

responses for similar information will be treated in a similar manner.

GENERAL OBJECTIONS

The Defendants' responses are subject to, qualified by, and limited by the following General Objections, which apply to each specific request as if incorporated and set forth in full in each response.

1. The Defendants object to these requests to the extent they seek material that is not relevant to the subject matter involved in this action or is beyond the scope of what is required to be provided by the Federal Rules of Civil Procedure, the local rules of this Court, or the Orders of the Court in this matter.

2. The Defendants object to these requests to the extent that they are overbroad, oppressive, duplicative, or cumulative.

3. The Defendants object to these requests to the extent that they are vague, ambiguous, fail to specify with reasonable particularity the information sought, or otherwise are incomprehensible.

4. The Defendants object to these requests to the extent that they require the Defendants to make legal conclusions, and/or presuppose legal conclusions or assume the truth of matters that are disputed.

5. The Defendants object to these requests to the extent that they seek admissions regarding information not available to the Defendants and/or that calls for information that is not within the Defendants' possession, custody, or control.

6. The Defendants object to these requests to the extent that they seek information that is protected from disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, executive or

legislative privilege, or otherwise is privileged, protected, or exempt from discovery.

7. In addition to these General Objections, the Defendants also state, where appropriate, other specific objections to individual requests. By setting forth such specific objections, the Defendants neither intend to, nor do, limit or restrict or waive the General Objections, which shall be deemed incorporated in each of the responses to the specific requests that follow, though not specifically referred to or restated therein.

RESPONSES

1. Members of the GRAC considered Maryland voters' political party affiliations when drawing the boundaries of the Sixth Congressional District.

Response 1: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations.

Supplemental Response 1: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, members of the GRAC have indicated their intent to assert legislative and executive privilege as to their decision making and thought processes related to drawing the Proposed Congressional Plan. Subject to and without waiving those objections, the Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the

public that includes voters' political party affiliations, and the Defendants further admit that this voter registration data was available to the GRAC.

Second Supplemental Response 1: Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations, and the Defendants further admit that this voter registration data was available to the GRAC. Defendants are unable to admit or deny the statement as written because it is unclear what is meant by "considered" or "Maryland voters'". Defendants further admit that members of the GRAC, as active participants in Maryland politics, each had a general awareness of party affiliation trends and patterns in Maryland. Defendants deny that any member of the GRAC, as opposed to GRAC staff, drew the boundaries of the Sixth District. After reasonable inquiry and because members of the GRAC do not specifically recall the details of their service on the GRAC after six intervening years, Defendants do not have enough information to admit or deny, and therefore deny, that any specific GRAC member considered any data reflecting any Maryland voter's party affiliation, or Maryland voters' party affiliations generally, when approving the proposed congressional plan.

2. Members of the GRAC considered Maryland voters' voting histories when drawing the boundaries of the Sixth Congressional District.

Response 2: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, De-

fendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories.

Supplemental Response 2: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, members of the GRAC have indicated their intent to assert legislative and executive privilege as to their decision making and thought processes related to drawing the Proposed Congressional Plan. Subject to and without waiving those objections, the Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories, and the Defendants further admit that this voter registration data was available to the GRAC.

Second Supplemental Response 2: Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories, and the Defendants further admit that this voter registration data was available to the GRAC. Defendants are unable to admit or deny the statement as written because it is unclear what is meant by "considered" or "Maryland voters"". Defendants further admit that members of the GRAC, as active participants in Maryland politics, each had a general awareness of party affiliation trends and patterns in Maryland. Defendants deny that any member of the GRAC, as opposed to GRAC staff, drew the boundaries of the Sixth District. Defendants admit that Richard Stewart recalls reviewing voter turnout data in relation to the location of polling places. After reasonable inquiry and because

members of the GRAC do not specifically recall the details of their service on the GRAC after six intervening years, Defendants do not have enough information to admit or deny, and therefore deny, that any specific GRAC member considered any data reflecting Maryland voter's voting histories, or Maryland voters' voting histories generally, when approving the proposed congressional plan.

3. The Governor considered Maryland voters' political party affiliations when approving the Proposed Congressional Plan, introducing the Proposed Congressional Plan to the Maryland General Assembly, and/or signing the Proposed Congressional Plan into law.

Response 3: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations.

Supplemental Response 3: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, Governor O'Malley has indicated his intent to assert legislative and executive privilege as to his decision making and thought processes related to introducing the Proposed Congressional Plan to the Maryland General Assembly, and/or signing the Proposed Congressional Plan into law. Subject to and without waiving those objections, the Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that in-

cludes voters' political party affiliations, and the Defendants further admit that this voter registration data was available to the GRAC, which submitted the Proposed Congressional Plan to Governor O'Malley for his approval.

Second Supplemental Response 3: Defendants are unable to admit or deny the statement as written because it is unclear what is meant by "considered" or "Maryland voters'". Defendants admit that Governor O'Malley, as the result of his long political career, possesses an intuitive sense of political party affiliation patterns as they relate to Maryland geography. Defendants further admit that Governor O'Malley's involvement in the 2011 congressional redistricting process included asking his staff about particular voter registration data in relation to a particular geographic area, at the precinct level or above, if the need arose to consider that data for purposes of evaluating the Proposed Congressional Plan. Defendants admit that Governor O'Malley considered the information already known to him and the specific information provided to him orally by staff in approving the Proposed Congressional Plan. Defendants deny that Governor O'Malley considered or asked for individual voter registration information or examined party registration data in written or visual formats for the purposes of evaluating the Proposed Congressional Plan.

4. The Governor considered Maryland voters' voting histories when approving the Proposed Congressional Plan, introducing the Proposed Congressional Plan to the Maryland General Assembly, and/or signing the Proposed Congressional Plan into law.

Response 4: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the

truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories.

Supplemental Response 4: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, Governor O'Malley has indicated his intent to assert legislative and executive privilege as to his decision making and thought processes related to introducing the Proposed Congressional Plan to the Maryland General Assembly, and/or signing the Proposed Congressional Plan into law. Subject to and without waiving those objections, the Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories, and the Defendants further admit that this voter registration data was available to the GRAC, which submitted the Proposed Congressional Plan to Governor O'Malley for his approval.

Second Supplemental Response 4: Defendants are unable to admit or deny the statement as written because it is unclear what is meant by "considered," "Maryland voters', or "voting history." Defendants admit that Governor O'Malley, as the result of his long political career, possesses an intuitive sense of voter turnout patterns as they relate to Maryland geography. Defendants admit that Governor O'Malley considered the information already known to him and any specific information provided to him orally by staff in approving the Proposed Congressional Plan. Defendants deny that Governor O'Malley considered or asked for individual voter turnout information or examined

turnout data in written or visual formats for the purposes of evaluating the Proposed Congressional Plan.

5. Members of the Maryland General Assembly considered Maryland voters' political party affiliations when enacting the Proposed Congressional Plan.

Response 5: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations.

Supplemental Response 5: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege. Through counsel, members of the Maryland General Assembly involved in drafting the Proposed Congressional Plan have indicated their intent to assert legislative privilege as to their decision making and thought processes related to the Proposed Congressional Plan. Further, it would be unduly burdensome for the Defendants to make inquiries of all 188 members of the General Assembly who voted for the Proposed Congressional Plan, and the subjective intent of those legislators in voting for the Plan is irrelevant to this case. Subject to and without waiving their objections, the Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations. Defendants further admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF

No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that the audio recordings of the Senate Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_senate_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

that audio recordings of the House Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_house_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic.

Second Supplemental Response 5: Defendants, after reasonable inquiry, do not have enough information to admit or deny the statement as written. The Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations. Defendants further admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that the audio recordings of the Senate Floor proceedings on SB1 are available at:

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and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic.

6. Members of the Maryland General Assembly considered Maryland voters' voting histories when enacting the Proposed Congressional Plan.

Response 6: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' voting histories.

Supplemental Response 6: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege. Through counsel, members of the Maryland General Assembly involved in drafting the Proposed Congressional Plan have indicated their intent to assert legislative privilege as to their decision making and thought processes related to the Proposed Congressional Plan. Further, it would be unduly burdensome for the Defendants to make inquiries of all 188 members of the General Assembly who voted for the Proposed Congressional Plan, and the subjective intent of those legislators in voting for the Plan is irrelevant to this case. Subject to and without waiving those objections, the Defendants admit that the Mary-

land State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations. Defendants further admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that the audio recordings of the Senate Floor proceedings on SB1 are available at: http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_senate_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

that audio recordings of the House Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_house_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic.

Second Supplemental Response 6: Defendants, after reasonable inquiry, do not have enough information to admit or deny the statement as written. Defendants admit that the Maryland State Board of Elections compiles aggregated voter registration data that is available to the public that includes voters' political party affiliations. Defendants further admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that

the audio recordings of the Senate Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_senate_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

that audio recordings of the House Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_house_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic.

7. A motivation of members of the GRAC in drafting the Proposed Congressional Plan was to make it more likely that a Democrat would be elected as representative from the Sixth Congressional District.

RESPONSE 7: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Supplemental Response 7: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, members of the GRAC have indicated their intent to assert legislative and executive privilege as to their decision making and thought processes related to drawing the Proposed Congressional Plan. Subject to and without waiving those objections, the Defendants admit that a

Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Second Supplemental Response 7: Defendants deny that any member of the GRAC personally drafted a Proposed Congressional Plan. Defendants deny that it was a motivation of Senate President Miller in approving the plan to make it more likely that a Democrat would be elected as representative from the Sixth Congressional District. Defendants do not have enough information to admit, and therefore deny, that a motivation of Speaker Michael Busch, Richard Stewart or Jeanne Hitchcock in approving the Proposed Congressional Plan was to make it more likely that a Democrat would be elected as representative from the Sixth District.

8. A motivation of the Governor in introducing the Proposed Congressional Plan to the Maryland General Assembly and in signing it into law was to make it more likely that a Democrat would be elected as representative from the Sixth Congressional District.

RESPONSE 8: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Supplemental Response 8: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative and executive privileges. Through counsel, Governor O'Malley has indicated his intent to assert legislative and executive privilege as to his decision making

and thought processes related to introducing the Proposed Congressional Plan to the General Assembly and signing it into law. Subject to and without waiving those objections, the Defendants admit that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Second Supplemental Response 8: Admitted.

9. A motivation of members of the Maryland General Assembly in enacting the Proposed Congressional Plan was to make it more likely that a Democrat would be elected as representative from the Sixth Congressional District.

RESPONSE 9: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Supplemental Response 9: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege. Through counsel, members of the Maryland General Assembly involved in drafting the Proposed Congressional Plan have indicated their intent to assert legislative privilege as to their decision making and thought processes related to the Proposed Congressional Plan. Further, it would be unduly burdensome for the Defendants to make inquiries of all 188 members of the General Assembly who voted for the Proposed Congressional Plan, and the subjective intent of those legislators in voting for the Plan is irrelevant to this case. Subject to and without waiving

those objections, Defendants admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that the audio recordings of the Senate Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_senate_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

that audio recordings of the House Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_house_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1,

and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic. Defendants further admit that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

Second Supplemental Response 9: Defendants, after reasonable inquiry, do not have enough information to admit or deny the statement as written. Defendants admit that the articles attributing statements to individual Members of the General Assembly identified in paragraphs 40-50 of the Joint Stipulations (ECF No. 104) are authentic, that videotapes of individual Members of the General Assembly identified in paragraphs 63-65 and 70 of the Joint Stipulations (ECF No. 104) are authentic, that the audio recordings of the Senate Floor proceedings on SB1 are available at:

http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_senate_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1, that audio recordings of the House Floor proceedings on SB1 are available at: http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2011s1_house_audio&stab=02&pid=legisnlist&tab=subject3&ys=2011s1, and that the audio file of the joint committee hearing on SB1, produced to the plaintiffs as Exhibit 8 to defendants' proposed joint stipulations, is authentic. Defendants further admit that a Democrat has been elected as representative from the Sixth Congressional District in 2012, 2014, and 2016.

10. In her presentation to the House and Senate Democratic Caucuses about the proposed plan on October 3, 2011, GRAC Chair Jeanne Hitchcock stated that the GRAC's proposed map would make it more likely that a Democrat would be elected as the representative from the Sixth Congressional District.

RESPONSE 10: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege and that the Request assumes the truth of matters of which Defendants lack knowledge. Subject to and without waiving those objections, Defendants admit only that GRAC Chair Jeanne Hitchcock briefed the House and Senate Democratic Caucuses about the proposed plan on October 3, 2011.

SUPPLEMENTAL RESPONSE 10: In addition to their General Objections, Defendants object on the grounds that the Request seeks information protected by legislative privilege. The Defendants admit that GRAC Chair Jeanne Hitchcock briefed the House and Senate Democratic Caucuses about the proposed plan

on October 3, 2011. Through counsel, former GRAC Chair Jeanne Hitchcock has indicated her intent to assert legislative privilege as to her statements made during these briefings. Without waiving that privilege as to any particular statement that she may have made at briefings that occurred over five years ago, Ms. Hitchcock does not believe that she made the statement attributed to her in this request for admission.

SECOND SUPPLEMENTAL RESPONSE 10: Notwithstanding their general objections, the Defendants admit that GRAC Chair Jeanne Hitchcock briefed the House and Senate Democratic Caucuses about the proposed plan on October 3, 2011. Because Ms. Hitchcock cannot recall any particular statement that she may have made at briefings that occurred over five years ago and does not believe that she made the statement attributed to her in this request for admission, Defendants do not have enough information to admit, and therefore deny that Ms. Hitchcock made this statement.

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Dated: June 2, 2017 Attorneys for Defendants

Second Declaration of Yaakov Weissmann

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, et al ,

Plaintiffs,

v.

LINDA H. LAMONE., et al.,

Defendants.

Case No. 13-cv-3233

SECOND DECLARATION OF YAAKOV WEISSMANN

I, Yaakov Weissmann, under penalty of perjury, declare and state:

1. I, Yaakov "Jake" Weissmann, am over the age of eighteen and competent to testify on the matters stated below.

2. I have reviewed the July 10, 2017 Declaration of Professor Michael McDonald filed in this case as ECF 191-5. In that document, Professor McDonald draws conclusions from the dates of files produced to plaintiffs from my laptop and from the file names assigned to the files.

3. The dates of files produced to plaintiffs are not reflective of the date of last substantive change to the map. We would regularly send plans to the Department of Planning, the Department of Legislative Services, or others to obtain technical input. Cleaned up maps (correcting missing medians for example) would be uploaded in place of the old maps after the maps were received from these other State entities.

4. Other than the map described in paragraph 8 of my June 29, 2017 declaration, I do not remember receiving additional draft maps from the Congressional delegation or NCEC. The file names "Congressional Option 1" and "Congressional Option 2" were chosen by me to mark these draft maps as the main options to be considered by decisionmakers for the congressional plan. We were contemporaneously also drafting maps related to legislative districts, and I used these names to indicate that these were maps for the statewide congressional districts. I do not recall what particular factors led me to choose these names for "Congressional Option 1" and "Congressional Option 2" compared with "111012 Group", "111012 Group2", and "111012 Group Zeroed Out," other file names mentioned by Professor McDonald.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

8/1/17 /s/

Date Yaakov Weissmann

U.S. Census Bureau on Race

Race

About

The U.S. Census Bureau must adhere to the 1997 Office of Management and Budget (OMB) standards on race and ethnicity which guide the Census Bureau in classifying written responses to the race question:

White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Black or African American—A person having origins in any of the Black racial groups of Africa.

American Indian or Alaska Native—A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment.

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

The 1997 OMB standards permit the reporting of more than one race. An individual's response to the race question is based upon self-identification.

The Census Bureau does not tell individuals which boxes to mark or what heritage to write in. For the first time in Census 2000, individuals were presented with the option to self-identify with more than one race

and this continued with the 2010 Census. People who identify with more than one race may choose to provide multiple races in response to the race question. For example, if a respondent identifies as "Asian" and "White," they may respond to the question on race by checking the appropriate boxes that describe their racial identities and/or writing in these identities on the spaces provided.

What is Race?

The data on race were derived from answers to the question on race that was asked of individuals in the United States. The Census Bureau collects racial data in accordance with guidelines provided by the U.S. Office of Management and Budget (OMB), and these data are based on self-identification.

The racial categories included in the census questionnaire generally reflect a social definition of race recognized in this country and not an attempt to define race biologically, anthropologically, or genetically. In addition, it is recognized that the categories of the race item include racial and national origin or sociocultural groups. People may choose to report more than one race to indicate their racial mixture, such as "American Indian" and "White." People who identify their origin as Hispanic, Latino, or Spanish may be of any race.

OMB requires five minimum categories: White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander.

Reasons for Collecting Information on Race

Information for race is required for many Federal programs and is critical in making policy decisions, particularly for civil rights. States use these data to meet legislative redistricting principles. Race data also

are used to promote equal employment opportunities and to assess racial disparities in health and environmental risks.

Contact Us

For assistance, please contact the Census Call Center at 1-800-923-8282 (toll free) or visit ask.census.gov for further information.

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No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court
For The District Of Maryland

JOINT APPENDIX
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Sharon Strine
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Frederick County

Plaintiffs,

vs.

David J. McManus, Jr.,* **et al.,**
in their official capacities,

Defendants.

Case No. 13-cv-3233

Three-Judge Court

SECOND AMENDED COMPLAINT

* By operation of Federal Rule of Civil Procedure 25(d), David J. McManus, Jr., in his official capacity as Chair of the Maryland State Board of Elections, is automatically substituted for defendant Bobby S. Mack.

Plaintiffs Stephen M. Shapiro, Maria A. Pycha, O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine, for their complaint against defendants Linda H. Lamone and David J. McManus, Jr., in their official capacities, allege by and through their attorneys, as follows.

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INTRODUCTION

1. This is a constitutional challenge to Maryland's 2011 congressional redistricting plan (the "Plan," attached as Exhibit A), and specifically to the "cracking" of Maryland's 6th Congressional District, which was purposefully and successfully flipped from Republican to Democratic control by strategically moving the district's lines by reason of citizens' voting records and known party affiliations.

2. Voters in Maryland and throughout the Nation ought to be able to organize politically, to support political campaigns, to register with their preferred political parties, and to vote for their preferred candidates without fear that—if they succeed in electing the public officials of their choice—they will be retaliated against by the legislature. Yet that is just what the Maryland legislature did when it enacted the Plan in 2011.

3. In 2010, registered Republican voters—comprising 32% of the party-affiliated registered voters in Maryland—were able to elect two of the eight members of the House of Representatives from Maryland, those from the 1st and the 6th Congressional Districts. But in 2011, the Democratic-controlled Maryland legislature violated the First Amendment and Article I of the Federal Constitution when it used data reflecting the political party memberships, party registrations, and voting histories of Republican and Democratic voters in the 6th and surrounding districts to gerrymander the 6th District for the purpose and with the effect of enhancing the effectiveness of votes cast in favor of Democratic candidates and diluting the effectiveness of votes cast in favor Republican candidates in the general election for a representative from the 6th District.

4. The legislature gerrymandered the boundaries of the 6th District to remove a net total of over 65,000 registered Republican voters from the district (and disburse them among surrounding districts with large Democratic majorities) and add a net total of over 30,000 Democratic voters to the district. The purpose and the effect of this cracking of the

6th District was to nullify the ability of Republican voters in the former 6th District to elect a Republican of their choice to Congress and to the prevent them from reelecting Representative Roscoe Bartlett, the 20-year Republican incumbent from the 6th District, in the 2012 general election. That purpose was achieved: In 2012 congressional election, the 6th District was flipped by the Plan from Republican to Democratic control. The district remained under Democratic control after the 2014 congressional election and is nearly certain to remain so in all future congressional elections under the Plan.

5. The Plan is widely regarded as one of the worst partisan gerrymanders in American history. Earlier in this case, Judge James K. Bredar of this Court acknowledged that "[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts . . . fail to provide 'fair and effective representation for all citizens.'" *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md.) *aff'd*, 584 F. App'x 140 (4th Cir. 2014) *rev'd sub nom. Shapiro v. McManus*, 136 S. Ct. 450 (2015). And in separate litigation challenging the Plan on different grounds, Judge Paul Niemeyer observed that "[m]any obvious communities of interest are divided" and the 3rd District is so contorted that it is "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the state." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 n. 5 (D. Md. 2011) *summarily aff'd*, 133 S. Ct. 29 (2012).

6. The Plan is manifestly unconstitutional. The drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to draw district lines. And it did so with the clear purpose and effect of diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress. In particular, the legislature succeeded in "cracking" the formerly Republican 6th District, where a Republican bloc of voters was divided by the Plan among the 1st, 6th, 7th and 8th Districts, giving the Democrats a majority in the new 6th District and allowing them to flip the seat to Democratic control.

7. A State violates the First Amendment when it "enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). A three-part analysis demonstrates that Maryland's 2011 partisan gerrymander violates the First Amendment in just this way.

a. *First*, the Maryland legislature expressly and deliberately considered Republican voters' protected First Amendment conduct, including their voting histories and political party affiliations, when it redrew the lines of the 6th Congressional District; and it did so with an intent to disfavor and punish those voters by reason of their constitutionally protected conduct.

b. *Second*, the Plan, in actual effect, has burdened Republican voters in the former 6th Congressional District. Republican voters in the former 6th District would have been able to elect a Republican representative in 2012 and 2014, but for the cracking of the district under the Plan. In other words, the vote dilution resulting from the cracking of the 6th District achieved its goal of preventing Republicans in the former 6th District from continuing to elect a Republican representative to the United States House of Representatives, as they had in the prior ten congressional elections.

c. *Finally*, the State cannot justify the cracking of the 6th District by reference to geography or compliance with legitimate redistricting criteria.

8. The injury inflicted on Republican voters in this case is, moreover, clear and perceptible. Prior to enactment of the Plan, Republican voters comprised a sufficiently great share of the 6th District that they were reliably able to elect a Republican representative. In the 70 years between January 1943 and January 2013, the district was represented in Congress by members of the Republican Party in four years out of every five, including for the entire two decades between 1993 and 2013. But after the Plan cracked the

6th District in 2011, Republicans kept *in* the 6th District and those moved *out* of the 6th District were no longer able to elect their preferred representative to the House—precisely as the mapmakers, legislators, and governor intended.

9. Maryland's 2011 redistricting plan therefore violates the First Amendment. The legislature adopted the contorted districts at issue here—and the shapes of the 1st, 6th, 7th, and 8th Districts in particular—with an eye to citizens' voting histories and party affiliations and with the purpose of punishing Republicans and preventing them from electing a Republican representative from the 6th District. The legislature succeeded in its efforts. And there is no plausible justification for the Plan's cartographic convolutions to save it from invalidation.

10. The Plan accordingly should be declared a violation of the First Amendment and of Article I, Sections 2 and 4 of the Constitution; the defendants should be enjoined from enforcing the Plan at any stage of any future election; and the legislature should be ordered to enact a new and valid plan within a reasonable time.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a), and 2284(a) and 42 U.S.C. § 1983. It has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and its general equitable powers.

12. Venue is proper in this district under 28 U.S.C. § 1391(b) because the defendants are domiciled in this district and because a substantial part of the events or omissions giving rise to the claims asserted occurred in this district.

THE PARTIES

A. The plaintiffs

13. Plaintiffs are qualified, registered voters in the State of Maryland. Together with other supporters of the Republican Party, plaintiffs have been harmed by the Plan's

unlawful partisan gerrymander because it burdens citizens by reason of their voting history and political party affiliation.

14. Stephen M. Shapiro is a citizen of the United States and a resident of and registered voter in Maryland. He was a registered Democrat but occasionally voted for Republican candidates prior to 2011. Before enactment of the Plan, Mr. Shapiro's residence was in the 8th Congressional District. Following enactment of the Plan, his residence remains in the 8th Congressional District. He has since continued occasionally to support Republican candidates and policies and will continue doing so from time to time.

15. Maria A. Pycha is a citizen of the United States and a resident of and registered voter in Maryland. She was a registered Republican and voted for Republican candidates prior to 2011. She has since continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office. Ms. Pycha is the Vice Chair of the Baltimore County Republican Central Committee and served as the finance director for the campaign committee of the 2014 Republican nominee for United States House of Representatives from the 6th District, Dan Bongino.

16. O. John Benisek is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Mr. Benisek's residence was in the 6th Congressional District. Following enactment of the Plan, his residence remains in the 6th Congressional District. He was a register[illegible] Republican and voted for Republican candidates prior to 2011. He has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office.

17. Edmund Cueman is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Mr. Cueman's residence was in the 6th Congressional District. As a result of the Plan, his residence is now in the 8th Congressional District. He was a registered Republican and voted for Republican can-

didates prior to 2011. He has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office.

18. Jeremiah DeWolf is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Mr. DeWolf's residence was in the 6th Congressional District. Following enactment of the Plan, his residence remains in the 6th Congressional District. He was a registered Republican and voted for Republican candidates prior to 2011. He has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office. Mr. DeWolf is a member of the Washington County Republican Central Committee.

19. Charles W. Eyler, Jr., is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Mr. Eyler's residence was in the 6th Congressional District. As a result of the Plan, his residence is now in the 8th Congressional District. He was a registered Republican and voted for Republican candidates prior to 2011. He has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office.

20. Kat O'Connor is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Ms. O'Connor's residence was in the 6th Congressional District. Following enactment of the Plan, her residence remains in the 6th District. She was a registered Republican and voted for Republican candidates prior to 2011. She has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office. Ms. O'Connor serves as the Communications Chair for the Montgomery County Republican Central Committee.

21. Alonnie L. Ropp is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Ms. Ropp's residence was in the 6th Congressional District. As a result of the Plan, her residence is now in the 8th

Congressional District. She was a registered Republican and voted for Republican candidates prior to 2011. She has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office. Ms. Ropp formerly served as the Chair for the Frederick County Republican Central Committee.

22. Sharon Strine is a citizen of the United States and a resident of and registered voter in Maryland. Before enactment of the Plan, Mrs. Strine's residence was in the 6th Congressional District. As a result of the Plan, her residence is now in the 8th Congressional District. She was a registered Republican and voted for Republican candidates prior to 2011. She has continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office. Mrs. Strine served as the campaign manager for the 2014 Republican nominee for United States House of Representatives from the 6th District, Dan Bongino.

B. The defendants

23. David J. McManus, Jr., is the chairman of the Maryland State Board of Elections, acting in his official capacity.

24. Linda H. Lamone is the Maryland State Administrator of Elections, acting in her official capacity.

25. The mission of the Maryland State Board of Elections is to ensure compliance with the requirements of Maryland and federal election laws by all persons involved in the election process. It bears responsibility for administering federal elections under the Plan.

CONCEPTUAL AND LEGAL FRAMEWORK

A. What partisan gerrymandering does

26. The crux of every partisan gerrymander is the dominant party's effort to dilute the effectiveness of the votes in favor of the disfavored party. *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*,

82 U. Chi. L. Rev. 831, 834 (2015). This complaint refers to the political party that controls redistricting as the "dominant party" and to the party whose votes are intentionally diluted through redistricting as the "disfavored party."

27. The goal of a partisan gerrymander is to punish the disfavored party's supporters by reason of their support for the disfavored party, with the specific aim of preventing those supporters from electing their preferred elected officials. According to the Supreme Court, the goal is, in other words, "to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

28. This end is achieved by drawing district lines so that the dominant party wins a large number of seats by narrow margins and the disfavored party wins a small number of seats by wide margins. These two strategies are often called "cracking" (splitting a party's supporters between districts so they fall short of a majority in each one) and "packing" (stuffing remaining supporters in a small number of districts that they win by wide margins). See generally *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (describing cracking and packing); Stephanopoulos & McGhee, *supra*, at 851 (same). All partisan gerrymanders work through some combination of packing and cracking. The net result is to dilute the efficiency and effect of the votes of the disfavored party's supporters.

29. Although partisan gerrymandering is nothing new (*see, e.g.*, Elmer C. Griffith, *The Rise and Development of the Gerrymander* (1907)), it has never before in the Nation's history so systemically undermined the Constitution's promise of representative democracy. *See generally* Thomas E. Mann & Norman J. Ornstein, *It's Even Worse Than It Looks: How The American Constitutional System Collided with the New Politics of Extremism* (2012). As a result of both increasing partisanship and more sophisticated voter data collection and analysis, map-drawers in recent decades have been able to create

redistricting plans in ways that crack and pack with unprecedented efficiency and accuracy. *See generally* Stephanopoulos & McGhee, *supra*, at 876; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering* 9-12 (Dec. 2015), perma.cc/W52P-MQG3 (forthcoming in the Stanford Law Review, vol. 68).

30. Severe gerrymanders are self-reinforcing and cannot be corrected through the political process. Incumbent state legislators have no incentive to fix an unfair gerrymander, which by definition benefits them and their colleagues in the State's federal delegation; and adherents of the disfavored party are unable to replace the entrenched legislators because their votes have been unfairly diluted. More broadly, gerrymandering has come to be seen as a national "war" in which singular state legislatures are unwilling to "disarm" unilaterally. *See, e.g.*, Jamie Raskin & Rob Richie, *Fair representation for all*, The Balt. Sun (Nov. 7, 2011), perma.cc/QLP5-6QP8.

B. Why partisan gerrymandering violates the Constitution

31. A successful partisan gerrymander of congressional districts violates the Constitution in two ways.

32. *First*, it violates the First Amendment when it burdens the supporters of a political party by reason of their protected First Amendment conduct—that is, by reason of the expression of their political views, the casting of their votes, and their affiliations with political parties of their choice. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

33. That straightforward conclusion finds repeated support in the Supreme Court's precedents. If a burden were imposed on citizens "because of [their] constitutionally protected speech or associations," the Court has said, "[their] exercise of those freedoms would in effect be penalized and inhibited." *Elrod v. Burns*, 427 U.S. 347, 359 (1976). On that theory, "[a] burden that falls unequally on [particular] political parties, . . . impinges,

by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

34. Thus, a redistricting map can violate the First Amendment when it "has the purpose and effect of burdening a group of voters' representational rights." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). "If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.*

35. *Second*, and for the same reasons, a successful partisan gerrymander violates the representational rights protected by Article 1, Sections 2 and 4. Although Section 4, also known as the Elections Clause, "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections," the Supreme Court has admonished that it is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-834 (1995); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)).

36. As States undertake their duties under Article I of the Constitution, therefore, "no classification of the people can be made to advance the state legislature's preference for one class [of voters] to the detriment of another." *Anne Arundel Cty. Republican Cent. Comm.* v. *State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402 (D. Md. 1991) (Niemeyer, J., dissenting). That is because Article I, like the First Amendment, implies "[a] prohibition . . . against classifications that are based on how the voters voted and can be expected to vote, for the purpose of steering the outcome of an election." *Id.* at 403.

C. The burden imposed by a partisan gerrymander

37. The gerrymander in this case clearly and concretely "burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political

association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). Justice Kennedy found the claims in *Vieth* insufficient because the plaintiffs in that case failed to provide a "standard by which to measure the burden . . . imposed on their representational rights" on a statewide basis. *Id.* at 313. *Cf. LULAC v. Perry*, 548 U.S. 399, 404 (2006) (rejecting a redistricting claim based on a "sole-motivation theory," where the plaintiffs "explicitly disavow[ed]" a need to "show a burden, as measured by a reliable standard, on the complainants' representational rights").

38. The same cannot be said here. Maryland legislators and their mapmakers set out to crack the 6th District and thereby to prevent voters in that district from electing a Republican representative to Congress—*and they succeeded in doing so*. Maryland legislators and their mapmakers sorted many Republican voters in the pre-2011 6th Congressional District into the new 8th and 7th Congressional Districts, leaving other Republican voters in the new 6th Congressional District, all by reason of those voters' political party affiliations and voting histories. They did so with a purpose and actual effect of preventing those voters (both those moved out of and those left in the district) from electing their preferred representative to Congress.

FACTUAL ALLEGATIONS

A. The Plan was drafted in secret by known partisans and passed by the legislature and signed by Governor O'Malley with no Republican input and no opportunity for public review

39. The Plan was drawn up by the Governor's Redistricting Advisory Committee (the GRAC) and enacted into law without any meaningful Republican input.

40. The Plan was passed against the backdrop of pervasive gerrymandering throughout Maryland's recent history. In fact, the Democratic Party has maintained majority control over the House of Delegates and State Senate since 1920, and to a degree far greater than the party's statewide share of votes would predict.

41. The state legislature has been dogged by allegations of partisan gerrymandering for the past 20 years, in particular. In 1992, Maryland's highest court called the legislative redistricting plan "perilously close" to violating the state's constitution. *See Legislative Redistricting Cases*, 629 A.2d 646, 666 (Md. 1993).

42. In 2002, the Maryland Court of Appeals struck down the state legislative redistricting map for violating the "due regard" provision of the Maryland Constitution and instituted its own districting plan. *See In re Legislative Redistricting*, 805 A.2d 292, 328 (Md. 2002). The current legislative map was also drawn up by GRAC in 2011 and has faced persistent litigation since it was implemented. *See In re 2012 Legislative Districting of the State*, 80 A.3d 1073 (Md. 2013).

43. In early 2011, Governor O'Malley, a Democrat, appointed the five members of the GRAC, stacking it with reliably partisan confidantes:

a. Committee Chair Jeanne Hitchcock, who was Governor O'Malley's Secretary of Appointments and former Deputy Mayor of Baltimore;

b. Senate President Thomas V. Mike Miller, Jr., a Democrat;

c. Maryland House of Delegates Speaker Michael E. Busch, a Democrat;

d. Delegate James J. King, a former one-term member of the Maryland House of Delegates who served as a Republican but was chosen without input from Republican leadership; and

e. Richard Stewart, a private business owner who chaired Governor O'Malley's 2010 re-election campaign in Prince George's County.

44. The GRAC was tasked with drafting a recommended plan for the State's legislative and congressional redistricting in light of the 2010 census results. Although the GRAC held public hearings around the State in the summer of 2011 and received some 350 comments from members of the public, those hearings were mere window dressing.

45. In fact, the Plan was developed entirely in secret. The GRAC never discussed or revealed its own plan for the proposed map to the public. Instead, the committee members conducted their deliberations and calculations entirely behind closed doors. This was made possible because the GRAC—by design—was not required by law to abide by the Maryland Open Meetings Act.

46. The GRAC drew its proposed redistricting map with no input or participation from Republican lawmakers. The GRAC did, however, have access to the Maryland Board of Elections statistical data, which provides highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State.

47. Precinct-by-precinct voting information available to the GRAC allowed the committee to analyze voting patterns and political affiliation at a granular level. The Maryland State Board of Elections posts a trove of statistics on Maryland voters, including voter registration by precinct, election day turnout by precinct and party, party share of vote by voting category, and voter consistency. This information, among other data, was used to shape partisan congressional districts with pinpoint accuracy.

48. The committee approved its final map on October 4, 2011, by a 4-to-1 vote. Former Delegate King—the lone Republican—cast the sole dissenting vote.

49. After receiving the GRAC's proposed plan on October 4, 2011, Governor O'Malley published a "substantially similar" final version on the evening of Saturday, October 15, 2011, just two days before the special session of the legislature he had called to approve it. *See* Annie Linskey & John Fritze, *O'Malley Unveils Proposed Congressional Map*, Balt. Sun (Oct. 15, 2011).

50. With no opportunity for public comment, the bill was introduced on the following Monday morning, approved by the Senate redistricting committee the same afternoon, and passed a vote of the Senate the next Tuesday morning. *See* Aaron C. Davis,

Maryland Senate Approves Gov. Martin O'Malley's Redistricting Map, 33 to 13, Wash. Post (Oct. 18, 2011). The House of Delegates followed a similarly expedited process, but a Republican parliamentary maneuver held up the vote for a day. *See* Annie Linskey & John Fritze, *O'Malley's Map Easily Wins House Approval*, Balt. Sun (Oct. 19, 2011).

51. On Thursday, October 20, 2011—barely 72 hours after it was proposed in the Senate—Governor O'Malley signed the Plan into law. *See* Annie Linskey & John Fritze, *O'Malley's Map Signs Congressional Map Into Law*, Balt. Sun (Oct. 20, 2011).

52. Not a single one of Maryland's 55 Republican legislators voted for the map at any stage of the process, including the nine Republican legislators on the Senate and House redistricting committees and former Delegate James King, who served on the GRAC. Through its public hearings and the inclusion of a Republican lawmaker, the GRAC attempted to create the appearance of bipartisanship and openness. But in reality, the Plan was drafted in secret, and Democratic lawmakers and committee members rushed it through the legislature hastily and with no input from their Republican colleagues.

53. Without intervention, the Plan will remain in effect through at least 2020.

B. The Plan produced a map that cracks and packs Republican voters, ignores traditional political boundaries, and divides communities of common political and social interests, with the result of preventing Republican voters in the pre-2011 6th District from electing a Republican representative

54. The Plan is widely regarded as one of the most gerrymandered in the Nation. A detailed analysis conducted by *The Washington Post* confirms that "Maryland and North Carolina are essentially tied for the honor of most-gerrymandered state" overall. *See* Christopher Ingraham, *America's most gerrymandered congressional districts*, The Wash. Post (May 15, 2014), perma.cc/9JP6-FDZD.

55. The following graphic depicts Maryland's 2011 redistricting plan.

56. The congressional districts are held together by narrow ribbons of territory and have evoked comparisons to a "praying mantis" (Ingraham, *supra*), a "Rorschach-like eyesore" (*Fletcher*, 831 F. Supp. 2d at 906 (Titus, J., concurring)), and a "broken-winged pterodactyl, lying prostrate across the center of the State" (*id.* at fn. 5). An unsigned editorial in *The Washington Post* decried that the Plan "mocks the idea that voting districts should be compact or easily navigable," explaining that, "[t]o protect incumbents and for partisan advantage, the map has been sliced, diced, shuffled and shattered, making districts resemble studies in cubism." *Md. redistricting maps are comic and controversial*, The Wash. Post (Oct. 29, 2011), perma.cc/A7BN-6LSD.

57. Several of the districts are essentially noncontiguous, split into two or more segments held together by narrow ribbons along major interstate highways. The 4th, 6th, 7th, and 8th Districts each consist of at least two distinct segments, one segment of which is more populous than the other and is socioeconomically, demographically, and politically

inconsistent with the other segment. In each of these Districts, the larger and smaller sections are connected only in a technical sense by a narrow ribbon.

58. A car driving from Bethesda on a direct route along I-495, I-95, and I-83 through Baltimore to Towson—a mere 50 mile trip—would set out from Maryland's 8th District and in sequence pass through the 3rd District, 4th District, 5th District, 4th District, 3rd District, 2nd District, 3rd District, 7th District, 3rd District, 2nd District, 3rd District, 7th District, 3rd District, and 2nd District, until finally arriving in Towson. That's in and out of six congressional districts 14 times over just 50 relatively straight miles. And that's to say nothing of that fact that Towson—a town of just 55,000—is itself split among the 1st, 2nd, and 3rd Districts.

59. In addition to their visual irregularity, the districts do not respect traditional geographic or political boundaries or the composition of communities of interest. This is not an accident. The GRAC moved and split neighborhoods and communities in and out of districts based primarily upon the prevailing voting history and political party affiliation of the residents of those neighborhoods and communities.

60. As a result, the 2011 Plan has paired voters that do not share the most basic elements of a neighborhood or community: Voters grouped together in single, meandering districts have "different climate[s], root for different sports teams, and read different newspapers." *Fletcher*, 831 F. Supp. 2d at 906 (Titus, J., concurring). The 6th District, for example, brings together voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears . . . with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." *Id.* at 906.

61. Between the 2000 and 2010 censuses, the population of Maryland grew by 9%, but six of the eight existing congressional districts remained within 3% of the ideal size of 721,529 people. Despite the relatively small adjustments needed to accommodate

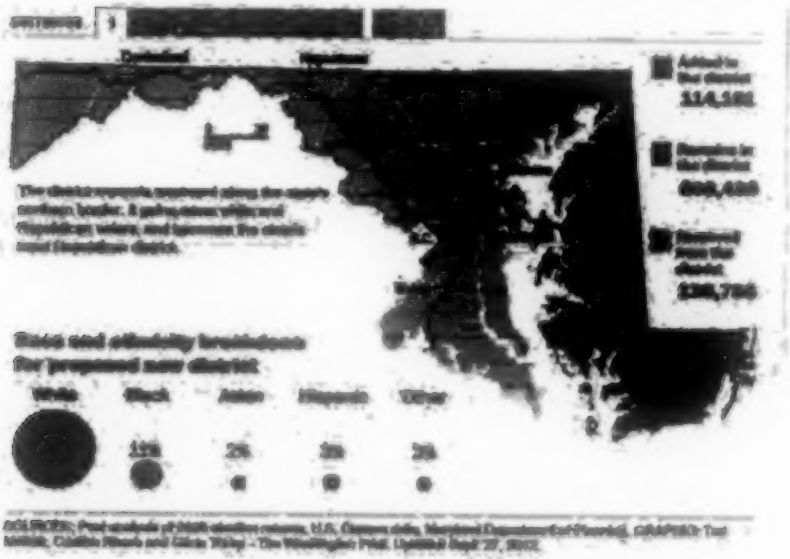
population growth, the Plan shuffled nearly one-in-three Marylanders from one district to another, scrambling the representation of 1.6 million people. See *Gerrymandered? Maryland voters to decide*, The Wash. Post (Sept. 27, 2012), perma.cc/CL96-PT25. This massive re-sorting of voters was intended to "pack" Republicans into the 1st District and "crack" Republicans in the 6th District, while maintaining close-but-safe margins in favor of Democrats in all other districts.

62. Prior to 2011, the Democrats Party held six House seats in Maryland, while Republicans held two. In 2012, the first election after the 2011 redistricting, Democratic challenger John Delaney routed 10-term Republican incumbent Roscoe Bartlett. Delaney was reelected in 2014, defeating Republican nominee Dan Bongino, whose campaign was managed by plaintiff Strine and whose fundraising was overseen by plaintiff Pycha.

63. The defeat of Representative Bartlett in 2012 left seven of Maryland's eight Congressional seats (87.5%) in the hands of Democrats, despite that Democratic candidates received just 63% of the popular vote across the State that year. The 2014 election produced even more inequitable results: Democrats held on to 87.5% of the congressional seats while receiving just 58% of the popular vote.

64. The **1st District** covers Maryland's Eastern Shore and stretches across a portion of the northern border of the State. It is the State's "packed" Republican district. Prior to 2011, this district included more of suburban Baltimore County, and it was closely contested, shifting into Republican hands by a narrow margin in the 2010 election. As a result of the 2011 redistricting, the 1st District has been flooded with Republican voters from the 6th District and is now the state's only Republican district.

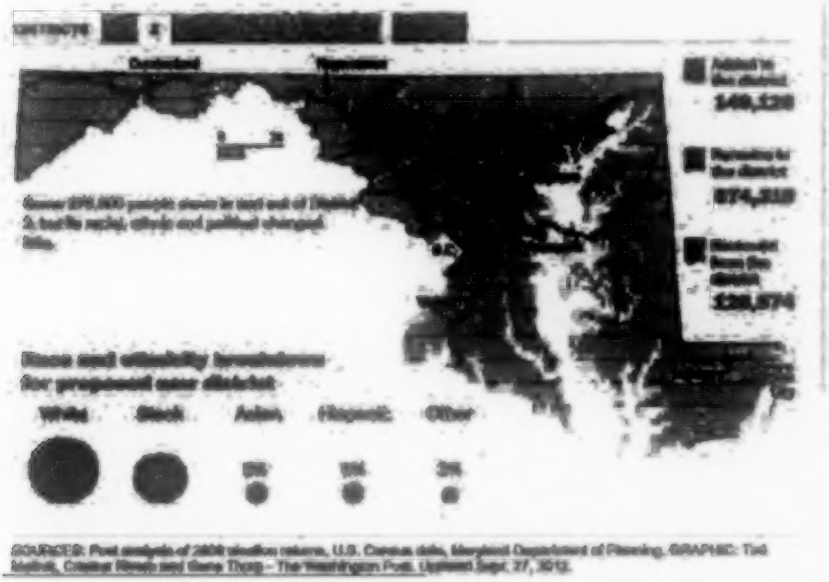
65. The following map shows the changes to the 1st District made by the Plan.



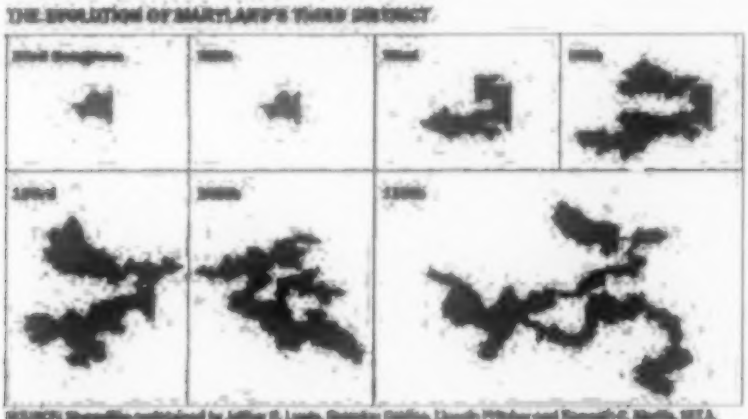
66. The 2011 redistricting reduced the population of the district by approximately 23,000: 114,161 citizens were added and 135,768 were subtracted. In the 2010 election, the Republican candidate received 54.1% of the votes; in 2012, the same candidate received 63.42% and won the election by a 36-point margin. Wendy Rosen, the 2012 Democratic nominee in the 1st District, told *The Washington Post*: "The party made it almost impossible to have a chance to win [in the 1st District]." Aaron C. Davis, *For Maryland Democrats, redistricting referendum forces a look in the mirror*, Wash. Post (Sept. 30, 2012), perma.cc/8NZF-8QFW.

67. The **2nd District** defies easy physical description. It contains a number of areas in the vicinity of Baltimore that are essentially non-contiguous except for narrow ribbons of territory between them. The 2011 redistricting moved about 275,000 people in and out of the district, but it remains largely urban and safely Democratic. The Democratic margin of victory fell by 5.47% after the redistricting.

68. The following map shows the changes to the 2nd District made by the Plan.



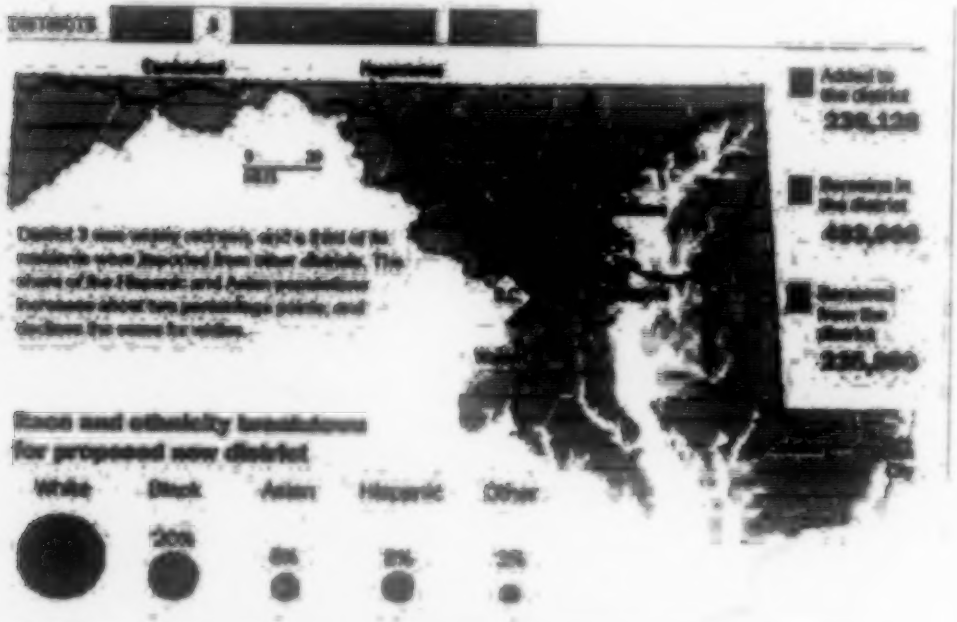
69. The **3rd District**, the second most gerrymandered district in the country (Ingraham, *supra*), has a long history of ever-worsening contortions. The following graphic depicts the evolution of the 3rd District over the past seven redistrictings.



70. As described in *Fletcher*, "[t]he District begins in Pikesville, a northwest suburb of Baltimore City; leaks eastward to capture the northeast suburbs of Baltimore City; then drops down into Baltimore City, taking a slice of the City on its way to Montgomery County, a northwest suburb of Washington, D.C.; then veers eastward in a serpentine manner to include Annapolis, a city on the Chesapeake Bay. . . . The Third District is rated at or near the bottom of all congressional districts in multiple measures of statistical compactness." 831 F. Supp. 2d at fn. 5.

71. The 2011 Plan shuffled over 450,000 people in or out of the 3rd District. Although the district remains firmly Democratic, the party's margin of victory fell by 12.2% after the redistricting.

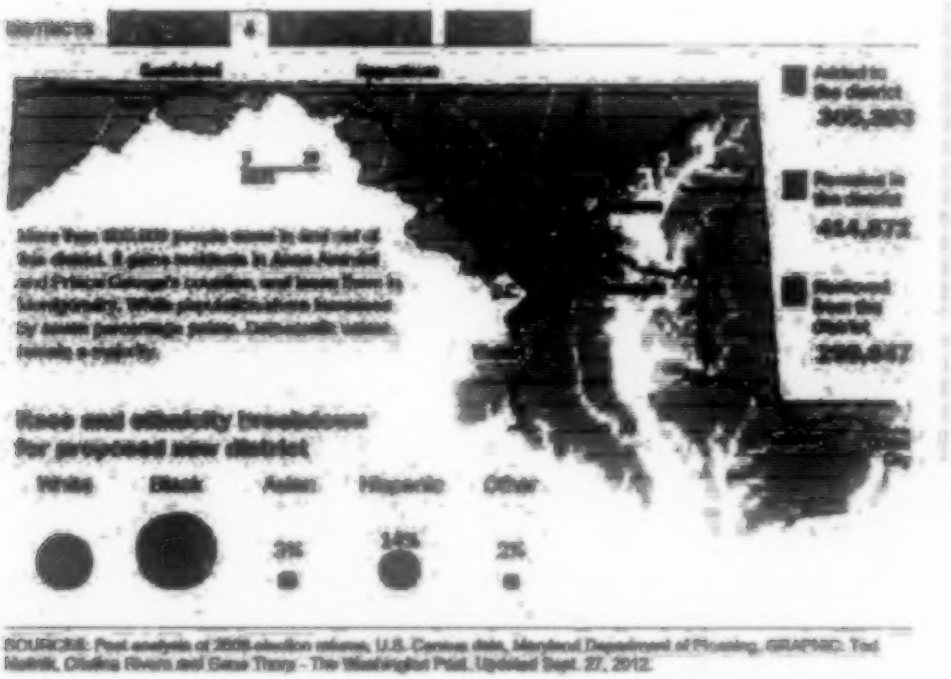
72. The following map shows the changes to the 3rd District made by the Plan.



SOURCES: Post analysis of 2008 election returns, U.S. Census data, Maryland Department of Planning, CHAPI-BCC, Ted Mellnik, Cristina Rivero and Gene Thorp - The Washington Post. Updated Sept. 27, 2012.

73. The **4th District** features a long, narrow ribbon of territory connecting portions of Anne Arundel and Prince George's counties. In the 2011 redistricting, the largely Republican voters of Anne Arundel County replaced the heavily Democratic Montgomery County voters, many of whom were moved into the formerly Republican 6th District. The redistricting shifted more than 600,000 people in and out of the district. Although the 4th District remains safely Democratic, the party's margin of victory dropped by 10% between 2010 and 2012.

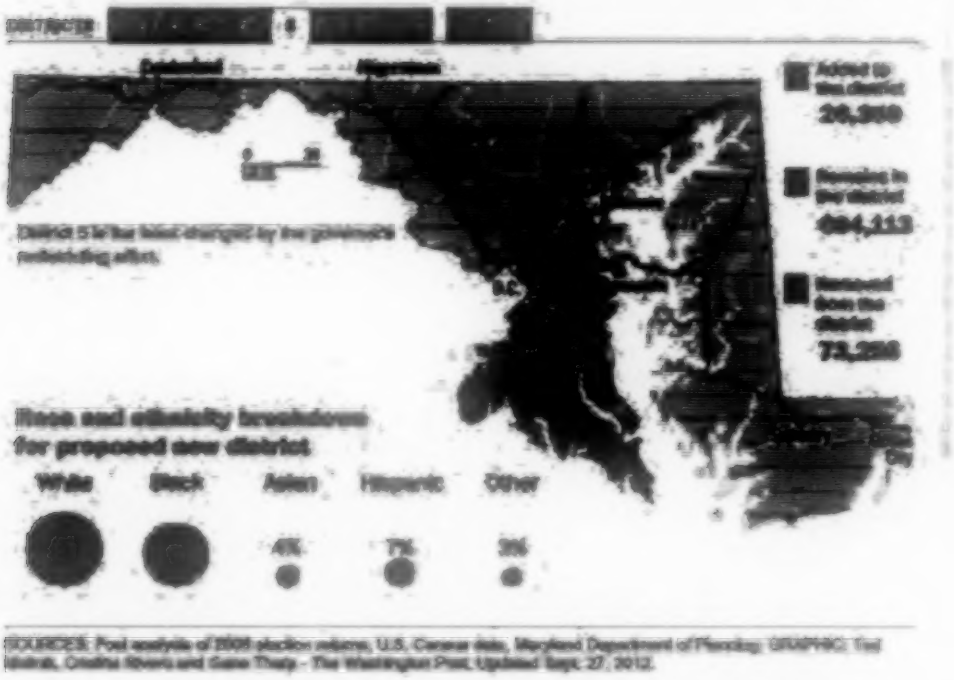
74. The following map shows the changes to the 4th District made by the Plan.



SOURCES: Post analysis of 2008 election returns, U.S. Census data, Maryland Department of Planning. GRAPHIC: Ted Mellnik, Cristina Rivera and Gene Thorp - The Washington Post. Updated Sept. 27, 2012.

75. The **5th District** comprises all of Charles, Saint Mary's, and Calvert Counties, as well as portions of Prince George's and Anne Arundel Counties. It has long been a safely Democratic seat and was the least impacted by the 2011 redistricting.

76. The following map shows the changes to the 5th District made by the Plan.



77. The **6th District** stretches nearly 200 miles, from the West Virginia border to the Capital Beltway. "[I]t is not a well-kept secret that the plan for the sixth congressional district was developed for the purpose of disadvantaging an incumbent Republican legislator." *Fletcher*, 831 F. Supp. 2d at 905-906 (Titus, J., concurring).

78. Historically, the 6th District was reliably Republican. In the 70 years between January 1943 and January 2013, the district was represented in Congress by members of the Republican Party in four out of every five years. Prior to the legislature's

2011 adoption of the Plan, the 6th District had been the State's *most* Republican district, represented for nearly 20 years by Republican Roscoe Bartlett, who won reelection in 2010 by a 28-point margin.

79. Under the 2001 redistricting map, the district included all of western Maryland and stretched across the northern border of the state to encompass other rural areas.

80. Under the Plan, the 6th District no longer encompasses all of western Maryland and has been combined by a narrow, southward-stretching territory with portions of the Washington, D.C. suburbs, including Potomac.

81. The redistricting cracked the 6th District by removing over 360,000 residents from the mostly-Republican northern counties of the district and adding nearly 350,000 residents from predominantly Democratic and urban Montgomery County. In particular, the Plan removed from the 6th District all of Carroll County, which had voted 68% Republican and 27% Democratic in the previous congressional election. The removal of Carroll County generated a loss of over 24,000 registered Republican voters from the district.

82. The Plan also moved specific, majority-Republican precincts of Frederick County to the 8th District, while leaving the majority-Democratic precincts of the county in the 6th District. This facilitated a loss of more than an additional 12,500 Republicans voters from the district. The Frederick County precincts that remained in the 6th District contained over 6,000 more registered Democrats than registered Republicans. In a county with a 12-point Republican majority in the previous Congressional election, the likelihood of producing such a one-sided transfer of voters by chance is zero.

83. The opposite pattern describes the transfer of voters from Montgomery County: Of the Montgomery County precincts that were added to the 6th District by the Plan, registered Democrats outnumbered registered Republicans by a two-to-one margin. Moving these cherry-picked portions of Montgomery County into the 6th District generated a gain of tens of thousands of Democratic voters.

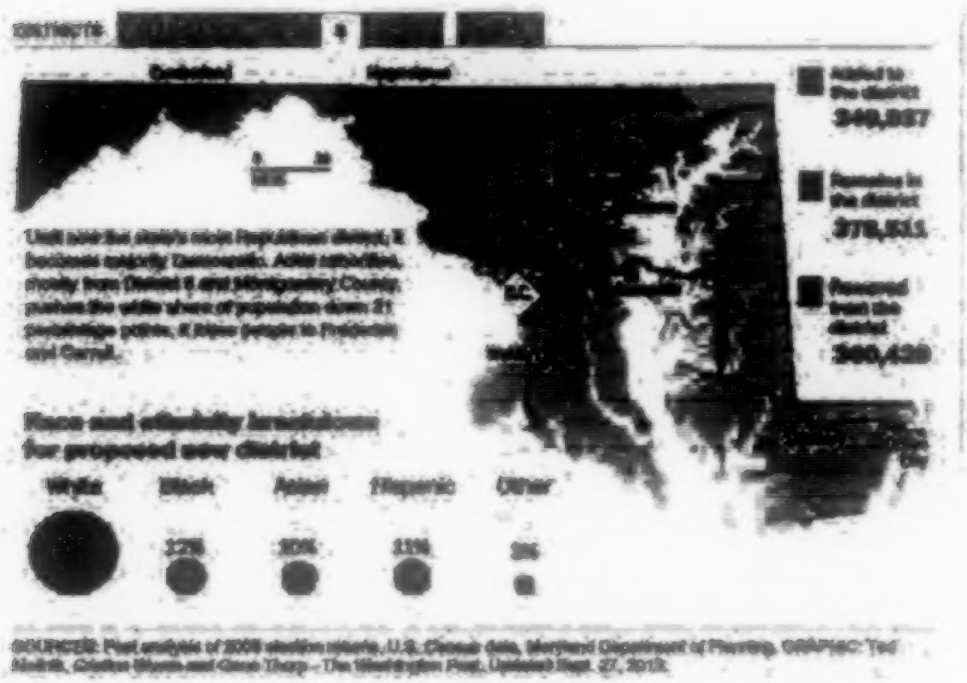
84. In total, the Plan accomplished a net transfer of over 65,000 Republican voters out of the district and over 30,000 Democratic voters into the district. *Compare* Eligible Active Voters on Precinct Register, 2010, perma.cc/QQP9-V7YX, *with* Eligible Active Voters on Precinct Register, 2012, perma.cc/V2QU-8SCE. As a result, whereas Republican voters had comprised 47% of all voters in the 6th District before the Plan, they comprise just 33% of 6th District voters after the Plan.

85. As Editorial Board of *The Washington Post* noted, the 6th District was "suddenly the scene of a competitive race" in 2012, "owing to a gerrymandered electoral map redrawn by Democrats in Annapolis." Editorial Board, *John Delaney for Maryland's 6th District*, The Wash. Post (Oct. 4, 2012), perma.cc/3NCN-Q38U.

86. Democrat John Delaney defeated Representative Bartlett in the 2012 election by a 21-point margin, as the long-time Congressman's share of the vote dropped from 61.45% to 37.9% in a single election cycle.

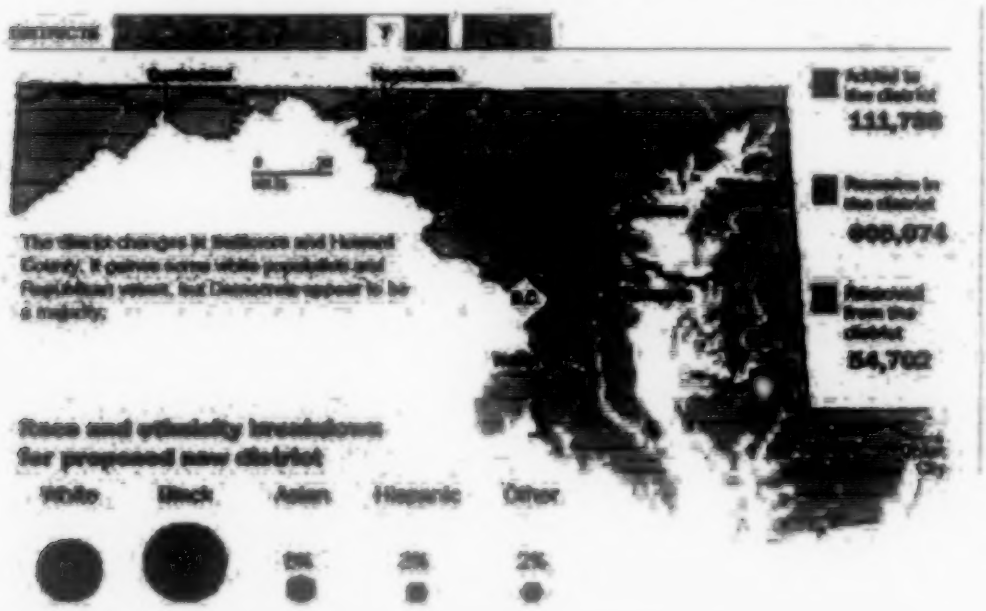
87. Representative Delaney won reelection in 2014, defeating Republican challenger Dan Bongino, whose campaign was managed by plaintiff Strine and whose fundraising was overseen by plaintiff Pycha.

88. The following map shows the changes to the 6th District made by the Plan.



89. The **7th District** covers about half of the City of Baltimore, including most of the predominantly black neighborhoods. It has always been safely Democratic. After the 2011 redistricting, the district was reconfigured to include heavily Republican portions of Baltimore County from the formerly Republican 6th District.

90. The following map shows the changes to the 7th District made by the Plan.

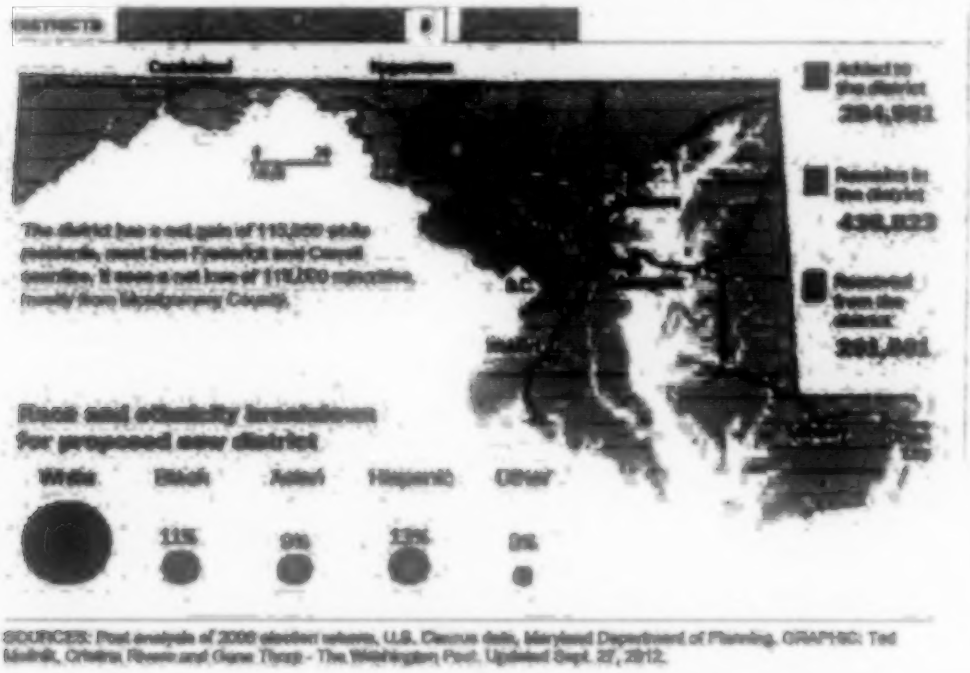


SOURCES: Post analysis of 2008 election returns, U.S. Census data, Maryland Department of Planning. GRAPHIC: Ted Mellnik, Cristina Fávero and Gene Thorp – The Washington Post. Updated Sept. 27, 2012.

91. The **8th District** was compact and coherent prior to 2011, encompassing most of Montgomery County. The 2011 redistricting altered the makeup of the district both geographically and culturally, adding 115,000 white residents, mostly from rural and predominantly Republican parts of northern Frederick and Carroll Counties, and removing 119,000 minority residents, mostly from Montgomery County. Tens of thousands of Democratic 8th District voters were swapped with Republicans from the 6th District in

order to facilitate the cracking of the 6th District. The 8th District remains safely Democratic, but the party's margin of victory fell by 17% after the district was redrawn.

92. The following map shows the changes to the 8th District made by the Plan.



SOURCES: Post analysis of 2000 election returns, U.S. Census data, Maryland Department of Planning. GRAPHIC: Ted Mellnik, Christine Rivers and Gene Thorp - The Washington Post. Updated Sept. 27, 2012.

C. **The purpose of the Plan was to burden Republican voters by reason of their political views, voting history, and political-party affiliation**

93. The goal and purpose of the Plan was to dilute Republican votes by cracking the 6th District. The predominant purpose of the map, in other words, was to burden Republican voters in the former 6th District by reason of their political views, voting history, and political-party affiliation.

1. **Direct and circumstantial facts**

94. The contorted and essentially non-contiguous shapes of Maryland's most gerrymandered congressional districts suggest, in their own right, an intent to connect

rural Republican voting blocs with dominant urban Democratic voting blocs, thereby cracking otherwise geographically and politically contiguous Republican communities in the 6th District. No other purpose can explain the otherwise convoluted nature of Maryland's congressional districts. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

95. Democratic lawmakers conceded that Maryland's map was an act of political retaliation to unseat Republican incumbent Roscoe Bartlett: "Sen. Jamie B. Raskin (D-Montgomery) said . . . that given the way Republicans had stacked the deck in districts in North Carolina, Ohio and elsewhere," his party "had little alternative" except to gerrymander Maryland to the advantage of the Democratic Party. Davis, *Maryland Senate Approves Gov. Martin O'Malley's Redistricting Map*, *supra*.

96. In private briefings after the map was released, GRAC members assured Democratic lawmakers that the map would increase the Democratic Party's power in Congress. "Sen. C. Anthony Muse, the only Democrat to vote against the map, . . . said lawmakers have been told the map is beneficial to the Democratic Party." Brian Witte, *Md. Senate approves U.S. House redistricting bill*, Associated Press (Oct. 18, 2011). Delegate Curt Anderson, a Democrat who supported the Plan, described a briefing given by GRAC Chair Jeanne Hitchcock about the redrawn 6th District: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." *See* Brian Witte, *Proposed redistricting map stirs political shakeup*, Associated Press (Oct. 4, 2011).

97. GRAC members openly acknowledged their intent to crack the 6th District. GRAC member Michael Busch, the Maryland House Speaker, said for example: "I think the numbers will show that [the Plan] makes [the 6th District] pretty competitive" in favor of Democrats, whereas it previously had been a safely Republican district. *Id.*

98. GRAC Chair Jeanne Hitchcock confirmed that purpose, noting that the 6th District was now "dominated" by the Democratic voters of Montgomery County. *Id.*

99. During the limited period of debate on the Plan, several Democratic lawmakers embraced the Plan's partisan gerrymander, while at the same time expressing frustration that the GRAC had implemented it at the expense of minority voters. "I have been one of the strongest proponents as a Democrat of drawing a seventh district for Democrats" said Representative Donna Edwards, who represents Maryland's 4th Congressional District. "But we can accomplish that in a different way . . . .Where I have a real disagreement is in making superior the political interests to the minority voting rights interests." *See* Aaron C. Davis and Ben Pershing, *Donna Edwards, Montgomery officials line up against redistricting map*, The Wash. Post (Oct. 11, 2011).

100. Democratic Delegate Emmett C. Burns, Jr., stated on the House floor that although he disapproved of how the map would affect minorities, he ultimately supported the Plan for a simple reason: "more Democrats in the House of Representatives." *See* Annie Linskey & John Fritze, *O'Malley's Map Easily Wins House Approval*, Balt. Sun (Oct. 19, 2011).

101. To achieve those expressly stated ends, legislators and their map-drawers deliberately drew lines based upon Republican voters' political views, voting history, and political-party affiliation in the mapmaking process.

102. The secrecy and other circumstances surrounding the Plan's enactment, the Plan's overall disrespect of traditional political boundaries and division of communities of interest, the non-compactness and non-contiguity of the Plan's districts, and on-the-record statements from legislators and members of the GRAC conclusively demonstrate that the primary consideration motivating lawmakers in adopting the Plan was their desire and

intent to dilute the votes of Republican Marylanders in the 6th District by reason of their political views, voting history, and political-party affiliation.

2. Statistical facts

103. The foregoing allegations, which demonstrate that the Plan was drawn in violation of the Constitution, are bolstered by statistical analyses that confirm that the cracking of Republican voters in the 6th District was not the product of chance or constitutionally acceptable considerations, but the result of a deliberate effort to disadvantage Republican voters by reason of their voting histories and political party affiliations.

104. One statistical tool to demonstrate vote dilution is to simulate a State's election using actual election results from other States throughout the Nation. *See* Wang, *supra*. This tool can help determine whether a disproportional election outcome is the product of deliberate manipulation by the legislature.

105. The Supreme Court has recognized in racial gerrymandering cases that proportionality "is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

106. Applying that same observation to partisan gerrymanders, the normal-district simulation test asks whether a redistricting plan moves the seats-to-vote outcome *toward* partisan proportionality or *away* from it. If a plan moves the outcome away from proportionality, the test asks whether the change could have arisen as a result of normal variation in districting as practiced across the Nation.

107. Computer simulations looking at election returns nationwide can be used to ask a simple question: If a given State's popular House vote were split into *differently* drawn districts carved from the same statewide voting population and party-affiliation

breakdown, what would its Congressional delegation look like? *See* Wang, *supra*, at 28. Using statistical software on an ordinary laptop computer, it is possible to create millions of hypothetical combinations of districts from around the United States that add up to the same statewide vote total for each party.

108. Using this statistical tool—that is, evaluating the average of one million random combinations of eight districts from States throughout the Nation that add up to the same statewide vote total for each political party—one researcher has shown that the expected congressional delegation from Maryland in 2014, in the absence of impermissible gerrymandering, would ordinarily comprise 5 Democrats and 3 Republicans. The current composition of Maryland's House delegation is 7 Democrats and 1 Republican.

109. The next step in the statistical analysis is to ask whether the difference between the normal-district simulation test and actual observed election results are the product of chance or deliberate design. This is called the "zone-of-chance" test. *See* Wang, *supra*, at 24-38, 53. If the results fall within the zone of chance, it is evidence that the difference between the average simulation and actual election outcome can reasonably be attributed to chance. If the results fall outside the zone of chance, it is strongly suggestive (to a statistically-significant degree of confidence) that the imbalance is the product of deliberate legislative design.

110. The zone of chance test shows to a statistically significant degree of confidence that the difference between the simulated average for Maryland in 2014 and the actual elections outcome under the Plan is the product of a purposeful effort to dilute Republican votes by cracking the 6th District.

111. Other statistical tests demonstrate the same.

3. Chilling

112. The dilution of Republicans' votes in Maryland has chilled and manipulated political participation since 2011 in precisely the ways that the Supreme Court had warned against.

113. Gerrymanders that "pack" votes chill political participation because voters in packed districts understand that their votes "won't count" because they cannot affect the outcome. Voters in packed districts are thus discouraged from voting. Voters in packed districts also understand that other like-minded voters' votes "won't count" and thus are less likely to participate actively in campaigning for their chosen candidates.

114. The Plan has chilled protected political speech throughout the State in just those ways.

115. Vote "cracking" chills political speech in an even more pernicious way in Maryland because Maryland employs a closed primary registration system. For a voter to participate in a particular political party's primary, the voter must be a registered member of that party. Registered Republicans cannot participate in Democratic primaries, in other words, and registered Democrats cannot participate in Republican primaries.

116. In districts where the Democratic Party's candidate is very likely to win the general election, the only real opportunity to influence what person is ultimately elected is the Democratic primary race. Under the closed primary system, residents must register as members of the Democratic party in order to vote in the Democratic primary.

117. Some Maryland voters who would otherwise register as Republicans have been chilled from doing so. They have chosen, instead, to register (against their preferences) as members of the Democratic Party so that they can participate in the Democratic Party's closed primary. Others who do not register as Democrats against their preference are, the legislature's design, shut out of the Democratic primary and lose any

opportunity to influence meaningfully the outcome of the general election. Voters of that sort are prevented from playing any meaningful role in the selection of their representatives and are therefore directly discouraged from participating in the political process.

118. More broadly, the Plan has chilled participation in general elections. Voters who feel that the outcomes of elections are preordained by the legislature's map-drawing and discouraged from casting their votes or engaging in the political process at all.

119. The Plan thus "casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012).

D. The Plan's burden on Republican voters cannot be explained by geography or compliance with legitimate redistricting criteria

120. The extreme partisan gerrymander at issue here cannot be explained or justified by reference to Maryland's geography or other legitimate redistricting criteria. It was possible to fashion a plan that does not crack the 6th District or pack the 1st District and that is as good as or better than the Plan in achieving equal population, compactness, respect for traditional political boundaries, and compliance with the Voting Rights Act.

121. In other words, the cracking of the 6th District would not have taken place without the legislature's targeting of Republican voters on the basis of their First-Amendment-protected conduct.

122. The GRAC's explanation for many of the changes the Maryland's congressional apportionment are implausible and contradicted by the Plan itself. The new 6th District, for instance, was purportedly drawn to "reflect the North-South connections between Montgomery County, the I-270 Corridor, and the westerns portions of the State." No such connections exist. The sham explanations provided by the GRAC and the Governor

are a pretext for the true purpose of the Plan: to dilute Republican votes and claim an additional congressional seat for the Democratic Party by cracking the 6th District.

123. The committee received numerous alternative plans from third-parties. Those alternative plans received little consideration from the GRAC or the Governor, even though many accorded better with common sense and would have produced results that, upon information and belief, were more consistent with traditional map-drawing and redistricting principles. *See* Exhibits B & C.

124. Upon information and belief, several alternative plans would have avoided cracking the former 6th District while better respecting traditional political and community boundaries and achieving equal compliance with the one-person-one-vote standard. The alternative plans also accorded better with the broadly-supported concepts of contiguity and compactness.

125. Under the plan submitted by the Maryland Republican Party, for example, Montgomery County and its more urban voters would have remained in the geographically compact 8th and 4th Districts around Washington, D.C., respecting the cohesiveness of a region that shares common political, social, and economic interests. The Republican 6th District would have encompassed the rural northern and western counties, which also share common interests; and Baltimore and its immediate surroundings would have occupied the entire 7th District.

126. The alternative plans would have better respected existing geographic and political boundaries, minimizing split counties and split communities of interest. In most cases, Frederick, Carroll, Anne Arundel, Harford, and Baltimore City Counties would all have remained undivided in their respective districts; under the current Plan, each is currently split between two or more congressional districts.

127. In keeping communities and political units that share common interests together, the districts in the alternative plans are unsurprisingly more contiguous and compact than the districts under the current Plan.

128. Upon information and belief, at least one of the alternative plans would have satisfied all of the constitutional requirements for congressional reapportionment without diluting either party's votes to a constitutionally significant degree.

CLAIMS FOR RELIEF

A. Violation of the First Amendment

129. Plaintiffs repeat and re-allege each and every allegation set forth in the preceding paragraphs as if set forth fully herein.

130. Plaintiffs and voters throughout the Nation should be able to organize politically, to support political campaigns, to register with their preferred political parties, and to vote in support of their preferred candidates without fear that—if they are successful in electing the public officials of their choice—they will be targeted and retaliated against by the legislature for the exercise of the First Amendment rights.

131. The Maryland legislature expressly and deliberately considered the voting histories and political party affiliations of Republican voters, including plaintiffs, when it redrew the lines of the 6th Congressional District as part of the Plan.

132. The legislature redrew the lines of the 6th District with an intent to burden and punish those voters, including plaintiffs, for their First-Amendment-protected conduct.

133. The Plan, in actual effect, has burdened Republican voters in the former 6th Congressional District, including plaintiffs, as a sanction for the exercise of their First Amendment rights. The cracking of the 6th District would not have taken place without the legislature's targeting of Republican voters on the basis of their First-Amendment-protected conduct; and Republican voters in the former 6th District, including plaintiffs,

would have been able to elect a Republican representative in 2012 and 2014, but for the cracking of the district under the Plan.

134. The State cannot justify the cracking of the 6th District by reference to geography or compliance with constitutionally legitimate redistricting criteria.

B. Violation of Article 1, Sections 2 and 4

135. Plaintiffs repeat and re-allege each and every allegation set forth in the preceding paragraphs as if set forth fully herein.

136. The Maryland legislature expresaly and deliberately considered Republican voters' voting histories and political party affiliations, including those of plaintiffs, when it redrew the lines of the 6th Congressional District as part of the Plan.

137. The legislature redrew the lines of the 6th District with an intent to sanction those voters, including plaintiffs, for their voting histories and political party affiliations.

138. The Plan, in actual effect, has burdened Republican voters in the former 6th Congressional District, including plaintiffs. The cracking of the 6th District would not have taken place without the legislature's targeting of Republican voters, including plaintiffs; and Republican voters in the former 6th District would have been able to elect a Republican representative in 2012 and 2014, but for the cracking of the district under the Plan.

139. The Plan has thus had the effect of burdening Republican voters' representational rights by diluting the efficiency and effect of their votes.

140. The legislature, rather than Maryland's voters, has in effect chosen the representative to the U.S. House of Representatives for Maryland's 6th District.

141. The result is a violation of plaintiffs' representational rights, protected under Article I, Sections 2 and 4, of the United States Constitution.

142. The State cannot justify the cracking of the 6th District by reference to geography or compliance with constitutionally legitimate redistricting criteria.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

A. declare the Plan unconstitutional and invalid, and the maintenance of the plan for any election of any kind a violation of plaintiffs' constitutional rights;

B. enjoin defendants and their employees and agents from administering, preparing for, and in any way permitting the nomination or election of any Member of United States House of Representatives from Maryland's 6th, 7th, or 8th Congressional Districts;

C. in the absence of a state law establishing a constitutional district plan for Maryland's congressional districts, adopted by the Legislature and signed by the Governor in a timely fashion, establish a redistricting plan that is valid under the law;

D. award plaintiffs their reasonable attorneys' fees, costs, and litigation expenses incurred in bringing this action; and

E. grant such further relief as the Court deems just and proper.

February 16, 2016

/s/ Michael B. Kimberly

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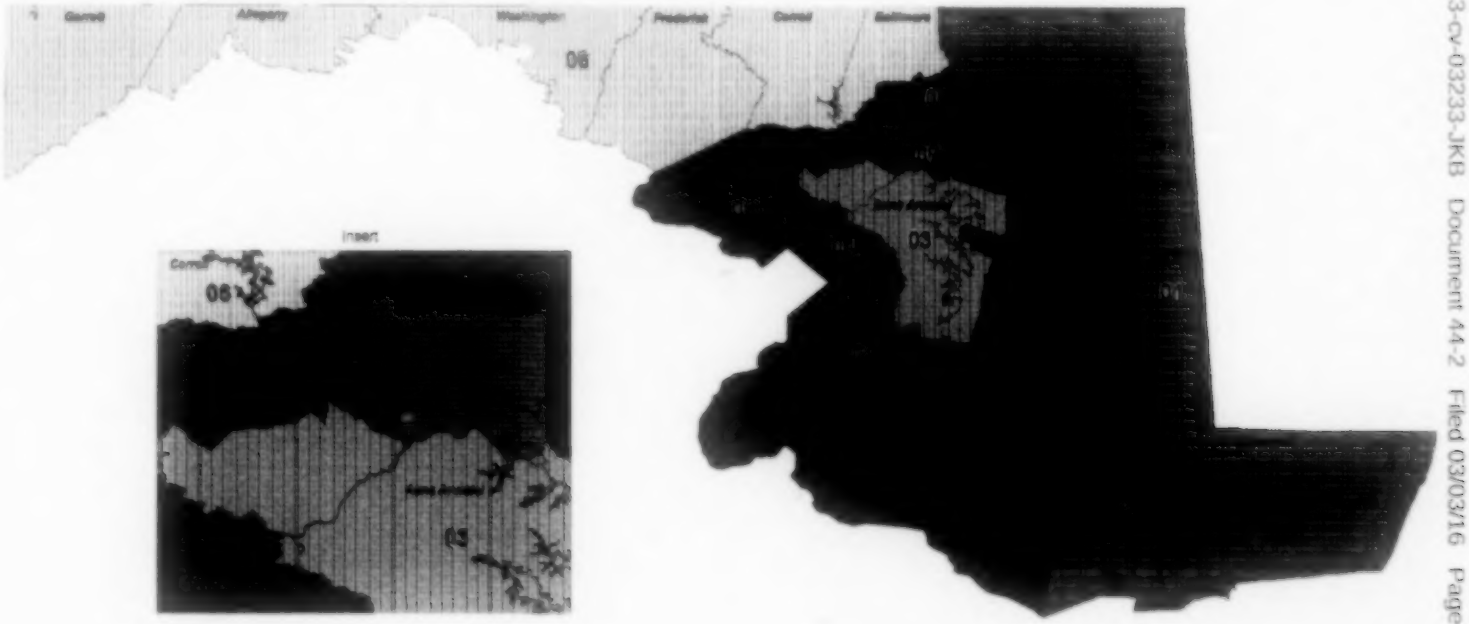
Counsel for plaintiffs

Maryland 2011 Congressional Districts
Senate Bill 1
October 20, 2011

Maryland Republican Party Congressional District Plan Update as Submitted to the Governor's Redistricting Advisory Committee

Submitted as a Block Equivalency file on September 19, 2011



Steve Shapiro's Congressional District Plan B-1 Corrected
as Submitted to the Governor's Redistricting Advisory Committee

Submitted as a Precinct Equivalency file on September 21, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Stephen M. Shapiro, et al. *Plaintiffs*, vs. David J. McManus, Jr., et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

JOINT STIPULATIONS

Pursuant to this Court's October 13, 2016 minute order, the parties file these Joint Stipulations of Fact and Law. The facts in these joint stipulations and exhibits attached hereto are intended to be received into evidence in lieu of further proof or testimony. The parties reserve their rights to contest the relevance of any stipulation or exhibit.

GLOSSARY OF TERMS

1. The "Governor" means former Maryland Governor Martin O'Malley.

2. The "Plan" means the map established by Senate Bill 1, which the Governor signed into law on October 20, 2011, and codifies the boundaries of Maryland's eight congressional districts today in effect.

3. The "GRAC" means the Governor's Redistricting Advisory Committee established by the Governor in July 2011.

4. The "District" means Maryland's Sixth Congressional District.

5. The "State" means Maryland.

6. The "Census" means the decennial United States Census mandated by Article I, Section 2 of the United States Constitution. As used in these stipulations, the "Census" additionally refers to the statement prepared by the President of the United

States pursuant to 2 U.S.C. § 2a showing the number of persons in each state and the number of representatives to which the state is entitled.

THE SIXTH DISTRICT BEFORE THE PLAN

7. The following individuals won election as United States Representative for the District between January 1943 and January 1993:

a. David J. Lewis, a Democrat, served 1911 through 1917;

b. Frederick N. Zihlman, a Republican, served 1917 through 1931;

c. David J. Lewis, a Democrat, served 1931 through 1939;

d. William D. Byron, a Democrat, served 1939 through 1941;

e. Katharine Byron, a Democrat, served 1941 through 1943;

f. J. Glenn Beall, a Republican, served 1943 through 1953;

g. DeWitt S. Hyde, a Republican, served 1953 through 1959;

h. John R. Foley, a Democrat, served 1959 through 1961;

i. Charles McCurdy Mathias, Jr., a Republican served 1961 through 1969;

j. J. Glenn Beall, Jr., a Republican, served 1969 through 1971;

k. Goodloe E. Byron, a Democrat, served 1971 through October 1978;

l. Beverly Barton Butcher Byron, a Democrat, served 1979 through 1993.

8. Republican Roscoe G. Bartlett challenged Beverly Barton Butcher Byron as United States Representative for the District in 1982, losing by a 49% margin. Bartlett won election as United States Representative for the District in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

9. The District's total adjusted 2010 Census population was 731,715. *See* Exhibit 1.

10. There were 208,024 Republican and 159,715 Democrat registered eligible voters in the District on October 17, 2010. On that date, Republicans comprised 46.68% and Democrats comprised 35.84% of registered eligible voters in the District. See Exhibit 2.

11. There were 182,775 Republican and 144,398 Democrat registered eligible voters in the District on October 15, 2002. On that date, Republicans comprised 48.39% and Democrats comprised 38.23% of registered eligible voters in the District. *See ibid.*

12. There were 182,431 Republican and 156,841 Democrat registered eligible voters in the District on October 13, 2000. On that date, Republicans comprised 46.46% and Democrats comprised 39.94% of registered eligible voters in the District. *See ibid.*

13. There were 133,773 Republican and 135,818 Democrat registered eligible voters in the District on August 13, 1990. On that date, Republicans comprised 45.36% and Democrats comprised 46.05% of registered eligible voters in the District. *See ibid.*

14. There were 122,762 Republican and 121,918 Democrat registered eligible voters in the District on February 3, 1992. On that date, Republicans comprised 46.19% and Democrats comprised 45.87% of registered eligible voters in the District. *See ibid.*

THE DRAFTING OF THE PLAN

15. The Maryland State Board of Elections is responsible under Maryland law for administering federal elections under the Plan. It is the primary source of aggregated address-level voter registration data, address-level voter history, and official election results in Maryland. The Board keeps voter registration, voter history, and elections data that is available to the public. Certain files are available upon application and payment of a fee and others are available freely on the webaite.

16. The United States House of Representatives consists of 435 members apportioned among the States according to population after each decennial census. After the 2000 Census, Maryland was entitled to 8 representatives. After the 2010 Census, Maryland was entitled again to 8 representatives.

17. The Maryland State Department of Planning produced adjusted Census population data to comply with the No Representation Without Population Act of 2010. That data was made available as a Report of Maryland Precinct Population Data and required a correction. The GRAC had access to this report. A true and accurate copy of the report is marked with the Bates-number range MCM001135 to MCM001389 in documents exchanged by the parties. The parties stipulate that the matters of fact asserted, stated, or depicted in MCM001135 to MCM001389 are true and correct.

18. The Governor established the GRAC by executive order in July 2011. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

19. The Governor appointed Jeanne D. Hitchcock to serve as chair of the GRAC. Hitchcock at the time served as Appointments Secretary in the Office of the Governor and had previously served as Deputy Mayor of Baltimore when the Governor served as Mayor.

20. The Governor additionally appointed to the GRAC: Democratic Delegate and Speaker of the House Michael E. Busch; Democratic Senator and President of the Senate Thomas V. Mike Miller, Jr.; Richard Stewart, a private business owner who had chaired the Governor's 2010 re-election campaign in Prince George's County; and former Delegate James. J. King, a Republican from Anne Arundel County. Linda C. Janey served on the GRAC's staff.

21. The foregoing list of GRAC members is exclusive; there were no other members of the GRAC.

22. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders

attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City. True and accurate copies of the transcripts of these hearings are marked with the Bates-number range MCM000001 to MCM000704 in documents exchanged by the parties. True and accurate copies of written testimony submitted to the GRAC on the subject of congressional redistricting are marked with the Bates-number range MCM000705 to MCM000906 in documents exchanged by the parties.

23. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. True and accurate copies of the third party plan submissions retained by the Department of Planning for publication on its website are marked with the Bates-number range MCM000907 to MCM001134 in documents exchanged by the parties. The GRAC had access to these plans.

24. The Department of Planning prepared a Briefing Book and provided it to the members of the GRAC. A true and accurate copy of this Briefing Book is marked with the Bates-number range MCM001392 to MCM001824.

25. The GRAC had access to information contained in a spreadsheet of the addresses of the 2010 Maryland Congressional representatives maintained by the Department of Planning. A true and accurate copy of the spreadsheet is marked with the Bates-number MCM001391 in documents exchanged by the parties.

26. The GRAC and the Department of Planning solicited and accepted public comment. True and accurate copies of comments on the proposed Congressional plan between October 4 and October 11, 2011 via e-mail and web comment form in the form prepared by the Department of Planning are marked with the Bates-number range MCM002436 to MCM002853 in documents exchanged by the parties. True and accurate copies of e-mails as maintained by the Department of Planning in hard copy are marked

with the Bates-number range MCM002243 to MCM002435 in documents exchanged by the parties. True and accurate copies of letters received regarding the GRAC plan and maintained by the Department of Planning are marked with the Bates-number range MCM002854 to MCM002870 in documents exchanged by the parties.

27. The GRAC was exempt by law from the Maryland Open Meetings Act.

28. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0. According to a 2010 promotional brochure produced by the program's publisher, Caliper Corporation, Maptitude for Redistricting allowed users to, among other things, "[c]reate districts using any level of geography," "[s]elect any number of summary data fields and compute totals and percents," "[a]dd political data and election results," and "[u]pdate historic election results to new political boundaries." *See* Exhibit 3.

29. The State Board of Elections maintains voter and voting data including address-level voter registration data, including by party affiliation; and address-level voter-history data. The State Board of Elections also makes publicly available votes cast during early voting, on election day, and by absentee or provisional ballot at various levels of aggregation. This information was available to the GRAC.

30. Data described in the immediately prior paragraph, including data reflecting Maryland citizens' political party affiliations and voting histories, can be used to determine how the outcome of historical elections would have changed in the District if the proposed plan had been in place in prior years, including in 2010.

31. One widely understood consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from the District.

32. The GRAC completed its proposed map on October 4, 2011. The four Democrats on the GRAC voted in favor of the proposal. The sole Republican, former Delegate King, voted against it. The GRAC prepared a PowerPoint presentation to accompany its recommended plan, it is attached as Exhibit 6.

ENACTMENT OF THE PLAN

33. The governor announced on October 15, 2011 that he would submit to the legislature a map that was, for purposes of this litigation, substantially the same as the map proposed by the GRAC. The changes made to the proposed plan by the Governor or his staff are depicted in Exhibit 4.

34. On October 17, 2011, the Senate President introduced Senate Bill 1 on behalf of the governor at a special legislative session. The same day, the Senate Committee on Reapportionment and Redistricting and the House Rules Committee held a joint hearing on Senate Bill 1 and voted to approve the bill. An audiofile of these proceedings is attached as Exhibit 19. After adopting technical amendments immaterial to this litigation, the Senate passed the bill on October 18, 2011, and sent it to the House of Delegates, which, after adopting additional technical amendments immaterial to this litigation, passed the bill on October 19, 2011. The Senate subsequently concurred in the House's technical amendments, and the Governor signed Senate Bill 1 into law on October 20, 2011. The Congressional District Map established by Senate Bill 1 is attached as Exhibit 5.

35. Jeanne Hitchcock briefed the House and Senate Democratic Caucuses about the proposed plan on October 3, 2011. *See* Exhibit 6.

36. No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes.

37. One Democratic Senator, Sen. C. Anthony Muse, and five Democratic Delegates, Tiffany Alston, Aisha Braveboy, Alfred C. Carr Jr., Ana Sol Gutierrez, and Luiz

Simmons, voted against the Plan. All other Democratic Senators and Delegates voted in favor of the Plan.

38. A true and accurate copy of the legislative history of SB1 through SB6 of the 2011 Special Session of the Maryland General Assembly is available on the website of the General Assembly at www.mgaleg.maryland.gov (perma.cc/P2VD-6TQW). A true and accurate copy of documents from the bill files of SB1 through SB6 maintained by the Department of Legialative Services that do not appear on the Maryland General Assembly website are marked with Bates-number range MCM002871 to MCM002960 in documents exchanged by the parties.

39. Statewide referendum Question 5 on the 2012 ballot asked voters whether they were "for" or "against" the Maryland law "[e]stablish[ing] the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution." There were 1,549,511 votes (64.1%) "for" the law and 869,568 votes (35.9%) "against" the law. Only two counties had more votes against than in favor of Question 5: Carroll (37,161 for and 42,459 against) and Garrett (5,423 for and 6,193 against). The results are available at perma.cc/NY6M-CALN.

PUBLIC STATEMENTS BY OFFICIALS CONCERNING THE PLAN

40. More than one month before the Plan was introduced in the legislature, Democratic Senator Richard Madaleno made the following statements in a series of taped interviews on September 13, 2011:

a. "What you see going on elsewhere is clearly in other states that are Republican controlled they are drawing maps to try to take out Democrats, so I think there is pressure on saying look, if they are playing that game elsewhere, then in states like Maryland where democrats control we've got to do the opposite." *See* Exhibit 7.

b. "This is a conflict between, what you could say, the heart and the mind of the Democratic party. The heart is 'Frank Kratovil had that seat [the 1st District] before, Frank Kratovil won before, he made hard votes on behalf of Barack Obama, we should find a way to reward our friend Frank Kratovil.' The head is telling you, 'Look, western Maryland, a new district focused toward western Maryland is one that you could actually pick up easier....' Do you reach out and help your good old friend Frank Kratovil, or do you go for where, in fact, you probably have a better chance at a pick up." *See ibid.*

c. "If you go with a competitive western Maryland district, the way that works is clearly that district comes further into Montgomery county, substantially into Montgomery county." *See* Exhibit 8.

d. "I think trying to achieve both makes it a little more difficult for everyone trying to draw the maps. But you're dealing with—one of the things that's interesting is—you're dealing with people like a Mike Miller or some of the staff of the legislature who have done this several cycles, so it's not like they are a bunch of people experimenting for the first time on how to do this." *See* Exhibit 9.

41. Donna Edwards, Democratic representative from the Fourth District, stated on October 11, 2011 in reference to the Plan: "I have been one of the strongest proponents as a Democrat of drawing a seventh district for Democrats. But we can accomplish that in a different way. . . . Where I have a real disagreement is in making superior the political interests to the minority voting rights interests." *See* Exhibit 10.

42. Democratic Senator C. Anthony Muse stated on the Maryland Senate Floor on October 18, 2011 (*see* Exhibit 11):

a. "[L]et's just be frank. As it stands, this plan dilutes minorities, minority power and parcels out minority populations—voters—to other very different communities in order to strengthen the chances of a Democrat being elected."

b. "Yes, the party walks away with maybe seven seats, but what do our minority populations walk away with?"

c. "I cannot support this map. It may well live up to the letter of the law, but surely not the spirit of the law nor the spirit of the democratic process. I think minorities lose with this map. Yes, the party gains. But honestly I believe the people, not the party, are the losers."

43. Democratic Senator Jamie Raskin stated on the Maryland Senate Floor on October 18, 2011 (*see* Exhibit 11):

a. "[T]his is not a Maryland problem with redistricting and gerrymandering. It's an American problem. All across America, people are complaining about extremely spliced and diced, curvy, swervy districts, where elected officials choose voters before voters choose elected officials. That's the system we've got in 50 states today, in the United States. And it's a process where we dress up partisan and political ambition on both sides of the aisle in high principal, but we can all tell what's really going on."

b. "To my distinguished colleagues on the other side of the aisle, the disappointment that they feel today is shared by Democrats in North Carolina, a state won by President Obama in 2008, which just had districts redrawn, ten majority Republican, three majority Democrat, with all the Democrats packed in there. In Ohio, a state that was won by President Obama in 2008, 12 majority Republican Districts have been drawn, four

> majority Democratic districts have been drawn. So they've gone way beyond anything that's been seen here. The basic problem is that we are trying to build a whole range in multiplicity of interests and factors into these single member districts, and we now have the convenience of computer technology to be able to accompliah very strange looking figures on the map."

44. Democratic Delegate Emmett C. Burns, Jr., stated on the House floor that he supported the Plan because it meant "more Democrats in the House of Representatives." *See* Exhibit 12.

45. Democratic Speaker Michael Busch said of the Plan, "I think you will have a very competitive 6th District when you didn't have that in the past." *See* Exhibit 13.

46. Democratic Delegate Curt Anderson described the October 3, 2011, briefing given by GRAC Chair Jeanne Hitchcock about the redrawn District: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." *See* Exhibit 13.

47. Democratic Delegate Curt Anderson stated in an interview on October 17, 2011: "What we're doing is we are trying to get more, in terms of – currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *See* Exhibit 14.

48. Democratic Senator Jamie Raskin explained of the redistricting process on November 7, 2011: "Democrats control the redistricting process in Maryland" and with the Plan "hoped to pick up a seventh House seat through redistricting." *See* Exhibit 15.

49. House Speaker Michael Busch made the following statement regarding the District: "I think the numbers will show that it makes it pretty competitive, but I think the fact of the matter, that's reflective of the population growth in that area and the change that you see in voting behavior." *See* Exhibit 16.

50. Senate President Thomas V. Mike Miller made the following statements about the GRAC (*see* Exhibit 17):

a. "We recognized that Congressman Sarbanes lived in Baltimore County, but wanted to continue to represent the capital city Annapolis, and that was challenging."

b. "We recognized the fact that Congressman Ruppersberger, for example, is on the Intelligence Committee." "We tried to be sure that he represented both Aberdeen and Fort Meade, which was kind of challenging."

c. "We recognized that Congressman Hoyer lives in St. Mary's County and wants to represent Pax River, but also wanted to represent his alma mater, College Park, and that was challenging."

d. "If you are in public office, you don't want to give up a single precinct."

51. In a letter to the Governor dated October 20, 2011, Attorney General Douglas Gansler stated: "As indicated by those who participated in developing and adopting the redistricting plan, including the Redistricting Commission, the Governor, and the General Assembly, the boundaries of the newly adopted Congressional districts reflect a number of considerations, including a preference for joining communities of interest, keeping residents in their current districts, recognizing growth patterns, protecting incumbents, and partisan consideration." *See* Exhibit 18.

THE SIXTH DISTRICT AFTER THE PLAN

52. The Plan created eight congressional districts that were equal in population according to the adjusted 2010 Census data. The first seven of Maryland's congressional districts had an adjusted population of 721,529, and the Eighth District had an adjusted population of 721,528.

53. There were 145,620 Republican and 192,820 Democrat registered eligible voters in the District on October 21, 2012. On that date, Republicans comprised 33.32% and Democrats comprised 44.11% of registered eligible voters in the District. Exhibit 19.

54. Democrat John Delaney defeated Roscoe Bartlett in the election for representative to the United States Congress for the District in 2012 by a 20.9% margin.

55. Representative Delaney won re-election in 2014 with a 1.5% margin of the popular vote over his Republican challenger.

56. Representative Delaney won re-election in 2016 with, according to unofficial election results with some provisional and absentee ballots counted, a 14.4% margin of the popular vote over his Republican challenger.

EXHIBITS

57. Exhibit 1 reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit 1 are true and correct.

58. Exhibit 2 reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, at various dates between 1990 and 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit 2 are true and correct.

59. Exhibit 3 is a true and correct copy of Caliper Corporation's 2010 promotional material for Maptitude for Redistricting. The parties stipulate that the exhibit is authentic.

60. Exhibit 4 depicts the changes made by the Governor to the map proposed by the GRAC on October 4, 2011. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit 4 are true and correct.

61. Exhibit 5 depicts Maryland's eight congressional districts under the Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit 5 are true and correct.

62. Exhibit 6 is a true and correct copy of a PowerPoint presentation prepared by the GRAC to accompany its recommended plan. The parties stipulate that the presentation is authentic.

63. Exhibit 7 is a video depicting a September 13, 2011 interview with Senator Richard Madaleno. The parties stipulate that the video is authentic but make no stipulation as to the text preceding the video. The parties further stipulate that, as of the date of the filing of these stipulations, the video is available online at www.youtube.com/-watch?v=by_mclaHZv8.

64. Exhibit 8 is a video depicting a September 13, 2011 interview with Senator Richard Madaleno. The parties stipulate that the video is authentic but make no stipulation as to the text preceding the video. The parties further stipulate that, as of the date of the filing of these stipulations, the video is available online at www.youtube.com/-watch?v=7bTNNn6zLj8.

65. Exhibit 9 is a video depicting a September 13, 2011 interview with Senator Richard Madaleno. The parties stipulate that the video is authentic but make no stipulation as to the text preceding the video. The parties further stipulate that, as of the date of the filing of these stipulations, the video is available online at www.youtube.com/-watch?v=ddqQcOKzAT0.

66. Exhibit 10 is a true and correct copy of the article titled "Donna Edwards, Montgomery officials line up against redistricting map," written by Ben Pershing and Aaron C. Davis and published on October 11, 2011 in the *Washington Post*. The parties stipulate that the article is authentic.

67. Exhibit 11 is a true and correct audio recording of the Maryland State Senate floor proceeding held on October 18, 2011 audio file. The parties stipulate that the recording is authentic.

68. Exhibit 12 is a true and correct copy of the article titled "O'Malley's map easily wins House approval," written by Annie Linskey and John Fritze and published on October 19, 2016 in the *Baltimore Sun*. The parties stipulate that the article is authentic.

69. Exhibit 13 is a true and correct copy of the article titled "Redistricting panel targets Rep. Bartlett," written by Annie Linskey and published on October 3, 2011 in the *Baltimore Sun*. The parties stipulate that the article is authentic.

70. Exhibit 14 is a video depicting an October 19, 2011 interview with Delegate Curt Anderson. The parties stipulate that the video is authentic and that, as of the date of the filing of these stipulations, the video is available online at www.youtube.com/-watch?v=xPVKdKSgm9I.

71. Exhibit 15 is a true and correct copy of the opinion article titled "Fair representation for all," written by Jamie Raskin and Rob Richie and published on November 7, 2011 in the *Baltimore Sun*. The parties stipulate that the article is authentic.

72. Exhibit 16 is a true and correct copy of the article titled "Redistricting proposal would mean big changes for Western Maryland," written by Brian Witte and published on October 3, 2011 by the Associated Press. The parties stipulate that the article is authentic.

73. Exhibit 17 is a true and correct copy of the article titled "GOP, others find faults with proposed map," written by Annie Linskey and John Fritze and published on October 13, 2011 in the *Baltimore Sun*. The parties stipulate that the article is authentic.

74. Exhibit 18 is a true and correct copy of an October 20, 2011 letter from Maryland Attorney General Douglas Gansler to the Governor. The parties stipulate that the letter is authentic.

75. Exhibit 19 reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit 19 are true and correct.

76. Exhibit 20 is the audio recording of the October 17, 2011 Joint Hearing of the Senate Committee on Reapportionment and Redistricting and the House Rules Committee on Senate Bill 1. The parties stipulate that the recording is authentic.

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Appendix A - 1

SUMMARY REPORT - ADJUSTED 2010 CENSUS POPULATION COUNTS by EXISTING 2002 Congressional District
(Senate Bill 805, May 6, 2002)
TOTAL POPULATION by SINGLE RACE ALONE, UNADJUSTED HISPANIC ORIGIN and VOTING AGE (18+) POPULATION

Note: This report is based on Census 2010 P.L 94-171 Redistricting Data (Maryland) and is ADJUSTED for the use of Maryland Redistricting pursuant to the "No Representation Without Population Act" (SB 400\HB 496) passed into Maryland law in 2010. Maryland census data must be ADJUSTED for the purposes of creating congressional, state legislative, and local districting plans. Generally, the law requires that the census data must be adjusted to reassign Maryland residents in State & Federal correctional institutions to their last known address, and to exclude out-of-state residents in correctional institutions from redistricting.

Ideal Congressional District Population 2000: 662,061
Ideal Congressional District Population 2010: 721,529

Congressional District	2010 Census Total Population	Adjusted Total Population	Adjusted Person of One Race	Adjusted White Alone	Adjusted Black or African American Alone	Adjusted American Indian and Alaska Native Alone	Adjusted Asian Alone	Adjusted Native Hawaiian and Other Pacific Islander Alone	Adjusted Some Other Race Alone	Adjusted of Two or More Races	*Unadjusted Hispanic or Latino (of Any Race)	Adjusted Age 18 and Over Population
Maryland	5,773,552	5,772,231	5,607,523	3,386,916	1,699,389	20,419	318,848	3,157	206,824	164,708	470,832	4,419,267
Congressional District 1	744,275	743,067	728,841	616,597	85,055	1,829	15,762	349	9,249	14,226	25,756	572,931
Congressional District 2	700,893	703,824	683,250	403,318	237,593	2,795	25,940	457	13,147	20,574	34,981	538,131
Congressional District 3	719,856	716,808	696,372	491,212	143,592	2,360	37,966	533	20,709	20,436	48,832	563,890
Congressional District 4	714,319	715,674	692,333	183,321	405,208	2,942	48,483	369	51,015	23,341	101,103	535,642
Congressional District 5	767,369	768,464	743,610	392,052	286,841	3,443	32,220	451	28,603	24,854	60,279	582,239
Congressional District 6	738,940	731,715	716,023	644,122	42,981	1,737	16,201	292	10,712	15,690	31,237	556,721
Congressional District 7	659,776	664,091	647,949	218,189	374,878	1,934	44,488	246	8,194	16,142	22,951	510,878
Congressional District 8	728,124	728,588	699,143	410,105	123,236	3,359	96,788	460	65,195	29,445	145,493	558,835

Note: *No Hispanic designation was available for prisoners; therefore, the Hispanic totals were not adjusted.
The district totals include minor corrections in the assignment of census tabulation blocks to voting districts/precincts. The corrections to the P.L 94-171 U.S. Bureau of the Census file were made by Maryland Department of Planning and Department of Legislative Services.
The 2010 Population for Congressional and Legislative Districts are derived and based on the assignment of voting district/precincts to district as provided by Local Board of Elections and adjusted by Maryland Departments of Planning, Legislative Services and Public Safety and Correctional Services pursuant to the "No Representation Without Population Act."

MDP Report prepared by the Maryland Department of Planning, Clearinghouse, Redistricting, May 2011.

*As of 10/17/10

Counts by County

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Allegany	16,606	19,827	130	12	119	5,305	449	42,450
Anne Arundel	145,707	120,970	840	76	1,114	62,255	139	331,101
Baltimore City	289,776	32,027	1,404	29	701	40,231	1,340	365,508
Baltimore County	290,996	128,638	1,326	80	1,499	64,706	5,620	492,869
Calvert	23,171	22,464	119	11	149	9,860	526	56,300
Caroline	7,407	7,481	36	5	89	2,949	120	18,037
Carroll	33,156	54,327	255	51	304	16,309	799	105,201
Cecil	24,530	22,853	143	25	208	11,218	860	59,837
Charles	50,767	24,687	131	19	197	13,609	579	89,989
Dorchester	10,392	6,982	26	2	41	2,185	150	19,778
Frederick	52,181	57,958	359	32	453	26,637	78	137,698
Garrett	4,994	11,379	39	3	48	1,786	186	18,434
Harford	62,100	63,101	274	37	512	22,310	719	149,053
Howard	86,045	55,017	440	41	571	34,159	1,810	178,083
Kent	6,170	4,478	42	3	36	1,621	135	12,482
Montgomery	324,195	123,253	1,432	59	1,364	122,587	541	573,431
Prince George's	403,582	46,641	710	55	732	43,061	22,719	517,500
Queen Anne's	11,059	13,982	64	8	95	4,290	207	29,705
Saint Mary's	24,832	23,454	150	14	191	10,246	526	59,213
Somerset	7,222	4,329	21	3	26	1,537	120	13,258
Talbot	10,166	11,073	51	7	79	3,615	315	25,306
Washington	31,340	37,027	219	20	234	14,347	89	83,276
Wicomico	25,366	19,785	113	9	151	8,178	668	54,268
Worcester	15,715	13,903	68	5	106	5,273	441	35,510
	1,957,279	925,814	8,392	606	8,964	526,274	39,136	3,466,267

Eligible Active Voters and Precinct Registers
Election: 2010 GUBERNATORIAL GENERAL ELECTION
Election Date: 11/2/10

*As of 10/17/10

Counts by Congressional District

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Congr. Dist: 01	196,183	196,411	1,036	119	1,459	71,932	4,044	471,184
Congr. Dist: 02	241,628	92,085	866	76	1,140	54,999	3,056	393,852
Congr. Dist: 03	240,852	114,282	1,450	69	1,439	73,826	2,361	434,079
Congr. Dist: 04	314,380	50,596	593	48	836	51,745	10,459	428,457
Congr. Dist: 05	277,134	118,109	952	78	1,138	63,593	13,036	474,040
Congr. Dist: 06	159,715	208,024	1,159	122	1,353	73,262	2,044	445,679
Congr. Dist: 07	283,827	64,222	1,255	53	872	51,025	2,735	403,989
Congr. Dist: 08	243,560	81,885	1,081	41	947	88,092	1,401	417,007
	1,957,279	925,614	8,392	606	8,984	528,274	39,136	3,468,287

Eligible Active Voters on Precinct Register
Election: 2010 GUBERNATORIAL GENERAL ELECTION
Election Date: 11/2/10

*As of 10/17/10

Counts by Legislative District

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Legis. Dist: 01A	6,625	14,648	48	3	59	2,345	221	23,949
Legis. Dist: 01B	8,645	10,640	71	7	50	2,780	241	22,434
Legis. Dist: 01C	9,068	10,495	66	9	76	3,242	181	23,137
Legis. Dist: 02A	9,818	13,237	69	8	75	4,605	21	27,833
Legis. Dist: 02B	8,685	11,385	61	4	73	4,358	25	24,591
Legis. Dist: 02C	9,602	7,346	68	4	62	3,887	33	21,002
Legis. Dist: 03A	22,637	17,650	160	13	175	10,070	33	50,738
Legis. Dist: 03B	12,488	13,874	80	6	93	6,747	22	33,310
Legis. Dist: 04A	16,305	24,898	116	12	176	9,314	24	50,845
Legis. Dist: 04B	8,233	14,470	54	11	79	4,386	187	27,420
Legis. Dist: 05A	17,260	27,915	143	32	160	8,156	390	54,056
Legis. Dist: 05B	11,855	14,641	110	5	107	4,197	429	31,344
Legis. Dist: 06	38,160	14,410	122	17	207	8,467	711	62,095
Legis. Dist: 07	36,391	28,505	157	18	264	11,081	815	77,232
Legis. Dist: 08	41,778	21,969	197	12	239	9,849	857	74,901
Legis. Dist: 09A	25,473	24,691	156	13	185	11,398	663	62,579
Legis. Dist: 09B	8,913	13,960	66	9	77	4,496	223	27,744
Legis. Dist: 10	58,976	7,324	148	7	143	7,746	616	74,960
Legis. Dist: 11	55,482	17,738	172	9	213	10,972	943	85,529
Legis. Dist: 12A	24,201	14,827	148	10	177	7,755	555	47,673
Legis. Dist: 12B	15,570	5,656	68	8	83	5,127	296	26,808
Legis. Dist: 13	40,483	21,181	191	19	262	15,595	761	78,492
Legis. Dist: 14	41,372	21,163	154	4	176	15,061	70	78,000
Legis. Dist: 15	41,210	22,611	134	9	164	20,967	76	85,171
Legis. Dist: 16	45,923	16,578	154	4	174	17,247	54	80,134
Legis. Dist: 17	38,071	14,753	188	8	213	17,098	81	70,412
Legis. Dist: 18	42,285	12,063	191	11	155	13,292	55	68,052
Legis. Dist: 19	40,334	15,656	151	8	148	13,550	58	69,905
Legis. Dist: 20	41,664	6,730	314	5	166	11,070	56	60,005
Legis. Dist: 21	40,762	12,164	159	6	235	10,134	2,948	66,408
Legis. Dist: 22	39,534	6,002	194	6	110	5,789	3,013	54,648

*As of 10/17/10

Counts by Legislative District (cont'd)

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Legis. Dist: 23A	36,624	9,514	69	15	86	5,276	2,899	54,483
Legis. Dist: 23B	24,904	3,199	29	2	35	2,586	1,161	31,916
Legis. Dist: 24	61,355	2,328	47	5	61	4,344	2,651	70,791
Legis. Dist: 25	63,076	3,393	42	8	61	4,562	2,688	73,830
Legis. Dist: 26	64,517	4,438	47	8	66	4,884	2,987	76,947
Legis. Dist: 27A	47,984	9,859	68	3	90	5,360	2,330	65,694
Legis. Dist: 27B	11,995	10,661	49	6	74	4,895	262	27,942
Legis. Dist: 28	49,853	23,866	127	19	189	13,285	557	87,896
Legis. Dist: 29A	11,919	11,119	57	3	62	4,409	256	27,825
Legis. Dist: 29B	11,640	10,850	80	11	120	5,288	257	28,046
Legis. Dist: 29C	10,046	10,450	69	5	77	4,541	217	25,405
Legis. Dist: 30	35,153	29,691	254	15	314	15,817	27	81,271
Legis. Dist: 31	33,151	26,264	161	22	207	13,040	34	72,879
Legis. Dist: 32	36,498	22,104	183	18	253	13,927	33	73,016
Legis. Dist: 33A	21,956	26,375	150	12	204	11,256	20	59,973
Legis. Dist: 33B	11,828	13,221	68	4	80	5,454	17	30,672
Legis. Dist: 34A	24,019	13,785	85	18	168	7,555	262	45,892
Legis. Dist: 34B	10,965	11,707	68	11	85	5,066	382	28,284
Legis. Dist: 35A	19,689	28,218	108	9	171	7,641	231	56,067
Legis. Dist: 35B	10,588	12,676	56	6	94	4,193	137	27,750
Legis. Dist: 36	33,774	32,599	195	26	286	13,347	860	81,087
Legis. Dist: 37A	13,637	5,505	42	3	59	2,872	196	22,314
Legis. Dist: 37B	22,930	24,045	100	14	147	7,652	578	55,466
Legis. Dist: 38A	11,813	8,924	42	5	52	3,225	272	24,333
Legis. Dist: 38B	24,512	21,720	116	8	165	8,547	713	55,781
Legis. Dist: 39	33,336	13,899	146	10	168	14,302	91	61,752
Legis. Dist: 40	47,843	3,736	417	5	125	6,354	218	58,498
Legis. Dist: 41	54,708	4,883	131	3	85	5,914	191	65,895
Legis. Dist: 42	36,874	21,479	323	7	274	9,754	888	69,599
Legis. Dist: 43	52,236	4,730	312	2	88	6,362	204	63,934
Legis. Dist: 44	44,381	3,713	159	6	83	5,546	224	54,112

Eligible Active Voters on Precinct Register

Election: 2010 GUBERNATORIAL GENERAL ELECTION

Election Date: 11/2/10

*As of 10/17/10

Counts by Legislative District (cont'd)

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Legis. Dist: 45	49,290	4,699	138	7	97	5,146	213	59,590
Legis. Dist: 46	41,518	10,286	247	6	223	10,909	290	63,479
Legis. Dist: 47	35,064	2,918	97	7	59	4,184	2,132	44,461
	1,957,279	925,614	8,392	606	8,984	528,274	39,136	3,468,287

Counts by Age, Gender, and Party

*According to Maryland State Law, voters who will be 18 and eligible to vote by a General Election are eligible to Vote in the related primary.

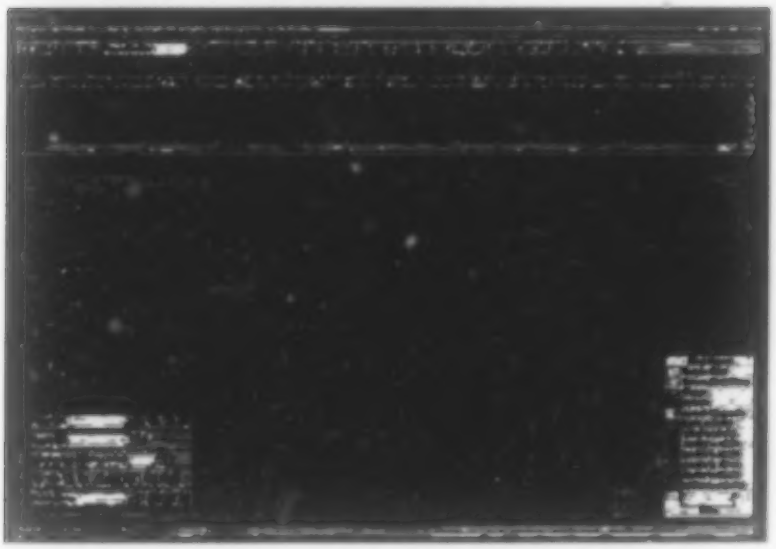
**Confidential Voters are not included in Age Range Statistics

		Female						Male						Unspecified					
	TOTAL	17 & below	18-24	25-44	45-65	65 & above	Subtotal	17 & below	18-24	25-44	45-65	65 & above	Subtotal	17 & below	18-24	25-44	45-65	65 & above	Subtotal
Null	2	0	0	0	1	0	1	0	0	0	1	0	1	0	0	0	0	0	0
DEM	1,957,026	212	100,500	374,808	459,713	217,933	1,153,166	166	78,739	249,474	326,505	148,232	803,116	1	213	262	210	57	743
REP	925,491	109	36,035	140,337	188,084	88,660	453,245	121	39,898	149,800	205,756	76,358	471,932	0	85	106	91	32	314
GRN	8,391	3	671	1,911	740	124	3,448	3	947	2,624	1,188	175	4,937	0	3	1	1	0	5
CON	606	0	35	63	56	18	172	2	85	177	140	30	434	0	0	0	0	0	0
LIB	8,982	2	863	1,676	649	72	3,262	6	1,264	2,970	1,306	162	5,708	0	1	5	5	1	12
UNA	528,282	116	38,489	116,897	80,378	19,478	255,358	100	39,154	120,553	90,954	21,670	272,431	1	114	183	117	48	463
OTH	39,133	3	1,046	7,369	7,351	2,567	18,336	3	963	8,104	8,888	2,826	20,784	0	5	3	3	0	11
TOTAL	3,467,882	445	177,641	643,081	736,972	328,872	1,886,991	401	161,050	533,702	634,737	249,453	1,579,343	2	421	560	427	138	1,848

Caliper

Maptitude® Software, Data, and Services for Redistricting

Maptitude for Redistricting™



Maptitude for Redistricting is the professional tool for political redistricting. It is used by a super-majority of the state legislatures, political parties, and public interest groups. Designed with the help of redistricting professionals, state legislatures, and political parties, Maptitude for Redistricting has the features redistricters want and is easy to learn and use.

Caliper Corporation has continued to improve Maptitude for Redistricting. The newest version represents a major leap forward with advanced features, the latest Census geography and data, one-button conversion of existing plans to the latest TIGER geography, new and enhanced reports, a state-of-the-art interface, open access to industry-standard file formats, interoperability with Google Maps and Google Earth, an updated manual, video tutorials, context-sensitive Help, web solutions, and more. Whether you are a current user or new to Maptitude for Redistricting, you will welcome this new version of the software as you prepare for the upcoming round of redistricting.

Maptitude for Redistricting includes all of the features in Caliper's Maptitude Geographic Information System (GIS) software. Maptitude is full-featured mapping and GIS software that has established new standards for performance and value for over a decade. It provides a complete set of mapping and spatial analysis functions, sophisticated geocoding, tools for complex data manipulation, and a large collection of nationwide geographic data.

Maptitude for Redistricting Key Features:

- Create districts using any level of geography
- Compute control field totals and deviations
- Select any number of summary data fields and compute totals and percents
- Display the plan as district boundaries or a thematic map
- Display the plan statistics in a scrollable data window
- Produce over 35 standard reports; add your own and customize ours
- Export the plan to an equivalency file in industry standard file formats
- Import plans from other GIS software
- Merge sub-plans
- Compute measures of compactness
- Verify completeness and district contiguity, and zoom to problem areas
- Update historic election results to new political boundaries
- Create single-district map layouts and map books
- Save plans in an Internet-compatible format
- Complete support for Google Maps and Google Earth
- Includes all TIGER geographic layers with PL94-171 population and race data attached

Maptitude for Redistricting

Includes a Data DVD for your jurisdiction containing all of the geographic layers from the U.S. Census TIGER map files with the official PL94-171 population, race, Hispanic ethnicity, and voting age data attached:

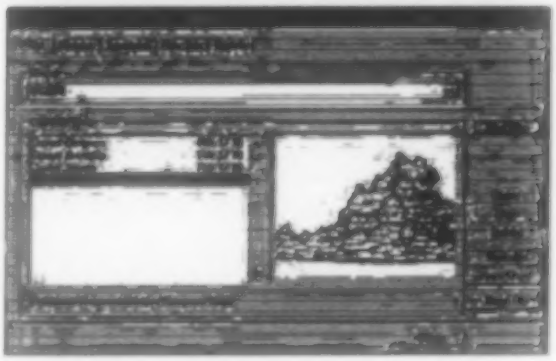
- Census blocks
- Census block groups
- Census tracts
- Upper and lower chamber state legislative districts
- Congressional districts
- State boundary
- County boundaries
- Incorporated place boundaries
- Minor Civil Division (MCD) boundaries
- Elementary, secondary, and unified school district boundaries
- Indian reservations
- Voting districts
- Point and area landmarks
- Water landmarks
- Utility lines
- Railroads
- Street segments
- All line features from Census TIGER/Line® files
- In addition to the PL94-171 redistricting data, you will find Department of Justice definitions of race, special calculations such as "Any Part Black," counts of persons reporting multiple races, and more.

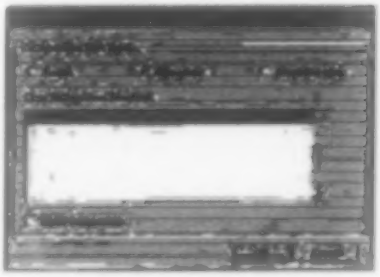
Maptitude for Redistricting includes everything you need to build and analyze redistricting plans.

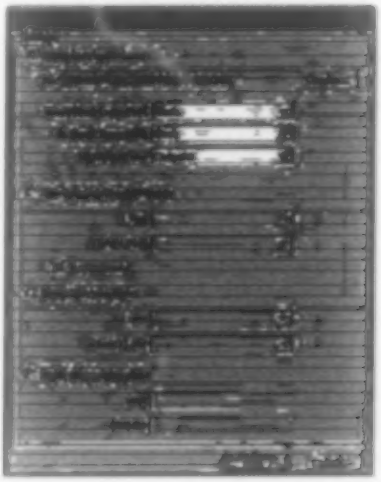
The Maptitude for Redistricting **Plan Manager** serves as your redistricting control center. Use it to organize plans, create any number of plan types (e.g., congressional, state house, senate, school district), and save them as Plan Templates. To create a plan, simply choose a template or an existing plan and enter a new name. Organize plans in libraries by plan type, user, security access, etc. Locate, copy, change settings, and password-protect plans. Group similar plans into plan sets and define report sets for batch printing.

The custom menu system and redistricting toolbox let you:

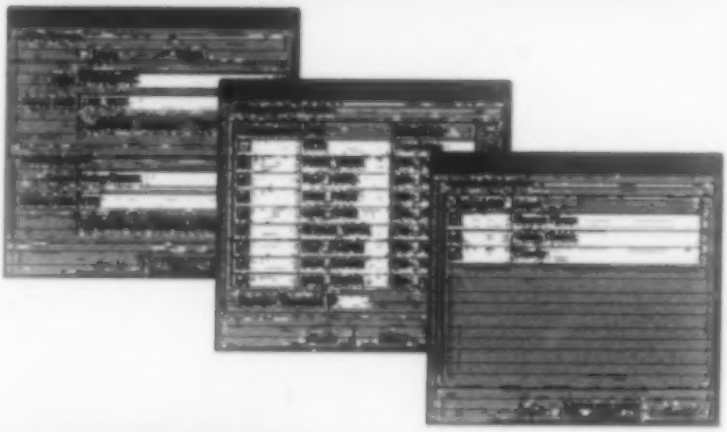
- **Create a new plan** from a map, a template, or an existing plan. You only have to enter the settings once. From then on, you can create a new plan by picking the appropriate template or existing plan.
- **Import and merge plans** created by Maptitude for Redistricting or other redistricting software. You can also automatically convert a plan based on a previous version of TIGER geography to a plan using the latest version of TIGER geography. There is no need to export the old plan to an equivalency file and then import the equivalency file into the new plan. This makes it very easy to update your old plans to the most recent and most detailed Census geography.







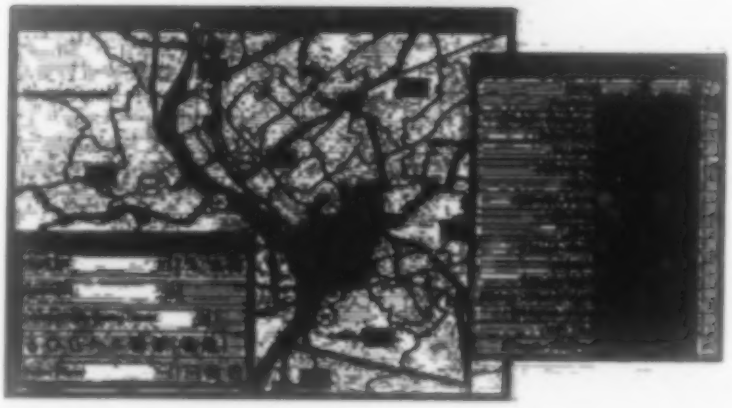
- **Add political data and election results** (usually reported at the precinct or VTD level of geography), and use the Disaggregation/Aggregation Wizard to quickly disaggregate the data down to Census Block geography and aggregate it up to all higher levels of geography. You can join in tables of data or overlay area layers (e.g., historic precincts) that contain the data.



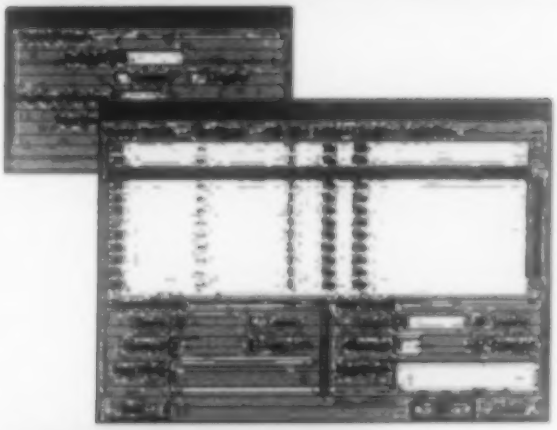
- **Designate the control field**, number of districts, ideal value, and summary fields, and set other plan properties including plan type, creation date, password protection, and backup strategy.

- **Include any number of data fields in the same plan**; one-button toggle between field sets lets you display only the data of interest at any particular time.

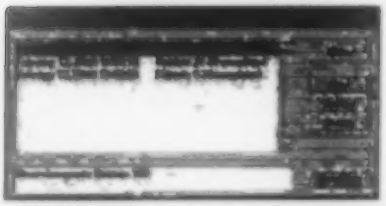
- **Add areas to a target district** using feature selection tools. Select by pointing, by circle, by lasso, by line, or by attribute values. Select features in any geographic layer, such as Census block, voting district, county, town, or school district. Limit the selection to unassigned areas, one district, or the entire jurisdiction. As you add areas to a district, Maptitude for Redistricting redraws the district boundaries and updates the control and summary fields to reflect changes to the current plan.



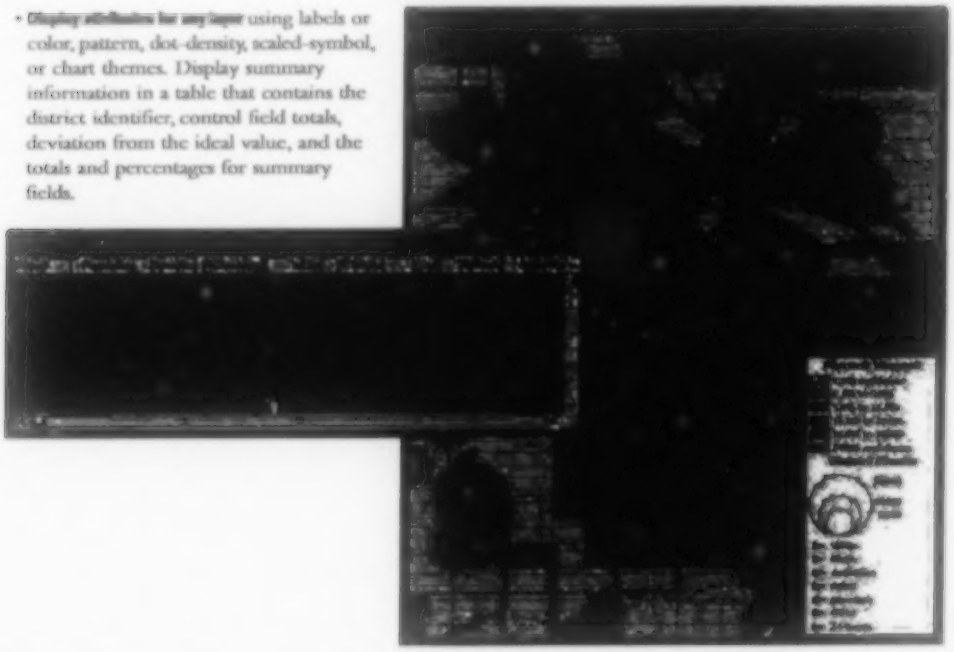
- **Easily manage districts:** rename districts, handle multi-member districts, assign both an ID and a long name to districts, lock districts, and mark them completed.

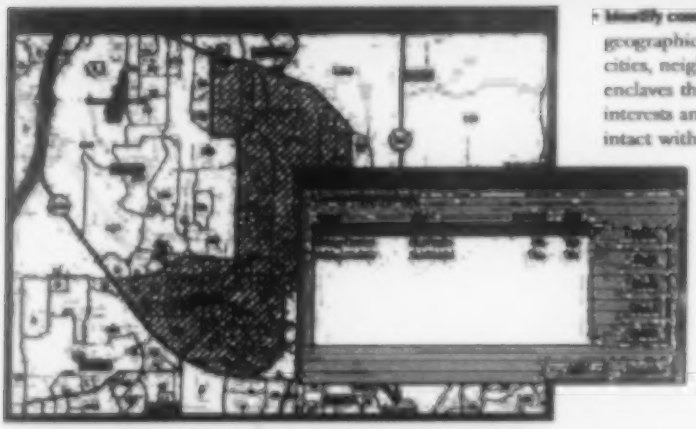


- **Capture the current status of a plan** as a snapshot. Each plan can have one or more snapshots organized by date and time under the same plan name. Return to any snapshot, and use it as a departure point in the evolution of the plan or as the starting point for a new plan.



- **Display attributes for any layer** using labels or color, pattern, dot-density, scaled-symbol, or chart themes. Display summary information in a table that contains the district identifier, control field totals, deviation from the ideal value, and the totals and percentages for summary fields.



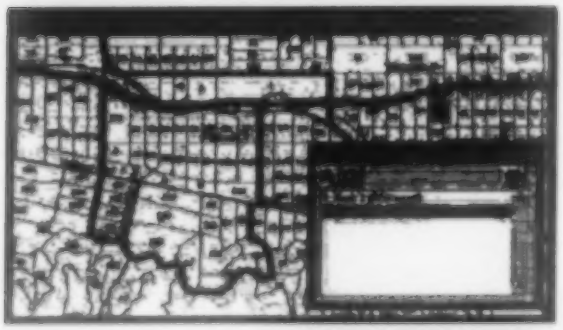


• **Identify communities of interest,** geographically cohesive areas such as cities, neighborhoods, or racial or ethnic enclaves that tend to have similar interests and vote as a bloc. Keep them intact within the same district, and lock them so that you cannot accidentally reassign them to different districts. Alternatively, for communities that you do split into multiple districts, run the Communities of Interest reports to calculate the total and percent population of the community in each district.

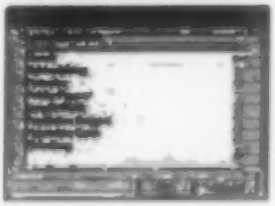
"(Previously) we did redistricting with software and hardware that was bulky, difficult to use, and extraordinarily expensive. Today, Maptitude software provides us far more flexibility, ease of use, and capability at a fraction of the cost. Following redistricting, we will be able to continue to use Maptitude for GIS/data applications ranging from school bus transportation to land use development issues."

Russell T. Larson
Delaware Controller General

• **Easily find unassigned areas** and assign them to the correct district. Automatically assign unassigned areas that are completely surrounded by the same district.



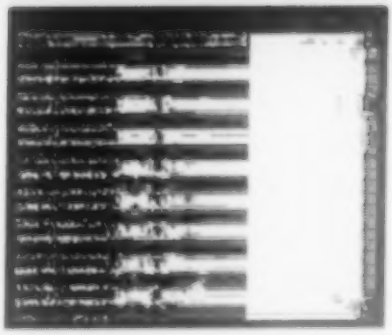
• **List all noncontiguous portions of a district,** zoom to each one, and easily assign them to the correct district.

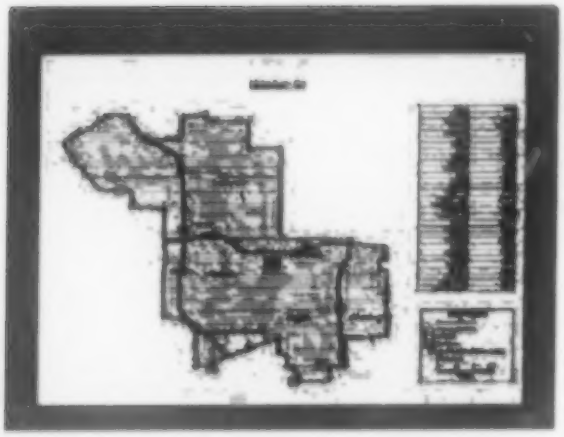


• **Compute measures of compactness** to assess or defend the districts in a plan. Maptitude for Redistricting computes all of the recognized measures of geographic compactness including the Reock, Schwartzberg, Perimeter, Polsby-Popper, Length-Width, Population Polygon, Population Circle, and Ehrenburg metrics.

"It's light years ahead. The software can do so much more, so much more quickly."
Karl Aro
Director, Maryland Department of Legislative Services

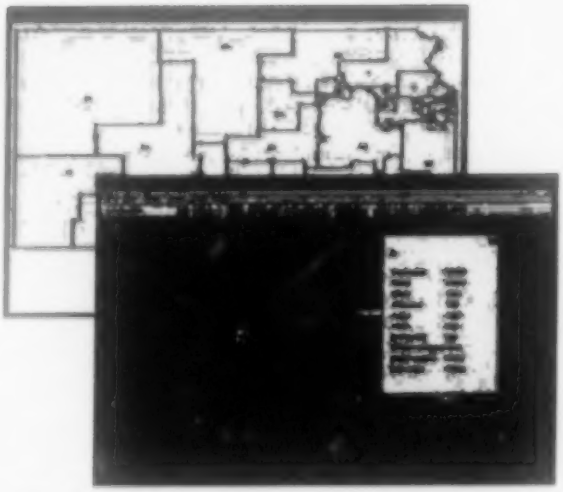
• **Export a plan to standard equivalency file** formats that can be read by other redistricting software and the Department of Justice. This is the best way to transfer a plan because every Census block is assigned to a district and there is no possibility for a mis-assignment.



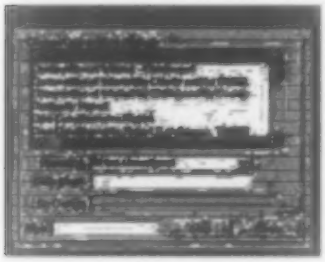


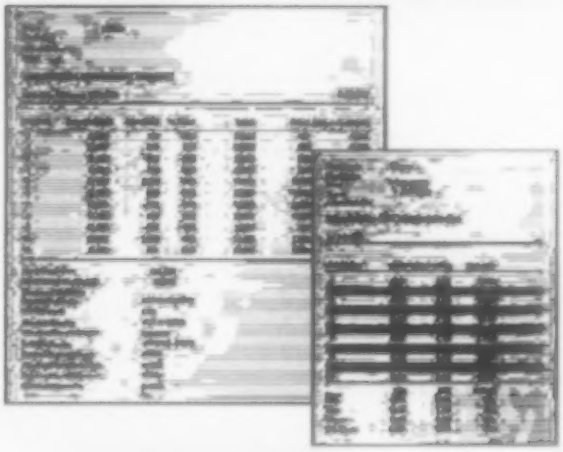
• **Create a map book** containing layouts for some or all of the districts. Display either a single district or the district and all adjoining districts, labeled with the district name, plan name, plan type, administrator, date created, and date last modified based on your settings.

• **Integrate your plans with Google Maps** and Google Earth. Save your plans in the Google format (.KML or .KMZ) and add them to Google Maps or Google Earth. Use the built-in Google Earth toolbox to display Google Earth in Maptitude as part of your plan or display your plan in Google Earth.



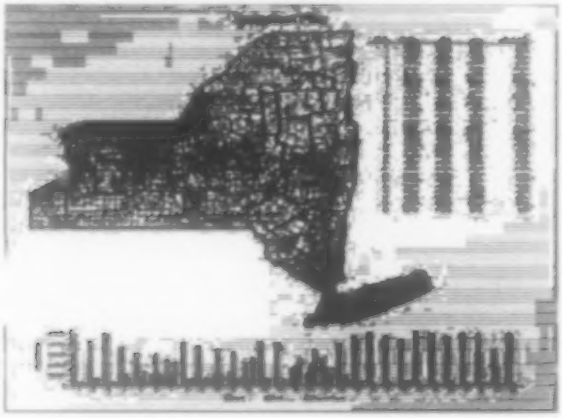
- **Generate and print over 35 reports** including population summary, error check, political subdivision splits, incumbents, plan statistics, plan components, plan comparison, communities of interest, measures of compactness, and more. Create custom reports and add them to the report menu.





- **Group reports together into report sets** and save considerable time by producing the set of reports with the click of a button. Since report sets include the settings for the reports (e.g., additional fields to report on), they eliminate potential errors in the settings. The same report can appear in multiple report sets with different settings, and you can create as many report sets as necessary.

- **Print a completed plan** using page layouts that combine maps, data tables, and charts.



Works with Most Other GIS and Mapping Software

Interoperates with ArcGIS, Google Earth, Oracle Spatial, and MapInfo.

Maptitude supports over 50 file types and more than 100 GIS and CAD file formats allowing you to easily migrate your existing geographic data. You can map ESRI Shapefiles, Geodatabases, MapInfo TAB files, and Oracle Spatial tables directly, or use the built-in translators to import geographic data from a variety of other software packages and public sources. This extensive library of importers and exporters is one of the largest in the industry and comes at no additional charge. You can export plans (geography and data) to these other formats if your GIS department uses one of these other products.

You can use raster images such as satellite or aerial photographs directly in your maps. Maptitude includes toolbars for quickly accessing online images from TerraServer-USA and Google Earth. You can use the images as a means of reference or in conjunction with the redistricting tools to draw your districts.

Easy to Learn and Use

"The difference between Maptitude and similar products is that it is shockingly easy to use."
Trudy Walsh
Government Computer News

Maptitude for Redistricting includes online help and detailed manuals packed with step-by-step instructions and tutorials. The Plan Manager leads you through the process of creating your first plan and speeds the creation of all additional plans. Other wizards help you create maps, display data using meaningful themes, and geocode information based on street address. In addition, Caliper offers training at your site or at our headquarters in Newton, Massachusetts.

Complete Organizational Solution

With the Maptitude for Redistricting Plan Manager you can easily manage an unlimited number of plans stored on a computer network. You can quickly find a plan by type, creator, date, key word, etc. The Plan Manager lets you distribute plans for viewing and perform plan management functions across your organization. Data and plans can be stored on individual machines or on one central server with access controlled by both Maptitude for Redistricting and the network administration software.

System Requirements

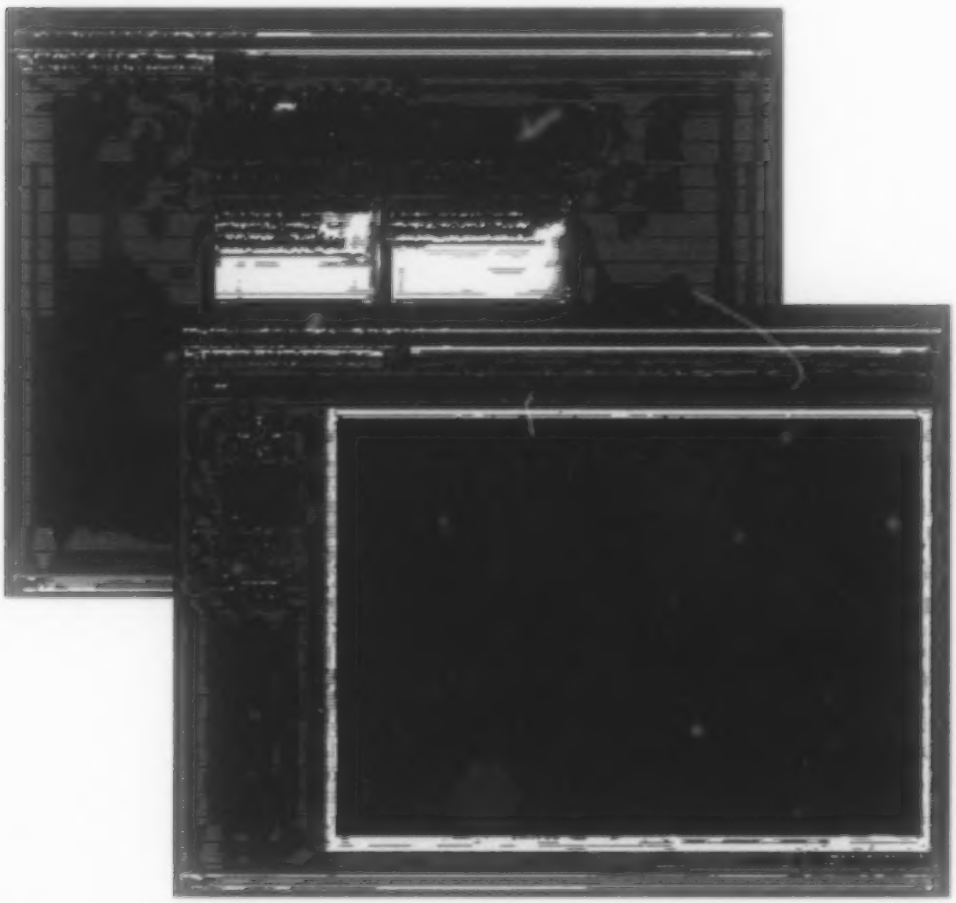
Maptitude for Redistricting runs on Microsoft Windows XP, Vista, or Windows 7. Minimum hardware includes a DVD-ROM drive and 1GB of memory. Disk space requirements vary by jurisdiction (200MB–1GB).

Maptitude Web Plan Publisher™

Publish Your Plans on the Internet

Maptitude for Redistricting lets you save your plans (maps, data tables, charts, layouts, and reports) as JPEG, PNG, and HTML files for static Web publishing. Caliper software also lets you add your plans to Google Earth or Google Maps and add Google Earth images to your plans in Maptitude.

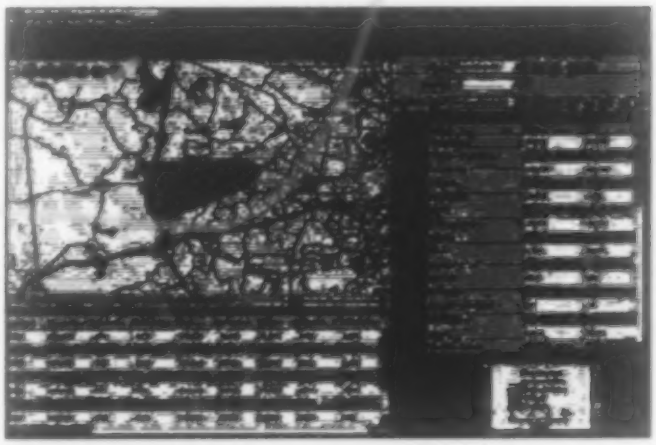
If you are looking for a more sophisticated presentation of your plans, Caliper Corporation's Maptitude Web Plan Publisher software makes it easy to publish your plans as interactive mapping applications on the Web. For example, users can locate their address on the map, pan and zoom, query the district assignments, and display tables of data from their browser.



Maptitude Online Redistricting™

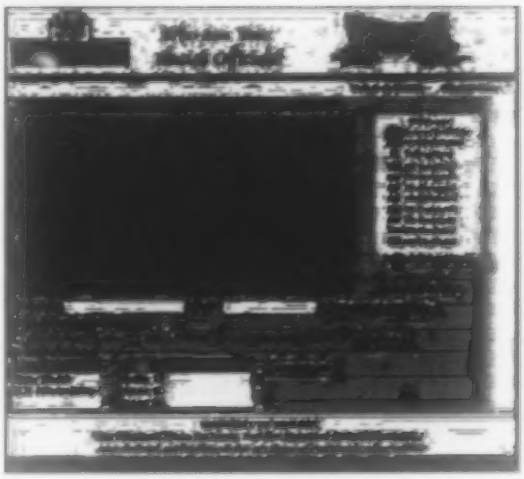
Maptitude Online Redistricting is web-based redistricting software designed for governments or organizations that want to provide their members or the general public with a means to draw and report redistricting plans. Because the PC and online versions share common file formats, plans developed online can be electronically submitted to the central redistricting office, opened in the PC-based software, and analyzed to the full extent as if they had been created using the PC-based software.

The Maptitude Online Redistricting screen contains the plan map, a dataview listing the existing districts and their statistics, and a dataview of pending changes based upon the user's current actions. The redistricting toolbox is similar to the toolbox in the desktop version, and the user can zoom, pan, and query the map using the mapping tools.



Custom Website Development

Caliper has extensive experience creating sophisticated websites for a number of large government organizations including the U.S. Census Bureau, the U.S. Department of Transportation, the Small Business Administration, and several state legislatures. Caliper can create custom web applications for your organization, such as "Who are your elected officials?" In this example, the user enters an address and the map zooms to that location and lists the elected officials with links to their websites.



Our Clients (Partial List)

Maptitude for Redistricting is used by a super-majority of the state legislatures, both national political parties, many state political parties, county and regional governments, city and local governments, elected officials, educational institutions, and public interest groups. For a more complete list, visit www.caliper.com/redistricting/clients.htm

National Organizations:
Democratic National Committee
Department of Justice, Civil Rights Division
National Committee for an Effective Congress
National Republican Congressional Committee
Republican National Committee

State Organizations:
Alabama Democratic Party
Alabama House Majority
Alaska Division of Elections
Arizona House of Representatives
Arizona Independent Electoral Commission
Arizona Redistricting Commission
California Assembly Rules Committee
California Governor's Office
California Legislative Data Center
California Senate Minority Reapportionment
California Senate Office of Research
California State Assembly
Colorado Department of State
Colorado Governor's Office
Colorado House of Representatives
Colorado Legislative Council
Colorado Reapportionment Commission
Delaware Commissioner of Elections
Delaware Legislature
District of Columbia Republican Party
Georgia General Assembly
Georgia Office of Planning and Budget
Georgia Redistricting Services
Idaho Legislative Services
Illinois House Republican Caucus
Illinois Senate Republican Caucus
Kansas Legislative Research Department
Kentucky Legislative Research Commission
Louisiana House of Representatives
Louisiana Senate
Maine Judicial Center
Maine Legislature
Maryland Department of Legislative Services
Maryland General Assembly
Maryland Office of Planning
Massachusetts House of Representatives
Massachusetts Republican Redistricting Taskforce
Massachusetts Senate
Michigan Democratic Party
Minnesota DFL
Minnesota Governor's Office
Minnesota Legislative Coordinating Commission
Minnesota Office of Planning
Minnesota Secretary of State
Minnesota Senate
Minnesota Supreme Court
Mississippi Community Policy Research
Mississippi Joint Reapportionment Committee
Missouri House of Representatives
Missouri Office of Administration
Missouri Office of Mgmt., Budget, & Planning
Missouri Senate
Nebraska Republican Party
Nevada Republican Party
New Hampshire GCIS
New Jersey Office of Legislative Services
New Mexico Republican Party
New York Empire State Development
New York Assembly Democratic Majority
New York Assembly Republican Caucus
New York Governor's Office
New York Office of Technology
New York Senate Majority
New York Senate Minority
New York State LATFOR
North Carolina General Assembly
North Dakota Legislative Council
Ohio Secretary of State
Oklahoma Governor's Office
Oklahoma Senate
Pennsylvania House Democrats
Pennsylvania Senate Democrats
Puerto Rico Supreme Court
South Carolina House of Representatives
South Carolina Senate
Tennessee Attorney General
Tennessee General Assembly
Tennessee Office of Legal Services
Texas Comptroller of Public Accounts
Texas General Land Office
Texas Legislative Council
Utah Republican Party
Vermont Legislative Council
Virginia Democratic Caucus
West Virginia Legislature
Wyoming Legislature

County & Regional Organizations:
Acadiana LA Regional Development District
Alabama Assoc. of County Commissioners
Alameda County CA Community Development
Alamosa County CO, County Clerk
Anne Arundel County MD
Anoka County MN
Barton County KS
Blount County AL, County Commission
Boone County WV Commission
Brooke County WV, County Commission
Butte County CA
Calvert County MD
Capitol Region LA Planning Commission
Cerro Gordo County IA
Chaffee County CO
Champaign County IL County Clerk
Clark County NV Manager's Office
Cobb County GA Elections
Comal County TX
Contra Costa CA Water District
Coweta County GA
Cumberland County ME
Elbert County CO
Forsyth County GA
Glenn County CA, Elections Department
Grand County CO
Hardee County FL
Hardin County KY
Harris County TX Tax Office
Hennepin County MN
Hood County TX
Jackson County MO Election Board
Jefferson County CO Clerk and Recorder
Johnson County KS
Kanawha County WV
Kent County DE
Kent County MI
Lincoln County MT
Los Angeles CA Superior Court
McCracken County KY
Miami-Dade County FL County Comms.
Mobile County AL Engineer's Office
Nassau County NY
Navajo Nation AZ
New Castle County DE
Nowata County OK, Clerk
Pasco County FL Supervisor of Elections
Pierce County WA, Elections
Polk County FL Supervisor of Elections
Putnam County FL Supervisor of Elections
Ramsey County MN
Saint Louis County MN
Saint Lucie County FL Supervisor of Elections
San Benito County CA
San Diego County Data Processing
Sanford/Lee County NC, County Commission
Santa Barbara County CA
Santa Cruz County CA, ISD Dept.
Stillwater County MT GIS
Summit County NJ Board of Elections
Sumter County FL Supervisor of Elections
Tate County MS
Trinity County CA
Trinity County TX
Vigo County IN
Westchester County NY

City Governments:
Albany NY, Common Council
Baltimore MD, City Council
Baltimore MD, Mayor's Office
Bloomington MN
Buffalo NY, City Clerk
Cambridge MD Commissioners
Champlain MN
Columbia MO
Dallas TX
Denver CO, Election Comm.
Jefferson MO
Lake Charles LA
Los Angeles CA Council
Minneapolis MN Metropolitan Council
New York NY City Council
New York NY Redistricting Comm.
Pasadena CA
Pensacola FL, Planning & Development
Phoenix AZ
San Francisco CA, Department of Elections
San Leandro CA
Temple TX
Villages FL
Westport CT

Educational Institutions:
Alabama State U. Ctr. for Leadership & Public Policy
Benedict College
Claremont McKenna College Rose Institute
Cronkite School of Journalism
CUNY Graduate Center
CUNY, Medgar Evers College
George Mason University
Georgia Institute of Technology
Georgia State University
Mississippi State University Stennis Institute
Princeton Univ. Woodrow Wilson School
Queens College
Rice University
UCLA, Dept. of Urban Planning
University of Florida
University of Georgia, Redistricting Services
University of Pennsylvania Law School

Other Redistricting Services

Caliper provides database development, hands-on training, software customization, web design, telephone support, on-site support, priority support, and other related consulting services on a time and materials basis.

About Caliper

Caliper Corporation is a leading developer of transportation and Geographic Information System (GIS) software and applications. Caliper software is used by more than 70,000 users in over 70 countries. Caliper is the developer of the U.S. Census Bureau's MAF/TIGER Partnership Software that has been used by Census Bureau partners to update the geography for the 2010 Census.

Ordering & Information

Please contact Howard Simkowitz, Director, Government Services, at 202-652-1024 or HSIMKOWITZ@CALIPER.COM for pricing and information. There are discounts for quantity purchases and for clients from the 2000 redistricting cycle. You can download an order form at WWW.CALIPER.COM/REDISTRICTING or call Caliper at 617-527-4700 to place your order.

What Others Have to Say

Maptitude for Redistricting was featured in a December 2003 *New Yorker* article, "The Great Election Grab," by Jeffrey Toobin.

> [Assistant professor of law and political science Nathaniel] Persily zeroed in even more closely, and a little donkey popped up inside one of the census blocks. "That's where the local congressman lives, a Democrat," he explained. "We have little elephants for the Republican incumbents." [Maptitude for Redistricting] seemed easy to use, justifying the boast, on the software company's Web site, that you could "start building plans thirty minutes after opening the box."

Maptitude for Redistricting was featured in a April 24, 2001 *Wall Street Journal* article, "Software Makes Redistricting Easier, Accessible," by Will Pinkston. Nearly everyone interviewed for the article uses Maptitude for Redistricting.

> In New Jersey, when a committee of five Republicans and five Democrats chosen by their parties couldn't agree on how to redraw the state's legislative boundaries, the state supreme court tapped Larry Bartels, a Princeton University professor, to break the impasse. After 10 days locked away in a hotel with the two sides, the professor emerged with a resolution: an entire state redistricting map drawn on a laptop computer, using [Maptitude for Redistricting].
>
> Cheaper software is letting independent consultants in the game, too. George Meier, former staff director of Florida's House reapportionment committee, had to requisition $600,000 in computer software and equipment in 1991 to draft new electoral district boundaries. This year, as a redistricting expert freelancing for cities and counties in Florida [using Maptitude for Redistricting], his overhead is considerably lower: He got everything he needs loaded onto his Dell laptop for under $4,000. And Baltimore civil-rights attorney Samuel L. Walters is using [Maptitude for Redistricting] to pitch his expertise to minority groups and local governments. Mr. Walters, who worked for the NAACP during 1991's redistricting, says he expects to quickly recoup his costs.

The Rose Institute at Claremont McKenna College conducts and publishes research primarily on California government and politics. Here is what the Rose Institute has to say about Caliper Corporation in its 2005 report, "Restoring the Competitive Edge: California's Need for Redistricting Reform and the Likely Impact of Proposition 77"

> [Caliper Corporation's] longstanding and generous support makes possible all of the Rose Institute's demographic, redistricting, and geographic information systems (GIS) research. Their outstanding, powerful and easy-to-use Maptitude software enables us to train our students up from GIS novices to expert users in only a few hours, and the software's extensive analytic capabilities provide the service and power needed for our work.

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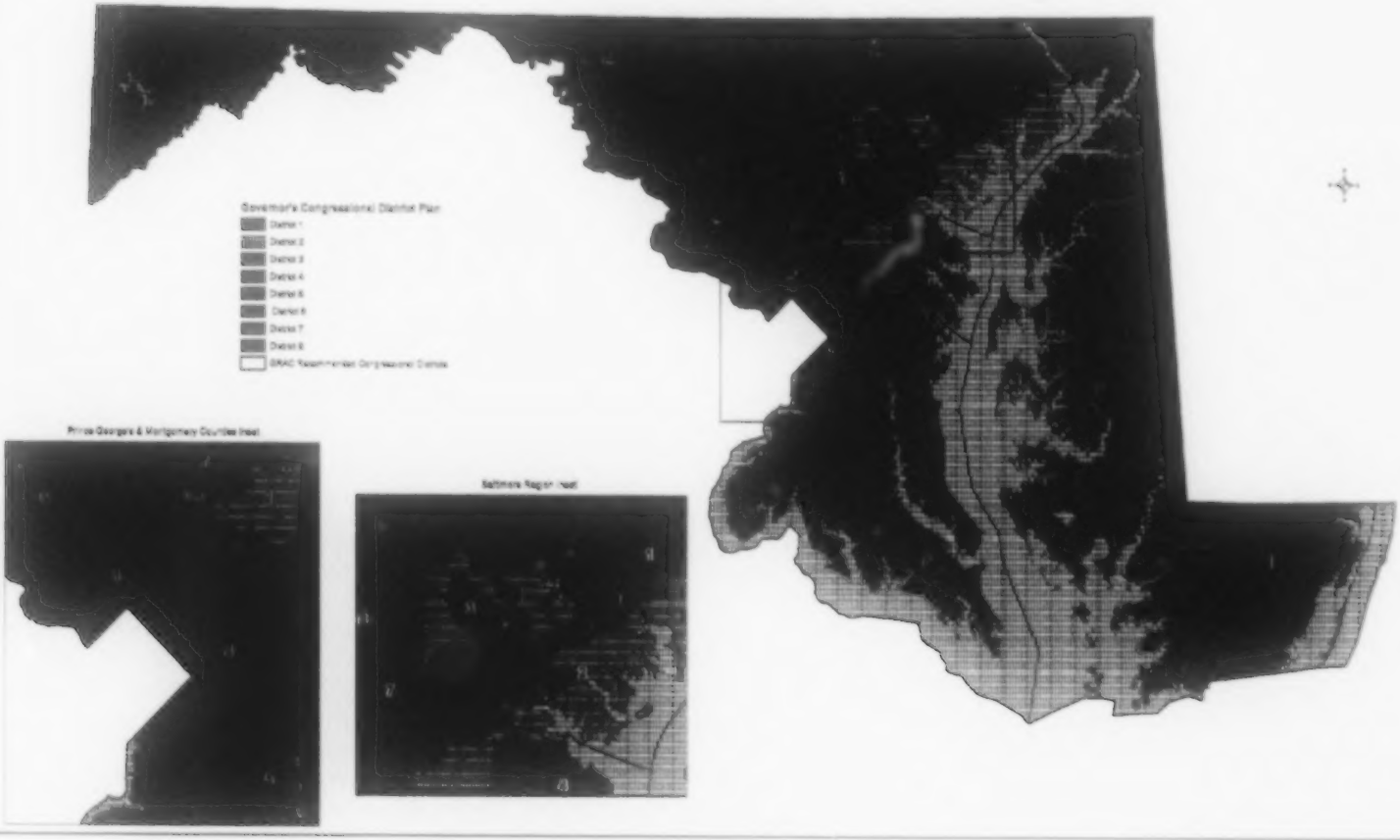
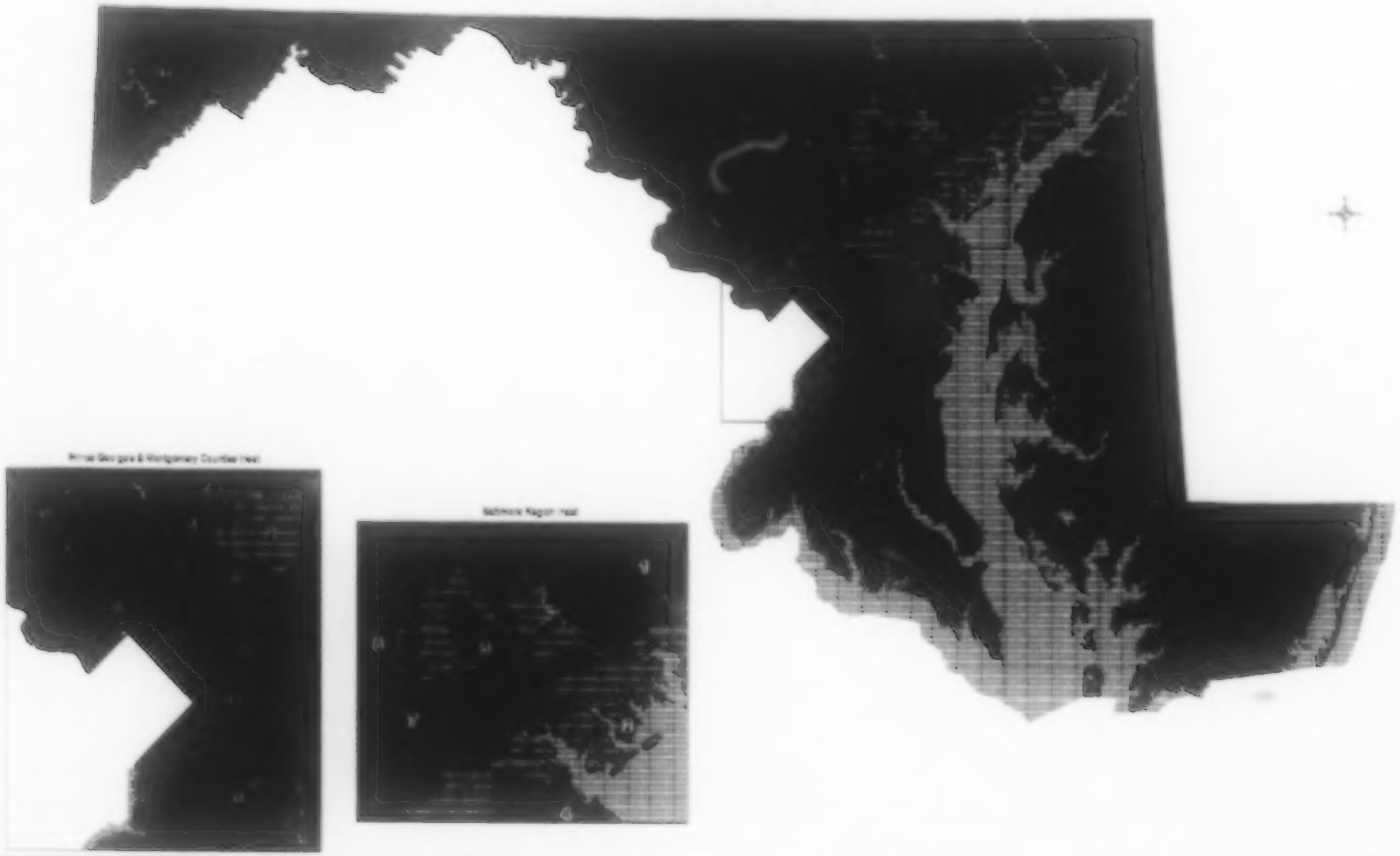
Governor Martin O'Malley's 2011 Congressional District Plan
& 2011 Governor's Redistricting Advisory Committee Recommended Congressional District Plan
October 15, 2011



Maryland 2011 Congressional Districts

Senate Bill 1

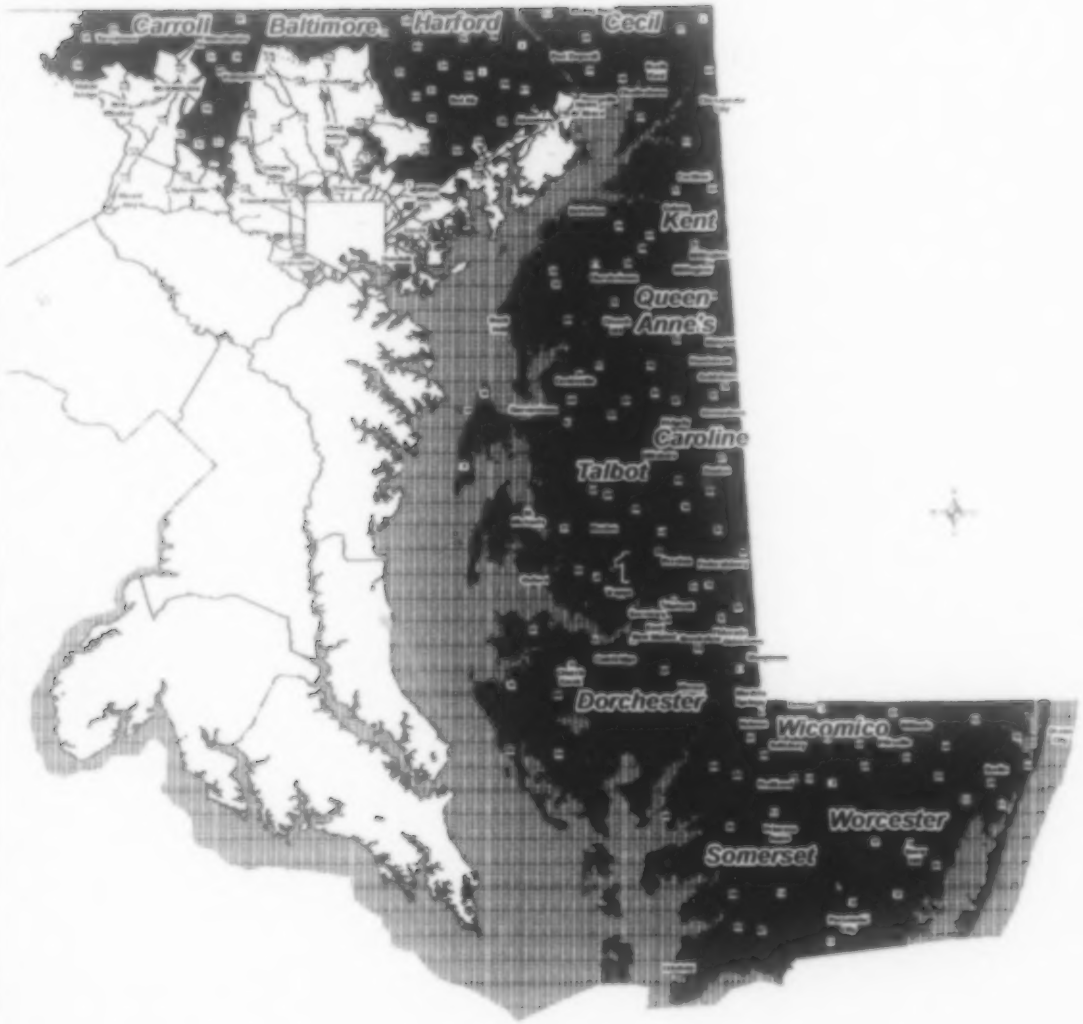
October 20, 2011



Maryland 2011 Congressional District 1

Senate Bill 1

October 20, 2011



Maryland 2011 Congressional District 2

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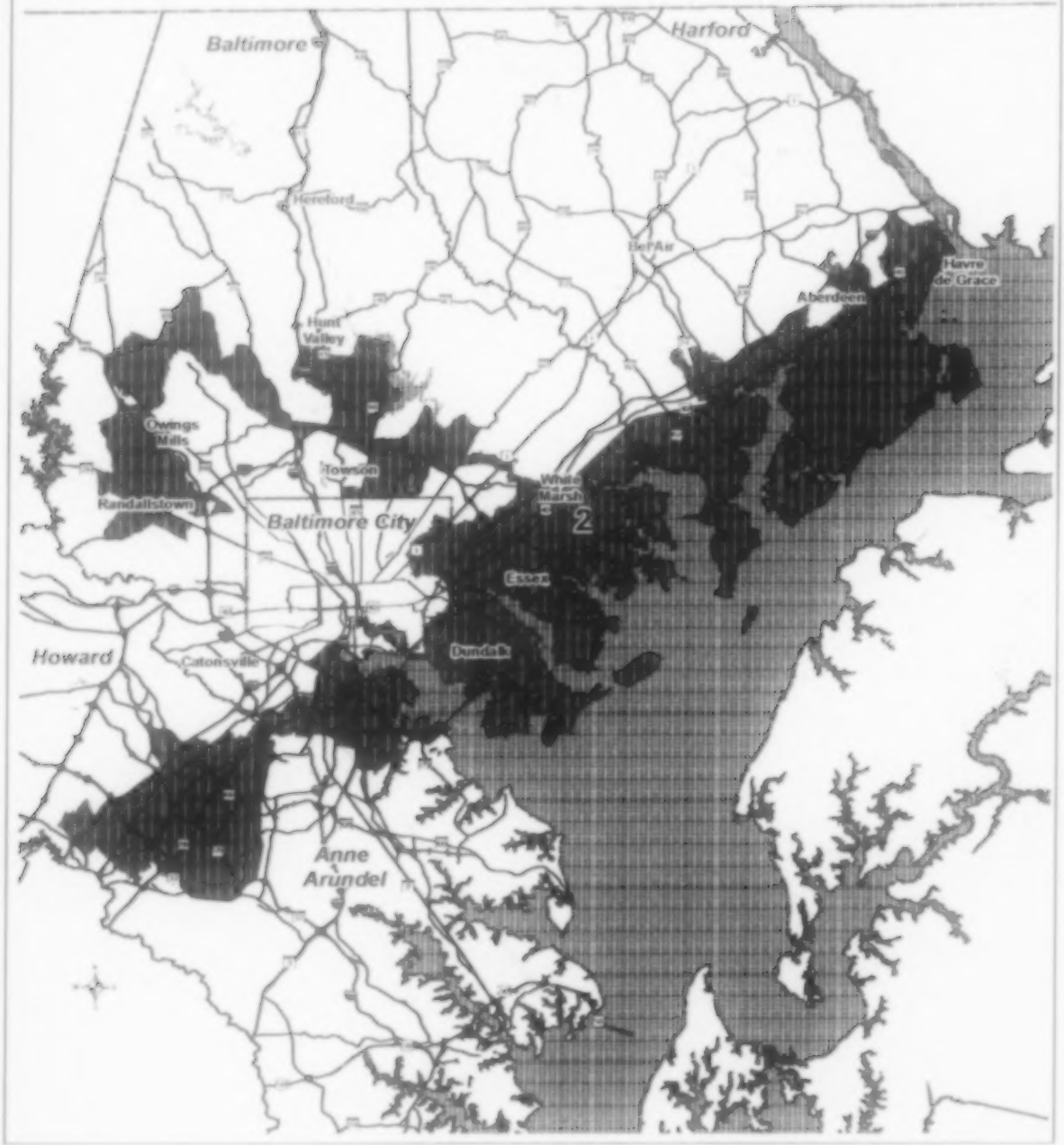
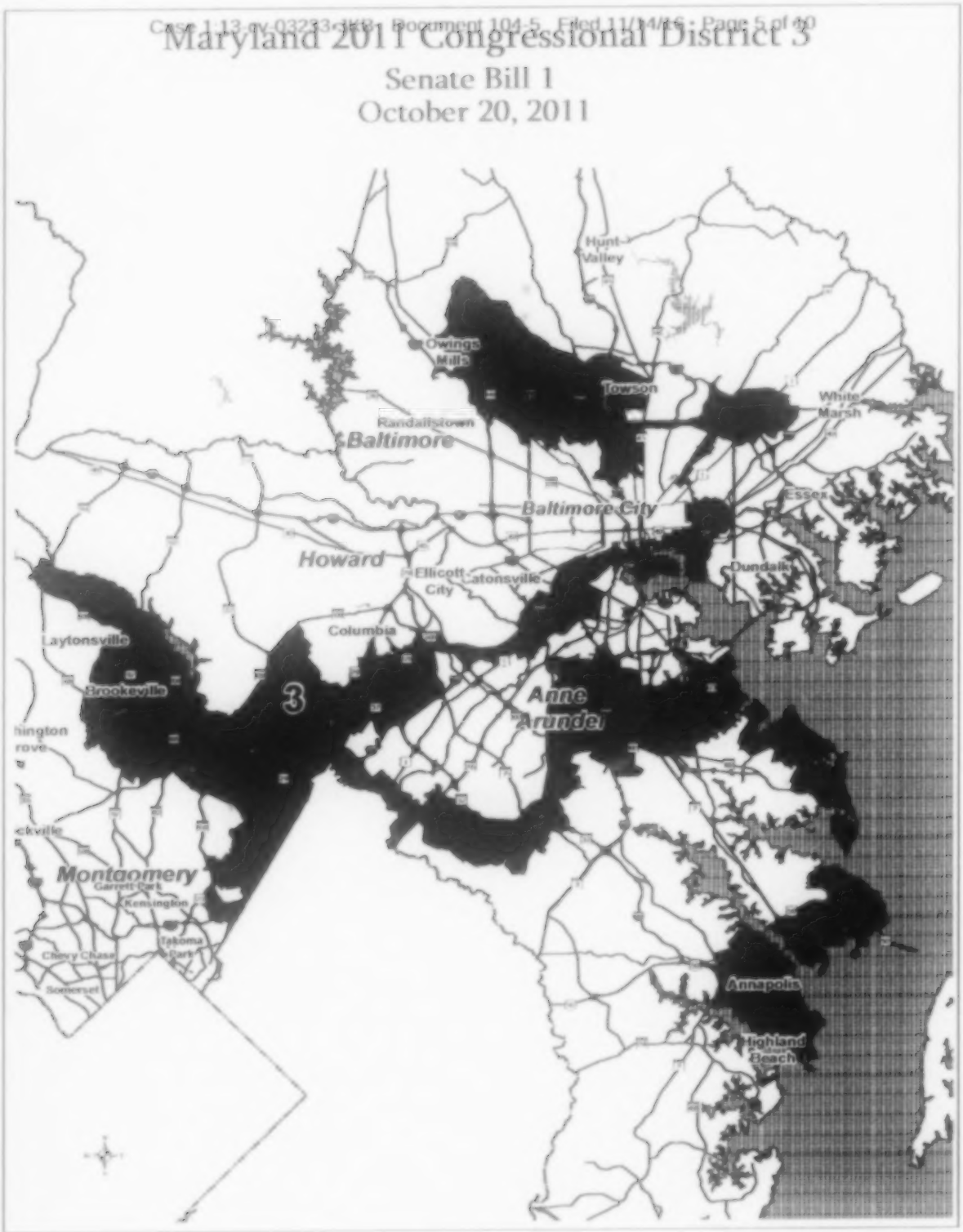
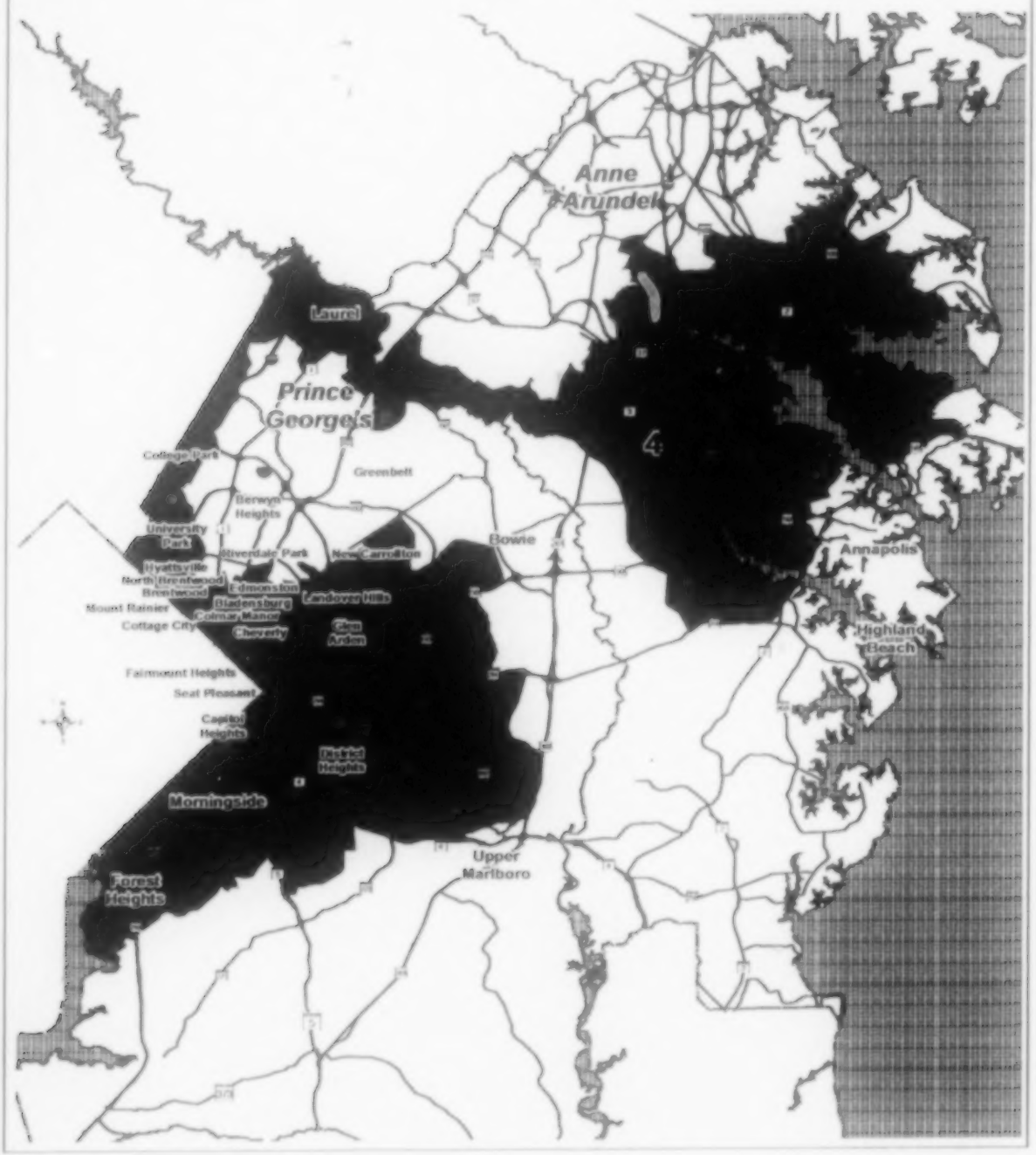



Maryland 2011 Congressional District 3
Senate Bill 1
October 20, 2011
Hunt Valley
Owings Mills
Towson
White Marsh
Randallstown
Baltimore
Baltimore City
Essex
Howard
Ellicott City
Catonsville
Dundalk
Columbia
Laytonsville
Brookeville
3
Anne Arundel
Montgomery
Garrett Park
Kensington
Takoma Park
Cherry Chase
Somerset
Annapolis
Highland Beach

Maryland 2011 Congressional District 4

Senate Bill 1

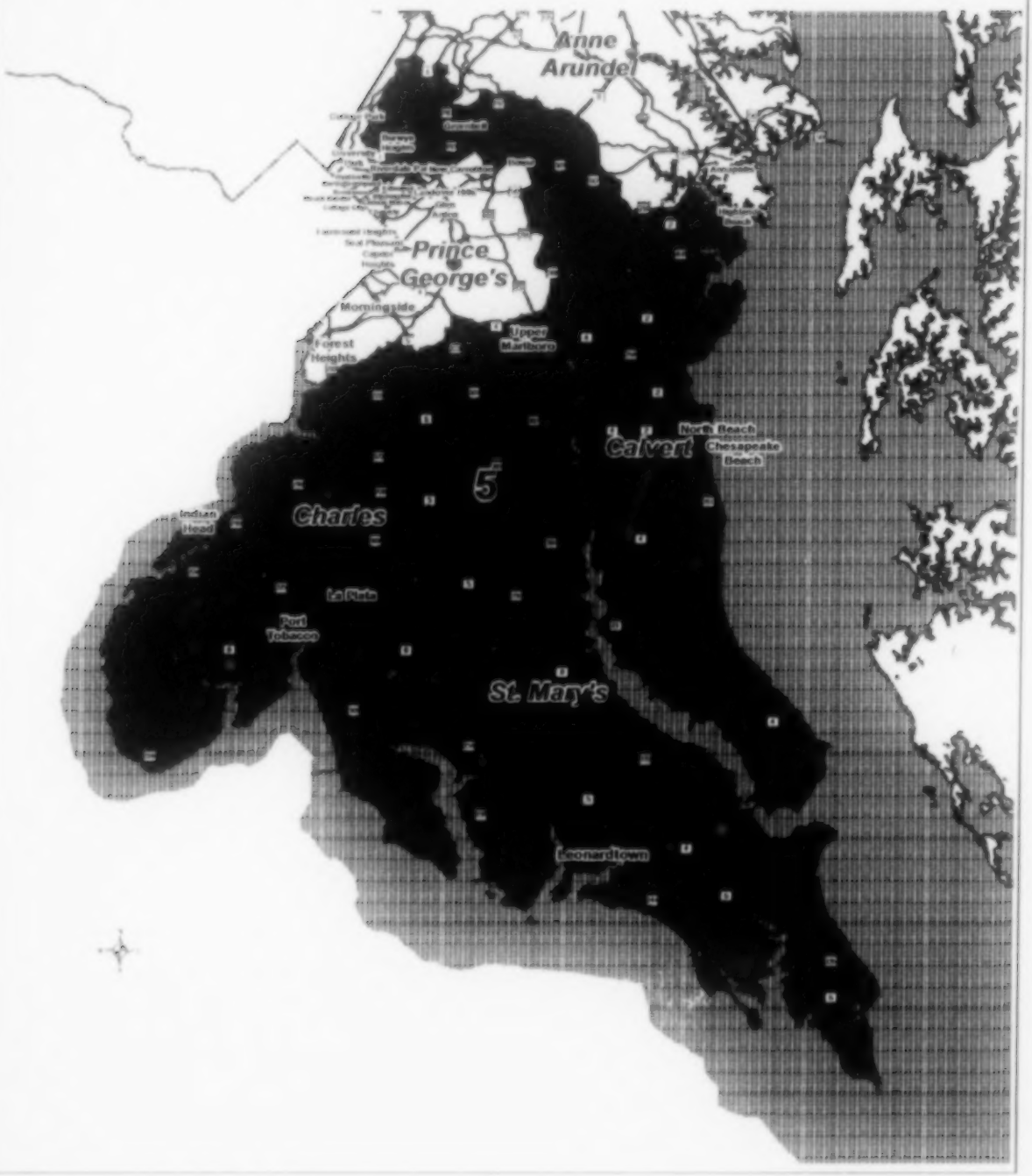
October 20, 2011



Maryland 2011 Congressional District 5

Senate Bill 1

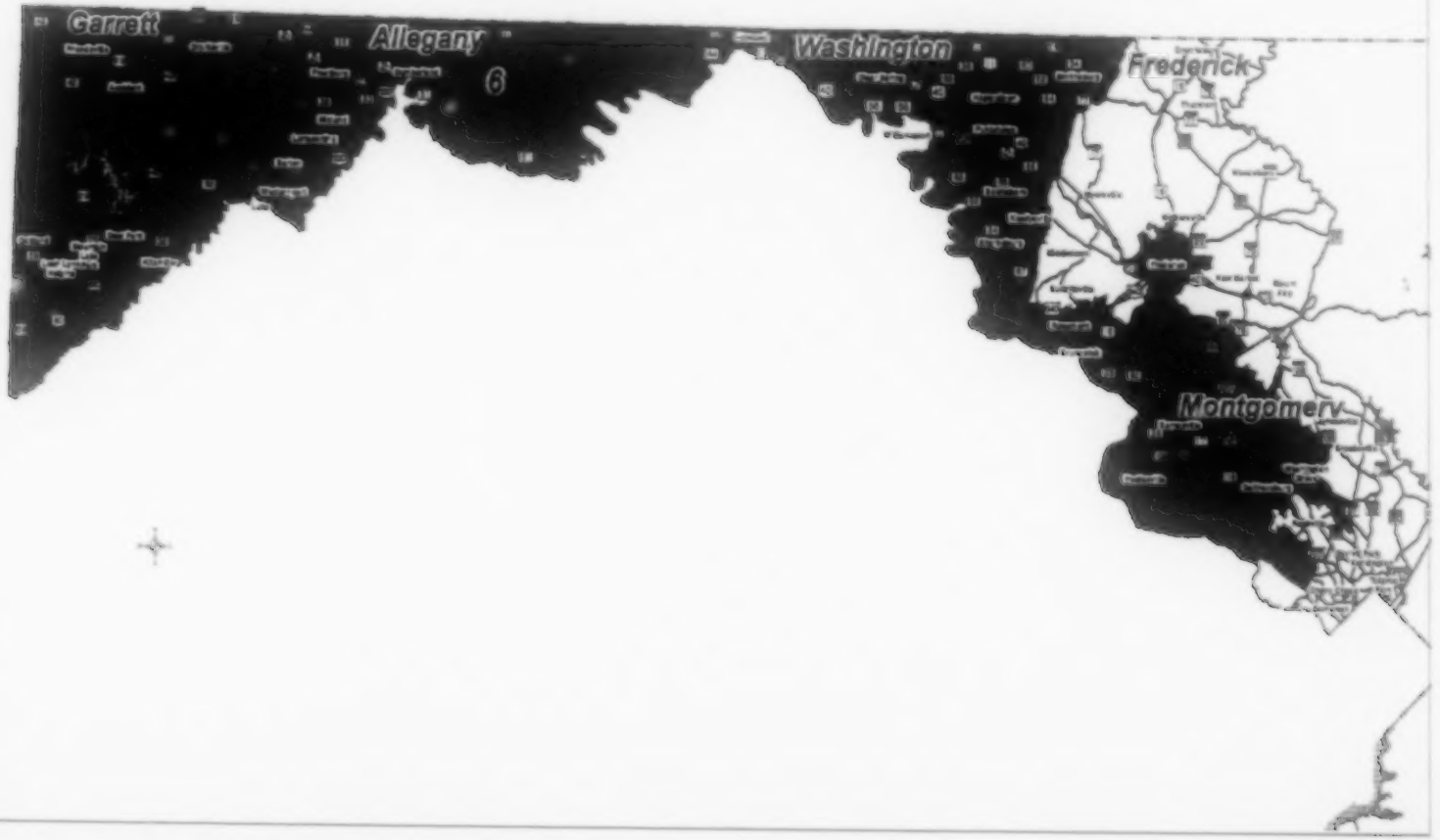
October 20, 2011



Maryland 2011 Congressional District 6

Senate Bill 1

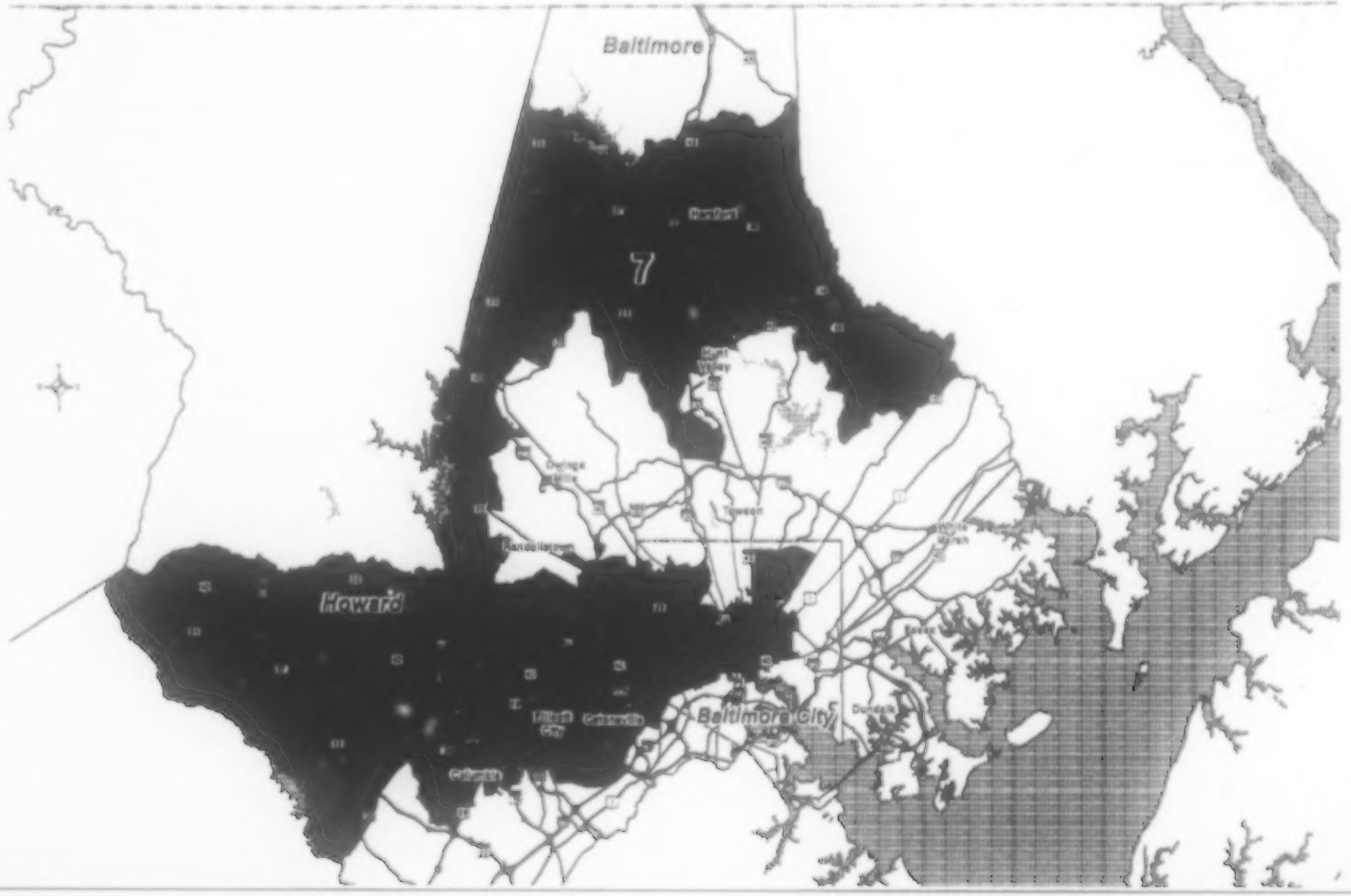
October 20, 2011



Maryland 2011 Congressional District 7

Senate Bill 1

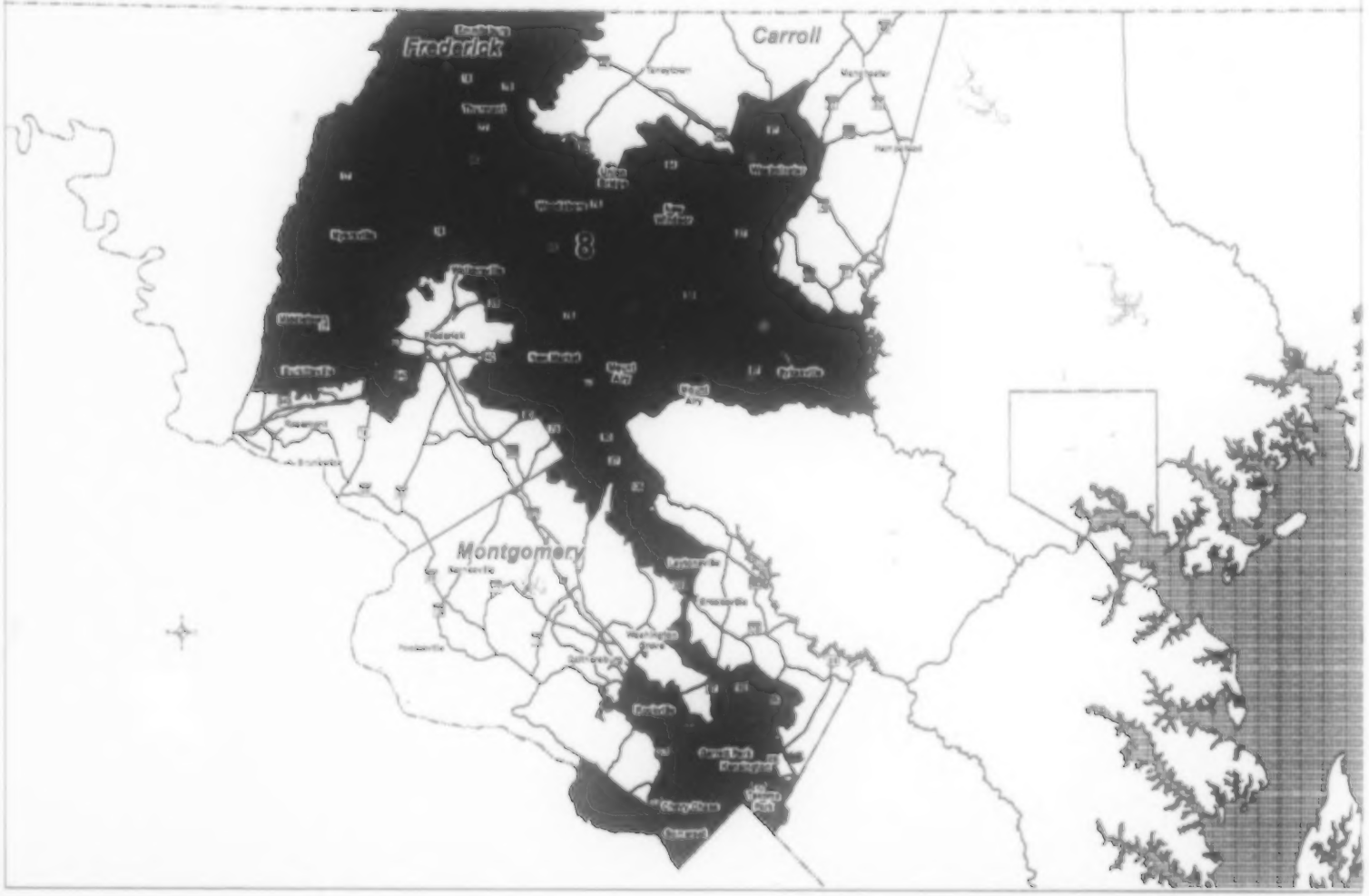
October 20, 2011



Maryland 2011 Congressional District 8

Senate Bill 1

October 20, 2011



Recommended Congressional Plan

Governor's Redistricting Advisory Committee

Exhibit 32

MC.M002454

Governor's Redistricting Advisory Committee

- Membership
  - Jeanne Hitchcock, Chair
  - Senate President Miller
  - House Speaker Busch
  - Richard Stewart
  - James King
- Public Input
  - 12 Regional Hearings Across the State close to 1000 Marylanders.
  - 350 total Comments (3rd Party Plans, testimony at meetings, written).

Recommended Plan Highlights

- Approximately 70% of Marylanders stay in their current Congressional District.
- Plan reflects population changes over past decade.
- Plan does not draw any incumbent member of Congress out of his / her district.
- District by District description follows.

District 1: Eastern Shore

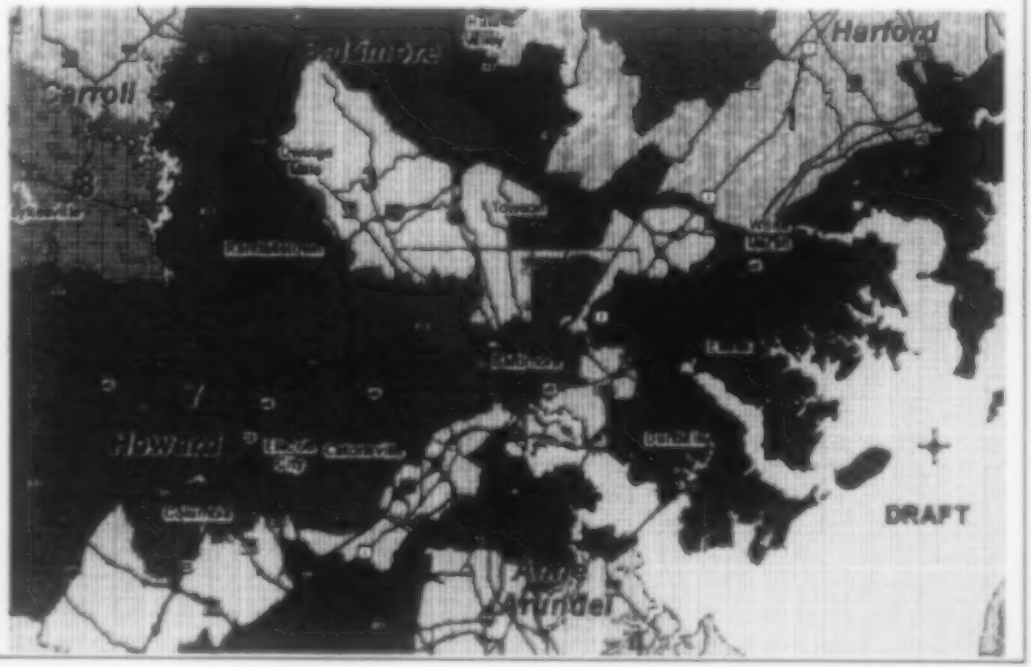
- 9 Eastern Shore Counties are kept together.
- District no longer crosses the Chesapeake Bay into more urban areas of Anne Arundel County, instead runs into rural portions of Carroll County.
- Harford County is no longer split into 3 Congressional Districts, a desire expressed by residents .

MCM002457

Districts 2, 3, and 7: Baltimore Region

- **District 7** remains a district based in Baltimore City, with surrounding portions of Howard and Baltimore Counties that are primarily in the current 7th District.
- **District 3** remains a Central Maryland district that incorporates portions of the Baltimore and suburban Washington regions because of population growth in Central, MD.

Baltimore Region

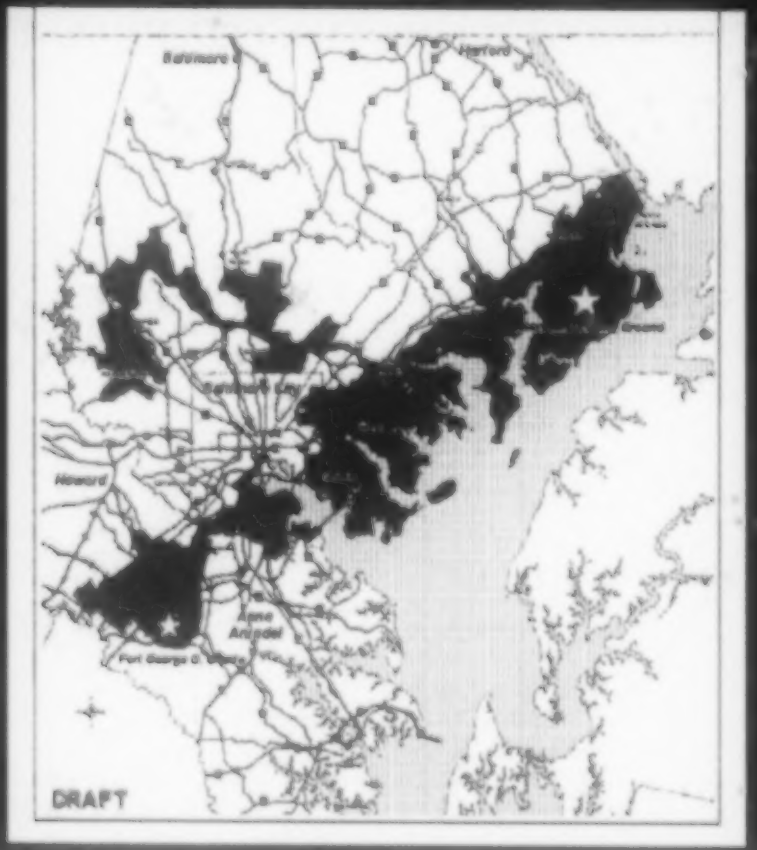


MCM002459

District 2

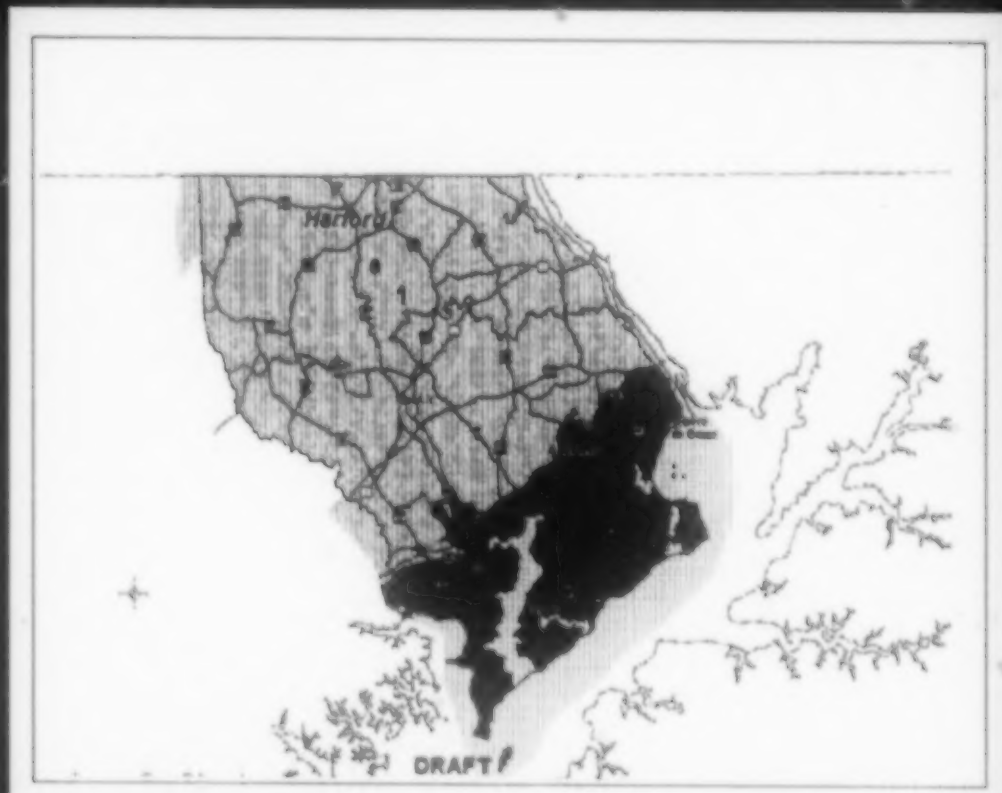
- Retains its character as a BRAC corridor district, anchored on the Northeastern edge by Aberdeen Proving Ground and the Chesapeake Bay shoreline of Harford County, through the Baltimore region, and anchored on the Southern edge by Fort George G. Meade.
- This configuration includes communities along the Upper Western Shore of the Chesapeake Bay and allows for the residents most impacted by the Base Realignment and Closure process to elect a Congressman capable of focusing on this important issue.

District 2



MCM002461

Harford County (parts of Districts 1 & 2)

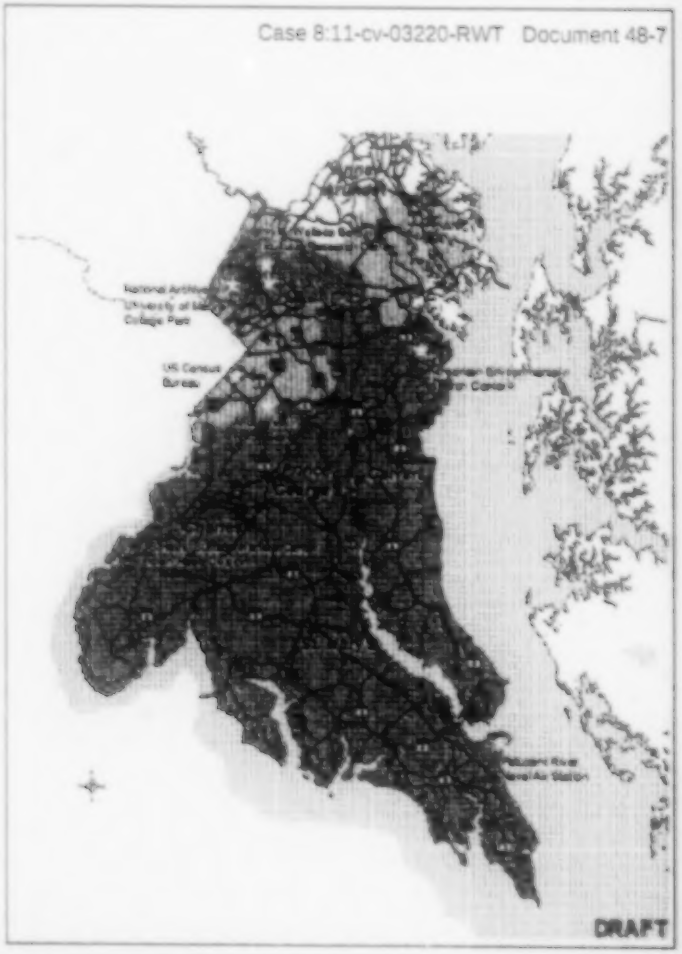


Districts 4, 5, 6 & 8: Greater Washington, D.C. Region

- Public testimony in this region expressed a desire to have a Congressional map that better reflects patterns in this region – the growth in Southern Maryland from Prince George's County, and the growth of the suburbs along the I-270 Corridor.
- Districts 4 & 5 - the Committee drew 2 districts that are based in Southern Maryland/Prince George's County.
- District 4 connects communities of Central and Upper Prince George's and Anne Arundel Counties, and District 5 connects communities of Upper and Southeastern Prince George's County with Anne Arundel County and Southern Maryland.
- Within Prince George's County, the Committee kept existing communities within their current Congressional districts, to the extent possible.
- Both districts retain the important State and Federal facilities currently within the districts. For instance in the 4th District: the Census Bureau in Suitland, Andrews Airforce Base, etc., and the District is anchored by the National Harbor complex.

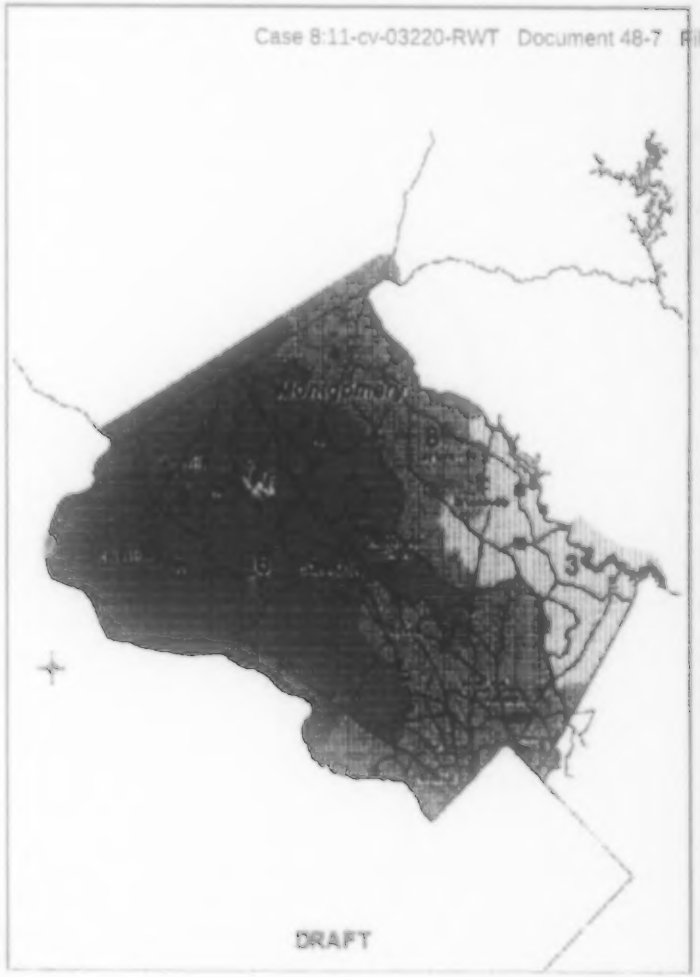
Districts 4, 5, 6 & 8: Greater Washington, D.C. Region (con't)

- Districts 6 & 8 - based in Montgomery County and the I-270 Corridor, into Western Maryland.
- Consistent with public testimony to the Committee, the proposed map eliminates the current overlap of districts in Prince George's and Montgomery Counties (District 8 into Prince George's and District 4 into Montgomery).
- District 8 includes southern Montgomery County, areas east of the I-270 Corridor, and includes portions of eastern Frederick County and western Carroll County.



Districts 4 & 5: Prince George's, Anne Arundel, Southern, MD

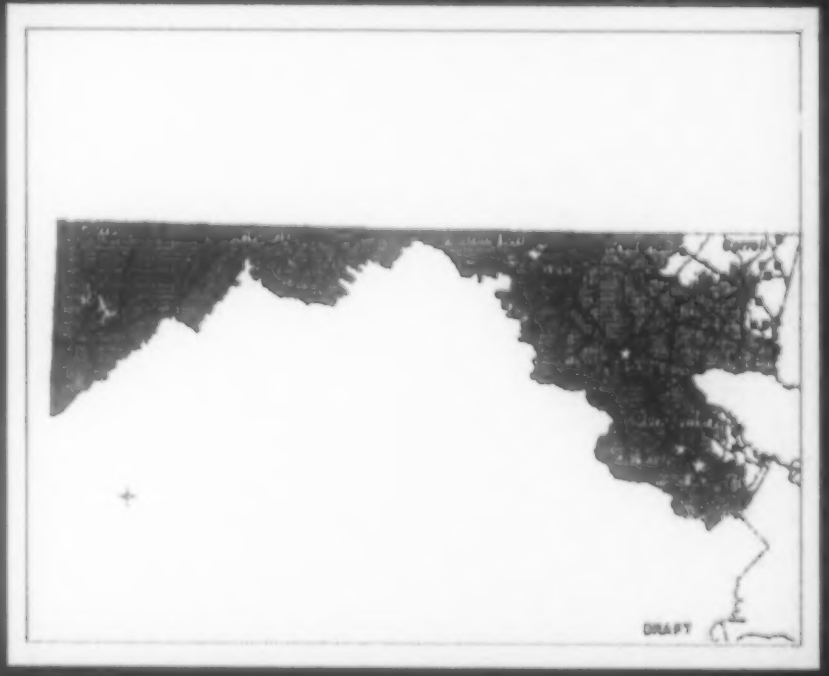
The Committee focused on the current alignment of District 5, which encompasses the Patuxent Naval Air Station, Indian Head Naval Surface Warfare Center, NASA's Goddard Space Flight Center, the National Archives II, the Smithsonian Environmental Research Center, other vital federal facilities, and related research and economic development resources at the University of Maryland, College Park.



Districts 6 & 8: Montgomery County Area

- Configured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State.
- Per public testimony, the Plan reduces the number of Congressional Districts in Prince George's County from 3 to 2, and re-orients the Montgomery County districts to reflect population trends.

District 6 & 8: Western Maryland, Frederick, and Montgomery Counties

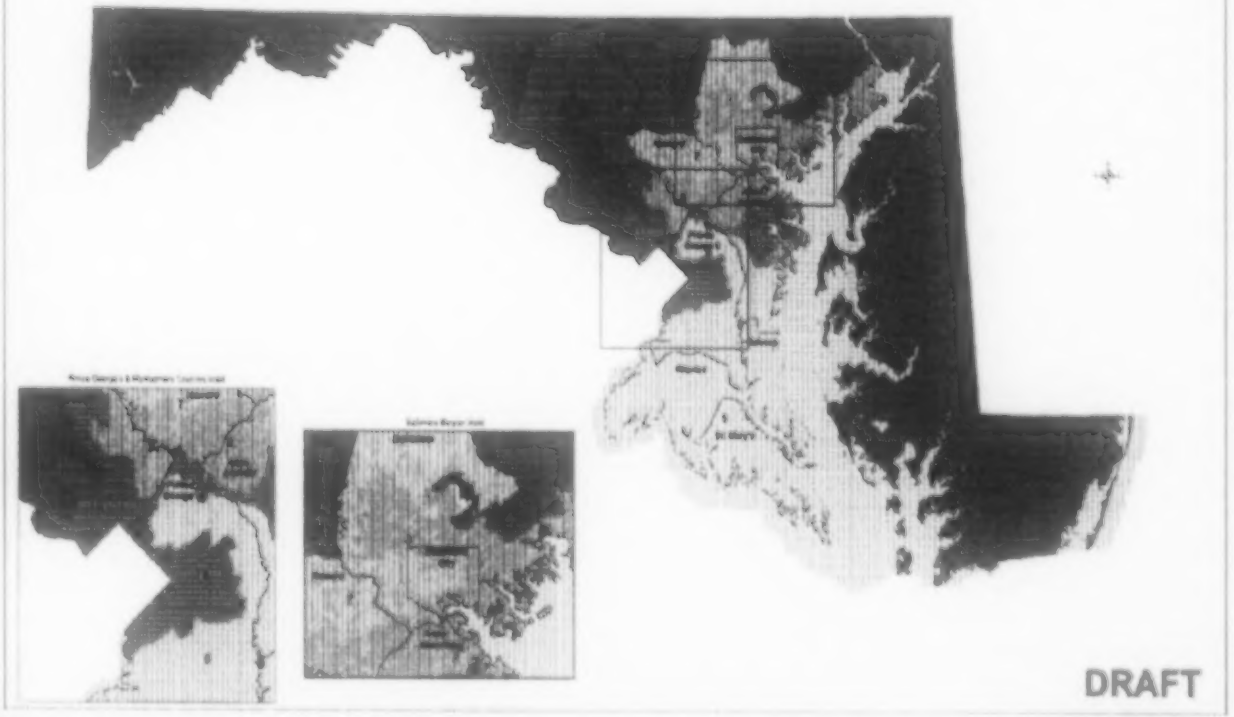


District 8 - includes Southern Montgomery County, areas east of the I-270 Corridor, and includes portions of eastern Frederick County and western Carroll County.

District 6 keeps Western MD together (all of Washington, Allegany, and Garrett Counties), continuing along the Potomac River, connecting portions of Frederick and Montgomery Counties, and incorporates the I-270 Corridor in Montgomery and Frederick Counties.

MCM002467

Statewide Map



O'Malley's map easily wins House approval

Baltimore delegates (from left) Keiffer Mitchell, Mary Washington, Jill Carter and Keith Haynes study a copy of a proposed redistricting map on the House of Delegates floor during debate Wednesday. (Barbara Haddock Taylor / The Baltimore Sun)

By **Annie Linskey and John Fritze, The Baltimore Sun**

OCTOBER 19, 2011, 9:12 PM

A new political map aimed at adding a seventh Democrat to the state's congressional delegation is expected to be sent to Gov. Martin O'Malley Thursday for his signature.

The plan won approval in the Maryland House of Delegates on Wednesday after five hours of debate, overcoming unified opposition from Republicans and ire from suburban Washington Democrats. One final stamp of approval is expected from the Senate Thursday morning.

Despite two weeks of steady criticism from liberal and conservative groups, the bill passed 91 to 46, with only five Democrats joining the House GOP caucus to vote "no." House leaders easily fended off three Republican amendments and one from Montgomery County Democrats, who argued that the map denies them a minority voice in Congress.

"It is an emotional process," said House Speaker Michael E. Busch in a meeting with reporters shortly after the legislation passed. "If you were to say it is a gerrymandered map, you started with a gerrymandered map. There is not a perfect process."

The state's ruling Democrats drew the new congressional districts, a process required every decade to reflect population changes found by the Census. Unless altered in court, the map will govern Maryland's elections to the U.S. House of Representatives for the next 10 years, starting with the April 3 primary.

The map is sure to face a legal hurdle, however, a fact even Democratic lawmakers conceded on the House floor. "It will be challenged in court," said House Majority Leader Kumar Barve. "But every plan is challenged in court. It is part of the process."

Republicans pointed out that the mapmakers drew lines to pack suburban Washington Democrats into Western Maryland's conservative 6th District, currently represented by Republican Rep. Roscoe G. Bartlett. And critics including the Maryland National Association for the Advancement of Colored People said that in dividing Montgomery County into three districts, the map sliced up minority populations and weakens their voting strength.

State Republicans were among several groups that threatened to file a lawsuit.

"These districts are not compact. They split up communities of interest. They appear to dilute minority communities," said House Minority Leader Anthony O'Donnell. "And it is clearly an exercise in politicians picking their voters instead of doing what is in the best interest of the citizens."

The effort to squeeze an incumbent Republican member of Congress out of office comes as states across the country are engaged in their own redistricting — a process that could have significant implications for the balance of power in Washington after next year's presidential election. Democrats hope to capture the U.S. House of Representatives while the GOP is aiming to add to the gains made in 2010.

Maryland is one of only six states in which Democrats have direct control of the process — compared with 18 states in which the GOP oversees redistricting. The remaining states are either politically divided or have nonpartisan commissions in charge of the process.

That is sure to put Maryland's new 6th District in the national spotlight as Democratic groups endeavor to take advantage of the rare opportunity.

"It's one of a handful of states where Democrats come out of redistricting with a better map," said David Wasserman, an editor at the nonpartisan *Cook Political Report* who follows House races nationally. "Democrats will clearly prioritize every advantage they have."

Bartlett, the 10-term Republican from Western Maryland, issued a statement hours after the vote promising that he will seek re-election, even though his district would switch from a conservative, rural stronghold to a more left-leaning enclave anchored in Montgomery County.

The 85-year-old congressman, who raised $1,000 over the past three months, will have to introduce himself for the first time to nearly half of his potential constituents. "I filed for re-election in June," Bartlett said in a statement. "Approval of this map hasn't changed my plans."

The Fannie Lou Hamer Political Action Committee, a Prince George's County group formed last year to increase the number of minority-controlled congressional districts, pledged to sue under the federal Voting Rights Act, arguing the plan dilutes minority voting power in Montgomery County.

Carletta Fellows, a spokeswoman for the group, said it will file its case as soon as O'Malley signs the bill and also will ask the Department of Justice to separately review the plan.

It is unclear if the group will be joined by the state's NAACP, which raised concerns about the map but is deferring to their national legal experts to determine whether they'll participate in a lawsuit, said Elbridge James, political director with the NAACP.

A spokesman for the organization's legal defense fund says the map is under review.

Del. Justin D. Ready, a Carroll County Republican and the interim executive director of the state GOP, said the party plans to put "resources toward working on a lawsuit" but noted "it costs a lot of money."

"It'll be a team effort," he said. "It'll be a point of emphasis for us as we raise funds, obviously."

Throughout the summer, Maryland Republicans and some members of the Legislative Black Caucus had hinted that they might join forces in opposing the governor's plan. Each of the three amendments offered by the GOP would have drawn three majority minority districts, a goal stated by some black leaders.

But none of the Black Caucus members voted with the GOP — including on a proposal drafted by the Fannie Lou Hamer group.

Ten Democrats, mostly from the Washington suburbs, supported a separate amendment that would have inched the new 4th District back into Montgomery County, a plan drafted by Rep. Donna Edwards. That plan failed 26-107.

In an unusual move, Edwards, a Prince George's County Democrat, spoke publicly against O'Malley's map on grounds that it would rob Montgomery, a majority minority county, of a black voice in Congress.

In a statement, Edwards acknowledged defeat, saying the state legislative process had "run its course." Still, she remains unhappy with the result, saying it "is not the best approach for minority voters or for all Marylanders."

O'Donnell offered the first of three GOP plans Wednesday — a proposal drafted this past summer by the state Republican Party that would keep congressional districts more compact. Democrats argued the GOP plan would force many voters into new districts.

Democrats, meanwhile, defended O'Malley's map, which they said would keep 70 percent of state residents in their current district. "There is no constitutional requirement that the map be pretty," said Del. Kathleen M. Dumais, a Montgomery County Democrat.

An alternate plan crafted by the Fannie Lou Hamer group initially appeared like it might gain some traction in the House, but it ultimately failed on a 40-97 vote.

The political action committee, named for the Mississippi-born civil rights leader in the 1950s and '60s, offered the map that would put Edwards' 4th District back into Montgomery County to ensure that minorities in that part of the state are represented by a black member of Congress.

It was introduced by Del. Neil C. Parrott, a freshman Republican best known for leading a successful effort to halt a law allowing some illegal immigrants to pay in-state tuition at Maryland colleges and universities.

But Baltimore County Del. Emmett C. Burns Jr., the pastor of an African-American church, rose to say he knew Hamer personally and attended her funeral. He gave an impassioned speech on the House floor, saying that he was "conflicted" about how his vote would affect minorities, but in the end supported the governor and said he believed Hamer would have too.

"I don't think I voted against her wishes," Burns said. "I think she would have opted for the larger picture, and that is more Democrats in the House of Representatives."

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http://www.twitter.com/jfritze

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Redistricting panel targets Rep. Bartlett

By Annie Linskey, The Baltimore Sun

OCTOBER 3, 2011, 10:41 PM

A panel appointed by Gov. Martin O'Malley recommended a new political map Monday evening that would pack Democrats into a redrawn 6th Congressional District in Western Maryland, giving the state's majority party a shot at sending a seventh Democrat to Washington.

The proposed map targets the 6th District representative, Republican Roscoe Bartlett, but would add GOP voters to the 1st Congressional District represented by the state's other Republican, Andrew Harris.

"I think you will have a very competitive 6th District when you didn't have that in the past," said House Speaker Michael E. Busch, a member of the redistricting panel. He said the new lines in Western Maryland reflect population growth along the Interstate 270 corridor.

The General Assembly's House and Senate Democratic caucuses were briefed on the plan by Jeanne D. Hitchcock, a longtime aide to O'Malley who chairs the Governor's Redistricting Advisory Committee.

Del. Curt Anderson, a Baltimore Democrat, stepped out of the meeting and said Hitchcock used broad hand gestures in her presentation reminding him of a weather report. Anderson said he came away from the meeting thinking "there will be a very cold front going through Western Maryland."

The map immediately drew criticism from Republicans, who view the redistricting process as blatant gerrymandering. "It is pure, raw, brute-force political power," said Del. Anthony O'Donnell, the House of Delegates minority leader.

Monday evening was the first time members of the General Assembly were officially presented the proposal of the advisory committee, a five-member panel that held hearings around the state over the summer.

The panel's recommendation is said to be similar in some respects to a map obtained Friday by The Baltimore Sun known as Option 1. A second map, known as Option 2, was designed to make all eight of the state's congressional districts attractive for Democrats.

Busch said that the governor will put the proposed map online for public comment for seven days and then consider making shifts in the borders. He said he expects O'Malley to call the General Assembly into special session Oct. 17 to approve the plan, and said he does not think the session will last longer than a week.

Lawmakers will have the opportunity to amend the map during the legislative process. The measure will be an emergency bill, and will therefore become law immediately after the governor signs it.

Officials said the proposed map makes only slight changes to congressional districts in the Baltimore area. The city would continue to be represented by three members of Congress.

Busch said a guiding principle in crafting the new map was to keep as many Marylanders as possible in their current congressional districts. On average, each new district keeps 70 percent of the population it previously held, he said.

The map, however, would put the western half of Montgomery County into the 6th District. That would mean the new congressional district would include all of state Sen. Rob Garagiola's General Assembly district. Garagiola, a favorite of Senate President Thomas V. Mike Miller, has said he would consider running for Congress if a favorable map were drawn.

Garagiola said he still wants to see the final congressional borders before he commits to running for the House of Representatives. If the final map is similar to the one presented, "there would be a very good chance I would run," Garagiola said.

Besides Hitchcock, Busch and Miller, panel members are Richard Stewart, who also serves on the Maryland Stadium Authority, and James King, a former state delegate who is the committee's only Republican.

O'Malley is not required to accept their map but is widely expected to accept at the least a very similar proposal. He's now in North Carolina raising money for the Democratic Governors Association.

Bartlett's Western Maryland seat is an appealing target for Democrats on several counts. Democratic strategists believe that over time it is becoming more liberal, as Washington-area residents move up the Interstate 270 corridor to Frederick and Hagerstown.

They also point to Bartlett's lackluster fundraising: The 85-year-old congressman raised a mere $28,000 in the second quarter of this year, putting him last among the state's eight-member delegation.

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Office of Counsel to the General Assembly

October 20, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: Senate Bill 1 of the Special Session of 2011

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 1, an emergency bill creating new districts for congressional elections based on the 2010 census. As always, in reviewing a bill passed by the General Assembly prior to its approval or veto by the Governor, we apply a "not clearly unconstitutional" standard. 93 *Opinions of the Attorney General* 154, 161, n. 12 (2008). This standard reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice. *Id.* In reviewing Senate Bill 1, we have considered whether it complies with the one person / one vote requirements of Article I, § 2 of the United States Constitution and Section 2 of the Voting Rights Act, and have found no violation. We also found no reason to believe that Senate Bill 1 constitutes a racial gerrymander in violation of the Fourteenth Amendment as interpreted in *Shaw v. Reno*, 509 U.S. 630 (1993).

Under Article I, § 2 of the United States Constitution, members of the House of Representatives are elected "by the people" from single member districts "founded on the aggregate number of inhabitants of each state," Madison, *The Federalist*, No. 54 at 369. The United States Supreme Court has said that Article I, § 2 requires states to make a good faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969). Senate Bill 1 does this. Seven of the districts contain 721,529 people, while one district contains 721,528 people. It is not possible to achieve greater population equality.

The population figures above have been adjusted as required by the No Representation Without Population Act, Chapter 67 of 2010, which requires that prisoners be counted in the place in which they resided prior to their incarceration, rather than in the place where they are incarcerated. This shift does not violate the equal population requirement of Article I, § 2. Federal courts have generally allowed states to determine the appropriate method by which to calculate population. 94 *Opinions of the Attorney General* 125, 127-129 (2009) (collecting cases). As noted in *Burns v. Richardson*, 384 U.S. 73, 92 (1966), the Supreme Court has never suggested that "the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed." Nor have we found any basis for the conclusion that it is not permissible to count prisoners at their home districts rather than remove them from consideration altogether.[1]

To pass muster under the Voting Rights Act, the plan, analyzed in light of the totality of the circumstances, must create political processes leading to nomination and election in the State that are:

> equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

The Supreme Court has created a three part test that plaintiffs must meet in order to bring a successful challenge to a redistricting plan under the Voting Rights Act. *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986). Specifically, it is necessary to show:

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[1] This method of enumerating prisoners was apparently used in the 1900 census, Nat'l Research Council, *Once, and Only Once, and in the Right Place: Residence Rules in the Decennial Census* 84-85 [Daniel L. Cork and Paul R. Voss, eds., 2006], and the reasons the Census Bureau counts prisoners where they are incarcerated now are technical rather than constitutional, U.S. Census Bureau Report: Tabulating Prisoners at Their "Permanent Home of Record" Address, pp. 10-13 (February 21, 2006). In fact, the Census Bureau released prisoner and other group quarter numbers early in this round of redistricting "so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale." Director's Blog, United States Census Bureau, posted March 10, 2010. http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle- prisons.html

> (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.

Bartlett v. Strickland, 556 U.S. 1, 21 (2009). Meeting this test is not sufficient to establish a violation, but is necessary before the court will proceed to analyze whether a violation has occurred based on the totality of the circumstances. *Id.* at 21-22. Analysis of a plan under these factors requires complex statistical analysis. For that reason, the State engaged in a nationwide search and hired an expert in the field, Bruce E. Cain, Ph.D., Heller Professor of Political Science, University of California Berkeley, and the Executive Director of the U.C. Washington Center. A copy of Dr. Cain's Curriculum Vitae and a copy of his analysis are attached.

According to Dr. Cain's analysis, the only minority group that has sufficient population to constitute a majority of a congressional district in Maryland is African Americans. While other minorities could form a majority in combination with African Americans, attempts to show cohesion among such coalitions has been difficult across the country. It is the view of the State's expert that political cohesion could not be shown for a coalition district in this State either.

According to the United States Census Bureau numbers non-Hispanic African Americans are found throughout the State and constitute 29% of the State's population. Compact populations of African Americans are found in the Baltimore region, and also in the areas around the District of Columbia.[2] The current plan creates a majority African American district in each of these population centers. Each of these districts has a 53.7% non-Hispanic African American voting age population,[3] and will, based on the analysis of the State's expert, enable African American voters to elect their candidates of choice. Moreover, African American voters are not packed in either district in a way that would

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[2] The relevant geographic area for the compactness analysis is a single member district, not a county. Thus, the fact that a county has a significant minority population, or has in the past had a portion of a majority minority district, is irrelevant to this analysis.

[3] This percentage is based on unadjusted data, Census 2010, P.L. 94-171 Redistricting Data (Maryland). An adjusted total for Hispanic is not available because no Hispanic designation was available for incarcerated persons.

inhibit the creation of an additional district. Even so, the population not included in either of these two districts is not, in the view of the State's expert, sufficiently compact to meet the requirements of the *Gingles* test. In the absence of compactness, the Voting Rights Act does not require the creation of an additional majority minority district simply because it is possible. *Abrams v. Johnson*, 521 U.S. 74, 90 (1997); *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994).[4] For these reasons, it is our view that Senate Bill 1 is in compliance with the Voting Rights Act.

It is also our view that nothing in Senate Bill 1 can be deemed an unconstitutional racial gerrymander. As discussed above, the two majority minority districts in the plan cover compact African American populations. While the 7th district is not compact overall, the shape is not due to any predominant focus on race, as prohibited under the holding of *Shaw v. Reno*, 509 U.S. 630 (1993), but to add population to the area of compact minority population and based on other considerations.

As indicated by those who participated in developing and adopting the redistricting plan, including the Redistricting Commission, the Governor, and the General Assembly, the boundaries of the newly adopted Congressional districts reflect a number of considerations, including a preference for joining communities of interest, keeping residents in their current districts, recognizing growth patterns, protecting incumbents, and partisan consideration. These factors have been recognized as permissible considerations under applicable case law. It is our view that Senate Bill 1 is not unconstitutional.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

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[4] With respect to the other two factors, the analyses performed by the State's expert reflect that while African American voters are generally politically cohesive, there is not significant polarized voting in the areas in question.

Voting Rights Assessment of Governor's Maryland Congressional Redistricting Plan

Professor Bruce E. Cain

A valid Congressional redistricting plan must meet all federal constitutional and statutory standards. Aside from creating equally populated, contiguous districts, the state is required to adhere to the standards of the Voting Rights Act (VRA) of 1965 as amended in 1982. There are of course many other perfectly legitimate political considerations that underlie the construction of districting plans, but they are secondary to the federal criteria. It is my judgment that the Governor's 2011 Congressional redistricting plan satisfies those federal criteria.

The relevant part of the VRA for Maryland is Section 2 which prohibits voting practices and procedures that discriminate on the basis of race, color or membership in a designated language minority group. When the VRA was amended in 1982, the Congress supplemented the previous intent standard established under Mobile v Bolden 446 US 55 (1980) with a totality of circumstances test that essentially asked whether in the context of various considerations a standard, practice or procedure (in this case a redistricting plan) has the effect of denying a protected minority group an equal opportunity to elect a candidate of choice. The Supreme Court in reviewing the 1982 revisions developed a three prong test in Thornburg v Gingles 478 US 30 (1986) that all states and local jurisdictions follow when assessing their Section 2 redistricting liability. Because these tests are empirical, they are usually conducted by political scientists.

There are three questions that need to be answered under the Gingles standard: 1. is the protected minority group sufficiently large and concentrated in a reasonably compact area to constitute a majority of a district; 2. is the group politically cohesive; and 3. does it face racial polarization by the majority population? To answer the first question, I mapped the voting age population (VAP) concentrations of African-Americans, Latino and Asian-Americans using the 2010 Census data, and determined whether there are reasonably compact voting age (VAP) concentrations of those groups that would be sufficient to constitute a majority of the ideal population (721,259) for a Maryland Congressional district.

There has been significant growth in Maryland's minority populations, particularly in Prince George's and Montgomery counties, both of which are now majority minority in population. Not all of this growth translates into political strength especially in the Latino population, as non-citizenship and a large Under 18 population share make many ineligible to vote. Unfortunately, there are no reliable estimates of citizenship, so we must rely on voting age population (VAP) as the best proxy. In my judgment, despite the impressive growth of the Latino and Asian American populations, neither has yet

reached the critical 50% VAP threshold for Congressional sized districts required by the law although they may in the next census.

The African-American case, however, is different. I determined that there are sufficient, reasonably compact concentrations in both the Baltimore and Prince George's/Montgomery County areas to create two majority black VAP Congressional districts. This is reflected by the creation of two majority African-American VAP districts (CDs 4 and 7) in the Governor's 2011 Congressional Redistricting Plan. But given the growth in the African-American population, I next explored whether there is sufficient population in a reasonably compact concentration to create a third majority black district. My conclusion is that there is not.

I explored a number of possible alternatives but I found there was simply no way to create a third majority black voting age population district in the Prince George's/Montgomery area or Baltimore and its suburbs area while maintaining two other African-American majority VAP seats . With one exception, this seems to have been also the judgment implicit in all the third party plans, including from a former Justice Department official on behalf of the Legislative Black Caucus. The one exception is the Fannie Lou Hamer PAC Plan that addresses the problem with a new barbell district that links black populations in the Baltimore area in the north with the Prince George's/Montgomery/Anne Arundel areas in the south with a narrow corridor through the intervening predominantly white areas. But such solutions substantially raise the risk of a so-called Shaw violation.

Faced with increasingly contorted attempts to maximize minority representation, the Supreme Court in a series of decisions beginning with *Shaw v Reno* 509 US 630 (1993) put limits on attempts to redistrict affirmatively. The resulting standard from these cases is that race can be taken into consideration but it should not be the exclusive or predominant consideration. Districts like the disputed majority black district in the *Shaw v Reno* case that link disparate black populations with narrow corridors to avoid white populations have been ruled unconstitutional. Districts drawn predominantly along racial lines invite a strict scrutiny review by the courts and significantly raise the odds of a Congressional plan being overturned on review. Given the geographic distribution of Maryland's African-American community and the heavy and suspect racial tailoring needed to create a potential third majority black VAP district, it is my view that the state was not required to do so.

The second step in the Gingles test is whether groups are politically cohesive. This judgment is based on analysis of past voting and survey returns as well as the scholarly literature on racial and ethnic voting tendencies. The evidence is clear in Maryland and elsewhere that African-Americans are a politically cohesive group. The same is likely true of Latinos based on national data, but the track record in Maryland is not very extensive yet. The national evidence on Asian-Americans is more mixed as a number of studies have revealed important differences based on historical tensions and socio-economic disparities between different Asian-American nationalities. Given that neither the Latino nor Asian-American populations have yet attained the threshold majority VAP level required for Congressional districts, it was not necessary to explore this question with respect to those groups in Maryland further at this time.

I also considered whether the state is compelled to create a new majority-minority VAP coalitional seat. The Governor's plan has already created a number of coalitional seats, including 2 that are already majority minority, 4 that are over 30% minority, 1 of which is over 40% minority and will likely be majority minority by the end of the decade. In short, it is likely that there will likely be a third majority-minority VAP coalitional congressional district before the next redistricting. The relevant legal question with whether the state is compelled to create another one right now.

It is important that we separate the political merits of different types of coalitional seats from the legal requirement to draw an additional 50% majority minority VAP district. The former is a political judgment. The latter requires meeting the Gingles tests. Proving that coalitional groups are sufficiently politically cohesive under the VRA has been difficult across the country. The original framework of the VRA was devised in a primarily biracial setting. The new diversity challenges the old framework in many important ways, particularly when different protected minority groups have competing claims in the same territory. The Gingles framework requires that coalitions have the same levels of cohesion that single minority groups have, and that is typically very hard to prove.

The normal method is to look at a number of elections that feature white v nonwhite and nonwhite v nonwhite candidates in primary and nonpartisan elections (to control for the effects of partisanship), and to link this with demographic data. As a preliminary analysis, I mapped the political returns and compared them with the demographic data and then ran multivariate regressions testing for detectable racial patterns in the 2008 Democratic Presidential Primary and for the 2008 General Election controlling for party. They basically confirm what the national survey data showed as well, which is that Hispanics as well as certain segments of the white population were considerably and statistically significantly less likely than African-Americans to support Barack Obama in both the primary and general election. This led me to conclude that it would be very hard to argue that African-Americans and Hispanics vote as a sufficiently cohesive political bloc to satisfy that prong of the Gingles test.

I would also add in California, a state that I have studied extensively, coalitions between African-Americans and Latinos have been quite unstable. When Latinos become sufficiently large to constitute a majority, they have preferred to solidify the prospects of electing a candidate of their choice and not of the African-American community. Tensions between the two groups have also come out in recent LA Mayoral races and in ballot measures over English as a second language and state benefits for undocumented Latinos.

The issue of a multi-racial coalition ties into the third prong of the Gingles test: I.e. whether white voters vote in a racially polarized way against African-American candidates. I base my conclusions on my preliminary examination of voting patterns in Maryland. I also attended the redistricting hearings in Prince George's and Montgomery Counties (areas of the most significant nonwhite racial growth), and the testimony at the October Special Legislative Session on October 17. Based on my own analysis, the testimony I heard, and the relevant academic literature, I believe that there is no simple generalization about white voting behavior in Maryland: white voters as a group are neither universally polarized nor completely post-racial.

The Maryland 2008 returns show high levels of support for Obama in both the primary and general elections in white urban and suburban areas such as Montgomery and Prince George's Counties and lower support in rural areas at the western end of the state and the Eastern shore. In the testimony I heard, there were numerous individuals in Montgomery County especially (including the African-American who had been elected as the County Executive Isiah Leggett, who believed that there significant numbers of white voters who would support African-American candidates.

From the regressions I have undertaken, I would characterize the level of polarization as moderate: enough to warrant protections but not so great as to exclude many white areas from the multi-racial coalitions. Moreover, as I mentioned before, at least in 2008, Hispanic voting patterns more closely resembled non-Hispanic whites than African-Americans and Asian-Americans.

An additional consideration about the merits of majority minority VAP coalitions versus coalitions that include supportive white populations in Maryland is demographic and relates to the "one person, one vote" rationale that is the reason for undertaking the difficult task of redistricting in the first place. Different coalitional combinations will have varying implications for population growth in the district over the decade. The spirit of the "one person, one vote" decisions is to try to equalize the weight of every vote by giving all the districts the same population. Placing faster growing populations together can cause district populations to grow out of balance more quickly over the decade than combining them with slower growing populations. Thus, a policy of systematically combining fast growing Latino areas in Montgomery County with fast growing African American areas could lead to greater mal-apportionment over the decade.

In sum, for all the reasons stated above, I find the Governor's Maryland Congressional Redistricting Plan meets the conditions of Section 2 of the Voting Rights Act.

Election: 2012 PRESIDENTIAL GENERAL ELECTION
Election Date: 11/6/2012
STATEWIDE

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Countywide Counts

	Dems	Reps	Grn	Lib	UNA	OTH	Subtotal
Allegany	15,557	20,006	121	143	5,891	410	42,128
Anne Arundel	149,232	125,386	874	1,393	71,623	262	348,770
Baltimore City	309,078	33,005	1,401	917	46,649	1,534	392,584
Baltimore County	297,941	132,720	1,338	1,806	75,760	5,843	515,408
Calvert	23,349	23,448	136	192	11,201	535	58,863
Caroline	7,183	7,636	36	59	3,106	141	18,165
Carroll	32,778	56,870	270	399	19,092	985	110,394
Cecil	24,197	24,372	140	244	12,824	744	62,521
Charles	55,690	25,339	140	234	15,712	572	97,687
Dorchester	10,414	7,131	25	47	2,424	126	20,167
Frederick	54,564	61,079	401	577	31,441	94	148,156
Garrett	4,724	11,825	36	52	2,084	208	18,729
Harford	63,549	67,467	315	649	26,855	1,133	159,968
Howard	90,072	56,330	471	698	36,779	2,398	186,748
Kent	6,095	4,572	35	44	1,706	140	12,594
Montgomery	345,449	125,185	1,509	1,745	139,040	3,072	616,000
Prince George's	443,643	47,472	765	940	56,106	19,665	568,591
Queen Anne's	11,366	15,284	64	111	5,295	209	32,329
Saint Mary's	25,295	25,721	144	245	12,049	469	63,923
Somerset	7,249	4,600	19	30	1,694	121	13,713
Talbot	9,896	10,979	48	91	4,012	267	25,295
Washington	31,750	38,551	236	322	16,150	282	87,291
Wicomico	25,474	20,855	117	192	9,310	676	56,424
Worcester	14,997	14,423	71	126	6,080	382	36,079
	2,059,844	969,859	8,715	11,256	614,867	40,266	3,694,527

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Eligible Active Voters on Precinct Register

Election: 2012 PRESIDENTIAL GENERAL ELECTION

Election Date: 11/6/2012

STATEWIDE

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Counts by Congressional District

	Dems	Reps	Grn	Lib	UNA	OTH	Subtotal
Congr. Dist: 01	181,774	200,601	967	1,656	76,428	4,411	465,837
Congr. Dist: 02	255,488	97,106	992	1,507	68,071	3,813	426,977
Congr. Dist: 03	253,626	115,393	1,389	1,725	86,771	2,620	461,524
Congr. Dist: 04	329,027	74,939	662	966	56,932	11,171	473,697
Congr. Dist: 05	280,789	118,128	951	1,319	72,544	10,184	483,915
Congr. Dist: 06	192,820	145,620	1,045	1,458	94,074	2,077	437,094
Congr. Dist: 07	326,950	78,475	1,436	1,186	61,511	3,675	473,233
Congr. Dist: 08	239,070	129,596	1,274	1,439	96,556	2,315	472,250
	2,059,544	959,858	8,716	11,256	614,887	40,266	3,694,527

Election: 2012 PRESIDENTIAL GENERAL ELECTION
Election Date: 11/6/2012
STATEWIDE

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Counts by Legislative District

	Dems	Reps	Grn	Lib	UNA	OTH	Subtotal
Legis. Dist: 01A	6,227	14,945	48	63	2,736	245	24,264
Legis. Dist: 01B	8,153	10,749	68	67	3,074	211	22,322
Legis. Dist: 01C	8,496	10,699	66	90	3,597	168	23,106
Legis. Dist: 02A	9,847	13,960	66	97	5,152	79	29,101
Legis. Dist: 02B	8,674	11,850	77	109	4,879	89	25,678
Legis. Dist: 02C	9,965	7,597	65	86	4,432	79	22,224
Legis. Dist: 03A	24,558	18,608	183	249	12,155	34	55,787
Legis. Dist: 03B	12,996	14,843	87	118	7,994	38	36,076
Legis. Dist: 04A	16,220	25,985	126	197	10,687	27	53,242
Legis. Dist: 04B	8,033	15,189	56	104	5,177	232	28,791
Legis. Dist: 05A	17,107	29,068	145	214	9,505	476	56,515
Legis. Dist: 05B	11,501	15,015	108	135	4,812	470	32,041
Legis. Dist: 06	38,172	15,464	142	251	10,264	701	64,994
Legis. Dist: 07	37,006	30,245	159	327	13,248	901	81,886
Legis. Dist: 08	42,201	22,848	196	283	11,547	843	77,717
Legis. Dist: 09A	26,302	25,442	179	226	13,272	884	66,307
Legis. Dist: 09B	8,895	14,768	79	99	5,270	279	29,390
Legis. Dist: 10	63,151	7,375	164	166	8,996	658	80,510
Legis. Dist: 11	57,284	17,864	162	255	12,434	997	88,996
Legis. Dist: 12A	24,290	15,252	149	203	9,113	606	49,613
Legis. Dist: 12B	16,096	5,632	70	104	5,479	345	27,726
Legis. Dist: 13	42,840	21,614	196	316	17,554	1,043	83,563
Legis. Dist: 14	43,817	21,614	174	240	16,996	362	83,203
Legis. Dist: 15	43,939	23,323	152	236	23,960	482	92,092
Legis. Dist: 16	48,306	16,988	155	211	19,611	490	85,761
Legis. Dist: 17	40,881	14,942	190	279	19,337	381	76,010
Legis. Dist: 18	45,235	12,154	214	209	15,300	350	73,462
Legis. Dist: 19	42,682	15,965	146	172	15,306	371	74,842
Legis. Dist: 20	44,877	6,568	321	200	12,510	303	64,779
Legis. Dist: 21	45,026	12,553	166	282	13,083	2,620	73,729
Legis. Dist: 22	43,248	5,992	201	146	7,462	2,564	59,633
Legis. Dist: 23A	39,629	9,585	66	109	6,941	2,489	59,018
Legis. Dist: 23B	27,369	3,120	34	49	3,341	954	34,867
Legis. Dist: 24	67,843	2,410	52	71	5,617	2,274	78,267
Legis. Dist: 25	69,354	3,426	49	91	5,844	2,322	81,086
Legis. Dist: 26	69,751	4,482	56	88	6,080	2,598	83,055

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Legis. Dist: 27A	53,105	10,097	77	110	6,794	2,035	72,218
Legis. Dist: 27B	12,271	11,279	64	84	5,621	278	29,597
Legis. Dist: 28	54,739	24,486	135	230	15,321	556	95,467
Legis. Dist: 29A	11,829	11,944	50	86	5,056	224	29,189
Legis. Dist: 29B	12,430	11,871	67	144	6,293	227	31,052
Legis. Dist: 29C	9,959	10,955	67	105	5,203	209	26,498
Legis. Dist: 30	35,576	30,127	266	359	17,463	51	83,843
Legis. Dist: 31	33,573	28,156	173	292	15,333	60	77,589
Legis. Dist: 32	36,448	22,936	191	325	16,429	68	78,399
Legis. Dist: 33A	22,223	26,896	148	237	12,839	45	62,388
Legis. Dist: 33B	11,946	13,990	75	113	6,439	23	32,586
Legis. Dist: 34A	25,832	14,746	103	223	9,121	388	50,413
Legis. Dist: 34B	10,720	12,531	71	114	5,800	345	29,581
Legis. Dist: 36A	19,105	30,191	119	214	9,073	398	59,100
Legis. Dist: 36B	10,695	13,516	65	113	5,075	199	29,663
Legis. Dist: 38	33,850	34,828	181	314	15,338	799	85,310
Legis. Dist: 37A	14,135	5,554	34	71	3,254	184	23,232
Legis. Dist: 37B	22,291	24,390	99	179	8,452	528	55,939
Legis. Dist: 38A	11,805	9,360	40	60	3,590	278	25,133
Legis. Dist: 38B	23,693	22,653	129	204	9,839	660	57,178
Legis. Dist: 39	35,712	13,631	157	198	16,020	333	66,051
Legis. Dist: 40	51,334	3,786	416	179	7,601	218	63,534
Legis. Dist: 41	57,522	5,130	132	111	6,780	243	69,918
Legis. Dist: 42	37,464	21,851	314	337	11,590	953	72,509
Legis. Dist: 43	55,421	4,724	324	112	7,218	245	68,044
Legis. Dist: 44	47,778	3,713	160	107	6,338	241	58,337
Legis. Dist: 45	53,036	4,665	136	94	5,696	234	63,862
Legis. Dist: 46	43,985	10,987	234	314	13,016	353	68,889
Legis. Dist: 47	38,688	3,055	107	83	5,512	1,906	49,351
	2,059,544	969,858	8,716	11,256	614,887	40,266	3,694,527

Eligible Active Voters per Precinct Register

Election: 2012 PRESIDENTIAL GENERAL ELECTION
Election Date: 11/6/2012
STATEWIDE

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Counts by Age, Gender, and Party

According to Maryland State Law, voters who will be 18 and eligible to vote by a General Election are eligible to Vote in the related primary

		Female						Male						Unspecified					
	TOTAL	17 & below	18-24	25-44	45-65	65 & above	Subtotal	17 & below	18-24	25-44	45-65	65 & above	Subtotal	17 & below	18-24	25-44	45-65	65 & above	Subtotal
DEM	2,059,844	0	116,895	388,968	474,189	230,185	1,210,237	0	91,981	263,849	336,886	155,422	848,138	0	390	389	310	80	1,169
REP	989,858	0	40,959	136,624	196,861	94,914	469,358	0	45,407	147,401	214,199	83,122	490,129	0	113	109	108	41	371
AME	131	0	11	29	15	2	57	0	25	22	23	4	74	0	0	0	0	0	0
UNA	614,867	0	46,472	132,464	91,999	24,080	295,018	0	46,488	139,452	104,149	27,101	319,190	0	136	295	182	69	682
OTH	60,236	0	3,469	10,930	9,061	3,310	26,770	0	4,012	13,895	11,754	3,740	33,401	0	22	22	17	6	67
TOTAL	3,694,886	0	207,806	669,015	772,125	352,491	2,001,437	0	189,913	564,619	667,011	269,389	1,690,932	0	661	815	617	196	2,289

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' FIRST SUPPLEMENTAL RESPONSES AND OBJECTIONS TO DEFENDANTS FIRST SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33 and Local Rule 104, Plaintiffs hereby submit their Responses and Objections to Defendants' First Set of Interrogatories. Plaintiffs reserve the right to amend and supplement these responses and objections to the extent allowed by the Federal Rules of Civil Procedure and the Orders and Local Rules of the District of Maryland.

GENERAL STATEMENT AND OBJECTIONS

The following General Statement and Objections apply to each of the interrogatories propounded by Defendants and, unless otherwise stated, shall have the same force and effect as if set forth in response to each of the separate interrogatories. By providing their responses to Defendants' First Set of Interrogatories, Plaintiffs do not concede that the information provided is relevant to the claims or defenses of any party, proportionate to the needs of the case, or could lead to the discovery of admissible evidence.

1. Defendants object to the interrogatories to the extent that Plaintiffs have not completed all discovery (fact and expert), their investigation of the facts, or the preparation for trial in this case, and therefore Plaintiffs reserve the right to rely on any theories of liability, facts, documents, testimony, or other evidence that may be discovered or may come to light in this case.

	Congressional District that were drawn during the 2011 Congressional redistricting process; knowledge of the failure of Maryland's new Sixth Congressional District boundaries to serve communities of interest.
Unknown employees or officials of the Democratic National Committee	Knowledge of the planning or drawing of the boundaries of Maryland's Sixth Congressional District in the 2011 Congressional redistricting process; knowledge of the intent and purpose of new boundaries of Maryland's Sixth Congressional District that were drawn during the 2011 Congressional redistricting process.
Unknown employees or officials of the Democratic Congressional Campaign Committee	Knowledge of the planning or drawing of the boundaries of Maryland's Sixth Congressional District in the 2011 Congressional redistricting process; knowledge of the intent and purpose of new boundaries of Maryland's Sixth Congressional District that were drawn during the 2011 Congressional redistricting process.
Unknown employees of the Office of Former Governor Martin O'Malley	Knowledge of the planning or drawing of the boundaries of Maryland's Sixth Congressional District in the 2011 Congressional redistricting process; knowledge of the data used to draw boundaries of Maryland's Sixth Congressional District in the 2011 Congressional redistricting process; knowledge of the intent and purpose of new boundaries of Maryland's Sixth Congressional District that were drawn during the 2011 Congressional redistricting process; knowledge of the failure of Maryland's new Sixth Congressional District boundaries to serve communities of interest.

INTERROGATORY NO. 2:

Identify all voters whom you allege would otherwise register as Republican if they had not been chilled from doing so.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs object to this interrogatory to the extent that it calls for the premature, non-reciprocal disclosure of expert reports in violation of the Court's scheduling order. Plaintiffs also object to this interrogatory to the extent that it seeks the disclosure of information that is already in the possession, custody, or control of Defendants. Plaintiffs object to this request as overly broad and unduly burdensome as it seeks information regarding "all voters" who "would otherwise register" as

Republican if they had not been chilled from doing so. Plaintiffs further object to this request as vague and ambiguous to the extent that the term "would otherwise register" is undefined.

Further, contention interrogatories may not be used to require a party to set forth all factual information obtained in discovery regarding a particular topic. Defendants' interrogatories, "insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications—supporting the identified allegations, are overly broad and unduly burdensome." *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010); *see also Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, 2010 U.S. Dist. LEXIS 127125, at *25-37 (M.D. Pa. 2010) (denying motion to compel detailed responses to interrogatories requesting "all facts" supporting a particular contention, holding that defendants' demand for specific and "narrative response[s]" to contention interrogatories was "little more than a mark-work request. . . . since they do not only have the information, they have the written materials themselves."). Accordingly, Plaintiffs do not identify every voter who would have registered as a Republican but for enactment of the Plan. Instead, Plaintiffs describe the types of voters who have been chilled by the State's conduct from participating in politics in Maryland.

In addition, Plaintiffs object to this interrogatory because "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J. 1990); *see also In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985) ("the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period."). Plaintiffs have not completed all discovery (fact and expert), their investigation of the facts, or its preparation for trial in this case, and therefore Plaintiffs reserve the right to rely on any legal theories, facts, documents,

testimony, or evidence which may come to light during fact and expert discovery.

Subject to and without waiving the foregoing objections, Plaintiffs will supplement their answer to this interrogatory on January 16, 2017.

FIRST SUPPLEMENTAL RESPONSE: Plaintiffs further object that to prove the elements of their causes of action they are not required to show that Republican voters were chilled from registering to vote, nor are they required to identify each such Republican voter. *See Shapiro v. McManus*, — F. Supp. 3d —, 2016 WL 4445320, at *10-11 (D. Md. 2016) (discussing facts that Plaintiffs must prove at trial). As a consequence, this interrogatory is not relevant to any party's claim or defense and is not proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

Subject to and without waiving the foregoing objections, Plaintiffs state that to the extent that a further response is required, Plaintiffs state that, after the 2011 Congressional Plan was adopted, voters in Maryland's Sixth District were chilled from participating in the political process, including registering to vote, voting, and/or supporting Republican candidates because they believed that their votes did not matter and their candidates did not have a reasonable chance of winning due to the cracking and packing of the Sixth District.

More generally, gerrymanders that "crack" blocs of like-minded voters chill political participation because those cracked voters understand that their votes "will not count" because they cannot affect the outcome. Voters in packed districts are thus discouraged from voting. Voters in cracked districts also understand that other like-minded voters' votes "will not count" and thus are less likely to participate actively in campaigning for their chosen candidates. Vote "cracking" chills political speech in an especially pernicious way in Maryland because Maryland employs a closed primary registration system. For a voter to participate in a particular political party's primary, the voter must be a registered member of that party. Registered Republicans cannot participate in

Democratic primaries, in other words, and registered Democrats cannot participate in Republican primaries. In districts where the Democratic Party's candidate is very likely to win the general election, like the new Sixth District, the only real opportunity to influence what person is ultimately elected is the Democratic primary race. Under the closed primary system, residents of the Sixth District—even those otherwise inclined to register as Republicans—must register as members of the Democratic party in order to vote in the Democratic primary and practically influence who becomes their representative.

In addition, the Congressional Plan chilled participation in general elections. Voters who feel that the outcomes of elections are preordained by the legislature's map-drawing are discouraged from casting their votes or engaging in the political process at all.

INTERROGATORY NO. 3:

> State the facts concerning your contention that Delegate James J. King was chosen without input from Republican leadership.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs also object to this interrogatory to the extent that it seeks the disclosure of information that is already in the possession, custody, or control of Defendants. Plaintiffs object to this request as overly broad and unduly burdensome as it seeks all facts regarding a particular contention. Plaintiffs further object to this request as vague and ambiguous to the extent that the terms "input" and "Republican leadership" are undefined.

Further, contention interrogatories may not be used to require a party to set forth all factual information obtained in discovery regarding a particular topic. Defendants' interrogatories, "insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and

legal applications—supporting the identified allegations, are overly broad and unduly burdensome." *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010); *see also Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, 2010 U.S. Dist. LEXIS 127125, at *25-37 (M.D. Pa. 2010) (denying motion to compel detailed responses to interrogatories requesting "all facts" supporting a particular contention, holding that defendants' demand for specific and "narrative response[s]" to contention interrogatories was "little more than a mark-work request. . . . since they do not only have the information, they have the written materials themselves."). Accordingly, Plaintiffs do not cite every document or fact responsive to this interrogatory. Instead, Plaintiffs will make a good faith effort to cite representative documents and facts that support their response.

In addition, Plaintiffs object to this interrogatory because "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J. 1990); *see also In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985) ("the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period."). Plaintiffs have not completed all discovery (fact and expert), their investigation of the facts, or its preparation for trial in this case, and therefore Plaintiffs reserve the right to rely on any legal theories, facts, documents, testimony, or evidence which may come to light during fact and expert discovery.

Subject to and without waiving the foregoing objections, Plaintiffs respond as follows: On July 4, 2011, former Maryland Governor Martin O'Malley appointed all five members of the Governors' Redistricting Advisor Committee (GRAC). The members of the GRAC were Committee Chair Jeanne Hitchcock, who was Governor O'Malley's Secretary of Appointments and a former Deputy Mayor of Baltimore (serving under then Mayor O'Malley); Senate President Thomas V.

Mike Miller, Jr., a Democrat; Maryland House of Delegates Speaker Michael E. Busch, a Democrat; Richard Stewart, a private business owner who chaired Governor O'Malley's 2010 re-election campaign in Prince George's County; and Delegate James J. King, a former one-term member of the Maryland House of Delegates, a Republican. Governor O'Malley appointed Delegate King to the GRAC without consulting with leadership of the Maryland Republican Party.

INTERROGATORY NO. 4:

Identify all statistical tests referenced in ¶ 111 of the Complaint.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs object to this interrogatory to the extent that it calls for the premature, non-reciprocal disclosure of expert reports in violation of the Court's scheduling order. Plaintiffs further object to this request as vague and ambiguous to the extent that the terms "statistical tests" and "referenced in" are undefined.

Plaintiffs further object to this interrogatory to the extent that it seeks materials prepared by non-testifying experts retained in anticipation of litigation who are not expected to be called as witnesses at trial. Fed. R. Civ. P. 26(b)(4)(D)(ii); *see also Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 420 (N.D. Ill. 2011) ("Because the materials relate solely to [an expert's] role as a non-testifying consultant, Plaintiffs may not discover them unless it can show 'exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.'"); *Monarch Knitting Mach. Corp. v. Sulzer Morat GMBH*, 1998 WL 338106, at *2 (S.D.N.Y. 1998) ("Under this rule, a consulting expert who will not testify at trial, 'is generally immune from discovery.'"); *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007) ("Several policy considerations underlie the rule, including, (1) encouraging counsel to obtain necessary expert advice without fear that the adversary may obtain such information; (2)

preventing unfairness that would result from allowing an opposing party to reap the benefits from another party's efforts and expense; [and] (3) preventing a chilling effect on experts serving as consultants if their testimony could be compelled."); *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982) ("there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course litigation should take.").

FIRST SUPPLEMENTAL RESPONSE: Plaintiffs further object to this interrogatory to the extent that it seeks the premature, non-reciprocal disclosure of expert witness reports. Plaintiffs will disclose further statistical tests supporting its allegations pursuant to Fed. R. Civ. P. 26(a)(2) on the date required by the Court's scheduling order. *See* ECF No. 108 at 2.

Subject to and without waiving the foregoing objections, Plaintiffs state that the statistical tests referenced in paragraph 111 of their Second Amended Complaint include the tests discussed in greater detail in:

- Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi L. Rev. 831 (2015); and
- Samuel H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stanford L. Rev. 1263 (2016).

INTERROGATORY NO. 5:

List all addresses at which you have resided since reaching voting-age and the dates you resided at each address.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs also object to this request as unduly burdensome, not proportionate to the needs of the case, and not relevant to any party's claim or defense to the extent that it seeks discovery before January 1, 2011 or after November 1, 2011. Plaintiffs further object to this request

as vague and ambiguous to the extent that the term "voting-age" and "resided" are undefined.

Subject to and without waiving the foregoing objections, Plaintiffs respond as follows: O. John Benisek is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Mr. Benisek's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, his voter registration address remains in the Sixth Congressional District. Mr. Benisek has been an eligible Maryland voter since 1966. He has resided at the following addresses or in the following cities in the State since that time: College Park, MD (1963-1977); White Oak, MD (1973-1977); 5113 Porterstown Road in Keedysville, MD 21756 (1978-1990); and 11237 Kemps Mill Road in Williamsport, MD 21795 (1990-present).

Edmund Cueman is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Mr. Cueman's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, his voter registration address is in the Eighth Congressional District. Mr. Cueman has been an eligible Maryland voter since 1961. He has resided at the following addresses in the State since that time: 304 W. Federal Street, Snow Hill, MD 21863 (1963-1968); 202 W. Martin Street, Snow Hill, MD 21863 (1968-1971); Baltimore Boulevard, Finksburg, MD 21048 (1971-1973); and 1201 Woods Rd., Westminster, MD 21158 (1973-Present).

Jeremiah DeWolf is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Mr. DeWolf 's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, his voter registration address remains in the Sixth Congressional District. Mr. DeWolf has been an eligible Maryland voter since 2007. He has resided at 4709 Mt. Briar Road, Keedysville, MD 21756, since that time.

Charles W. Eyler, Jr., is a citizen of the United States and a resident of and active eligible

voter in Maryland. Before enactment of the Plan, Mr. Eyler's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, his voter registration address is in the Eighth Congressional District. Mr. Eyler has been an eligible Maryland voter since 1970. He has resided at the following addresses in the State since that time: Schley Ave., Frederick, MD 21701 (1971-1973); Eyler Road, Thurmont, MD 21788 (1973-1976); and 13249 Creagerstown Road, Thurmont, MD 21788 (1976-Present).

Kat O'Connor is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Ms. O'Connor's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, her voter registration address remains in the Sixth Congressional District. Ms. O'Connor has been an eligible Maryland voter since 1985. She has resided at the following addresses in the State since 1998: 11411 Seneca Valley Drive, Germantown, MD 20874 (1998-2003); and 9321 Watkins Road Gaithersburg, MD 20882 (2003-present).

Alonnie L. Ropp is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Ms. Ropp's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, her voter registration address is in the Eighth Congressional District. Ms. Ropp has been an eligible Maryland voter from 1989 through 1996 and 1999 through the present. She resided at the following addresses between 1989 and 1996: 10021 Harp Road, Walkersville, MD 21793; 3 East 2nd Street, Frederick, MD 21701; 1300 Taney Avenue, Frederick, MD 21702; 103 E 8th Street, Frederick, MD 21701; 7 East 13th Street, Frederick, MD 21701. Ms. Ropp has resided at the following addresses since 1999: an apartment at Springwater Court, Frederick, MD 21701 (1999-2002); 8410 Myersville Road, Middletown, MD (2002-November 2016); 8543 Pete Wiles Road, Middletown, MD (November 2016-present).

Sharon Strine is a citizen of the United States and a resident of and active eligible voter in Maryland. Before enactment of the Plan, Ms. Strine's voter registration address was in Maryland's Sixth Congressional District. Following enactment of the Plan, her voter registration address is in the Eighth Congressional District. Ms. Strine has been an eligible Maryland voter since 1982. She has resided at the following addresses in the State since that time: 11611 Harp Hill Road, Myersville, MD 21773 (1972-1983); 312 Broad Street, Middletown MD 21783 (1983-1984); 12610 Loy Wolfe Road, Myersville MD 21773 (1984-1996); and 12709 Martin Road, Smithsburg, MD 21783 (1996-Present).

INTERROGATORY NO. 6:

> Identify any alternative redistricting plan that satisfies all of the constitutional requirements for congressional reapportionment without diluting either party's votes to a constitutionally significant degree that was submitted to the GRAC.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs object to this interrogatory to the extent that it calls for the premature, non-reciprocal disclosure of expert reports in violation of the Court's scheduling order. Plaintiffs further object to this request as vague and ambiguous to the extent that the terms "alternative redistricting plan," "constitutional requirements for congressional reapportionment," and "diluting either party's votes to a constitutionally significant degree" are undefined.

Plaintiffs further object to this interrogatory to the extent that it seeks materials prepared by non-testifying experts retained in anticipation of litigation who are not expected to be called as witnesses at trial. Fed. R. Civ. P. 26(b)(4)(D)(ii); *see also Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 420 (N.D. Ill. 2011) ("Because the materials relate solely to [an expert's] role as a non-testifying consultant, Plaintiffs may not discover them unless it can show 'exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other

means.'"); *Monarch Knitting Mach. Corp. v. Sulzer Morat GMBH*, 1998 WL 338106, at *2 (S.D.N.Y. 1998) ("Under this rule, a consulting expert who will not testify at trial, 'is generally immune from discovery.'"); *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007) ("Several policy considerations underlie the rule, including, (1) encouraging counsel to obtain necessary expert advice without fear that the adversary may obtain such information; (2) preventing unfairness that would result from allowing an opposing party to reap the benefits from another party's efforts and expense; [and] (3) preventing a chilling effect on experts serving as consultants if their testimony could be compelled."); *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982) ("there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course litigation should take.").

FIRST SUPPLEMENTAL RESPONSE: Plaintiffs' further object on the basis that it is not Plaintiffs burden to produce an alternative redistricting proposal that would comply with all constitutional requirements for Congressional reapportionment. That was (and continues to be) the responsibility of the State of Maryland. Plaintiffs are not required to present an alternative plan for Congressional reapportionment in order to receive the injunctive relief that they seek. *See Shapiro v. McManus*, — F. Supp. 3d —, 2016 WL 4445320, at *10-11 (D. Md. 2016) (discussing facts that Plaintiffs must prove at trial). As a consequence, this interrogatory is not relevant to any party's claim or defense and is not proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

Subject to and without waiving the foregoing objections, Plaintiffs respond as follows: Should the Court require Plaintiffs to produce an alternative redistricting proposal after entering a declaration in their favor, Plaintiffs will do so at the time designated by the Court.

INTERROGATORY NO. 7:

> Identify and state the facts concerning all acts by defendants, members of the General Assembly, members of the GRAC, and Governor O'Malley, taken either individually or as

any group, that you contend were done to punish, sanction, target or retaliate against the plaintiffs because of the plaintiffs' protected speech. For any act that you identify, please describe the act, the date the it occurred, the person who was targeted, the persons who took the act, and the protected First amendment activity you allege was the basis for any punishment, sanction, targeting or retaliation.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs also object to this interrogatory to the extent that it seeks the disclosure of information that is already in the possession, custody, or control of Defendants. Plaintiffs object to this request as overly broad and unduly burdensome as it seeks all facts regarding a particular contention. Plaintiffs further object to this request as vague and ambiguous to the extent that the terms "General Assembly," "Governor O'Malley," "punish," "sanction," "target," "retaliate," "protected speech," "punishment," and "retaliation" are undefined.

Further, contention interrogatories may not be used to require a party to set forth all factual information obtained in discovery regarding a particular topic. Defendants' interrogatories, "insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications—supporting the identified allegations, are overly broad and unduly burdensome." *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010); *see also Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, 2010 U.S. Dist. LEXIS 127125, at *25-37 (M.D. Pa. 2010) (denying motion to compel detailed responses to interrogatories requesting "all facts" supporting a particular contention, holding that defendants' demand for specific and "narrative response[s]" to contention interrogatories was "little more than a mark-work request. . . . since they do not only have the information, they have the written materials themselves.").

Moreover, Plaintiffs object to this interrogatory because it is an improper "blockbuster interrogatory" that "is overbroad and unduly burdensome on its face." *Bat v. A.G. Edwards & Sons, Inc.*, 2005 WL 6776838, at *3 (D. Colo. 2005). "[C]ourts have held that unnecessarily broad interrogatories, or 'blockbuster' interrogatories, which require a party to state every fact supporting all of its allegations, as well as identify each person with knowledge of each fact and all documents supporting each count, are impermissible." *HBC Fin. Corp. v. Kennedy*, 2016 WL 6216179, at *2 (S.D. Miss. 2016); *see also Nieman v. Hale*, 2013 WL 6814789, at *11 (N.D. Tex. 2013) (denying motion to compel response to "blockbuster" interrogatory); *Brasssell v. Turner*, 2006 WL 1806465, at *2 (S.D. Miss. 2006) (finding interrogatories overly broad an unduly burdensome where they sought an open-ended narrative that was not tailored in any way); *Gynberg v. Total S.A.*, 2006 WL 1186836, at *7 (D. Colo. 2006) (denying motion to compel answer to "blockbuster" interrogatory). "Indiscriminate use of blockbuster interrogatories, such as these, do not comport with the just, speedy, and inexpensive determination of an action. To require answers for them would more likely cause delay and unreasonable expense of time, energy, and perhaps money." *Hilt v. SFC, Inc*, 170 F.R.D. 182, 186-87 (D. Kan. 1997) (denying motion to compel interrogatory response).

Accordingly, Plaintiffs do not cite every document or fact responsive to this interrogatory. Instead, Plaintiffs will make a good faith effort to cite representative documents and facts that support their response. *See, e.g., K.R.S. v. Bredford Cmty. School Dist.*, 2014 WL 11513167, at *3 (S.D. Iowa 2014) (Courts emphasize that '[c]ontention interrogatories should not require a party to provide the equivalent of a narrative account of the case.' . . . When faced with contention interrogatories with overly broad language, courts typically direct that an answer still be provided but narrow the scope of the needed response to the 'material' or 'principal' facts supporting a specific claim or defense.") (citations omitted).

In addition, Plaintiffs object to this interrogatory because "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J. 1990); *see also In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985) ("the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period."). Plaintiffs have not completed all discovery (fact and expert), their investigation of the facts, or its preparation for trial in this case, and therefore Plaintiffs reserve the right to rely on any legal theories, facts, documents, testimony, or evidence which may come to light during fact and expert discovery.

Subject to and without waiving the foregoing objections, Plaintiffs will supplement their answer to this interrogatory on January 16, 2017.

FIRST SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, Plaintiffs state that Defendants, GRAC members, and legislators have refused to produce documents regarding the intent and purpose of the 2011 Congressional Plan. As a result, Plaintiffs cannot fully answer this interrogatory. When Defendants and other current and former Maryland state officials duly produce the documents and testimony required by Plaintiffs' discovery requests, Plaintiffs will supplement this interrogatory response.

In addition, Defendants, legislators, legislative staffers, state agencies, and members of former Governor O'Malley staff failed to preserve documents and electronically stored information relevant to this litigation after they reasonably anticipated litigation regarding the 2011 Congressional Plan. As a result of this spoliation, Plaintiffs cannot fully answer this interrogatory.

To the extent that a further response is required:

I. **Voters in the Sixth Congressional District Have Well-Established Conservative Political Views.** Historically, Maryland's Sixth Congressional District has been reliably Republican.

In the 70 years between January 1943 and January 2013, the district was represented in Congress by members of the Republican Party in four out of every five years. Prior to the General Assembly's adoption of the 2011 Congressional Plan, the Sixth District had been Maryland's most Republican district, represented for nearly 20 years by Republican Roscoe Bartlett, who won reelection in 2010 by a 28-point margin. Under the 2001 redistricting map, the district included all of western Maryland and stretched across the northern border of Maryland to encompass other rural areas of the State.

2. The GRAC and General Assembly Cracked Republicans in the Sixth Congressional District. Plaintiffs state that on July 4, 2011, former Maryland Governor Martin O'Malley appointed five members to the Governor's Redistricting Advisory Committee (GRAC). The five members of the GRAC were: (1) Committee Chair, Jeanne Hitchcock, who was Governor O'Malley's Secretary of Appointments and a Deputy Mayor of Baltimore, reporting to then-Mayor O'Malley; (2) Senate President Thomas V. Mike Miller, Jr., a Democrat; (3) Maryland House of Delegates Speaker Michael E. Busch, a Democrat; (4) James J. King, a former one-term member of the Maryland House of Delegates who served as a Republican, but was chosen without input from Republican leadership; and (5) Richard Stewart, a private business owner who chaired former

Governor O'Malley's 2010 re-election campaign in Prince George's County. As a consequence, four of the five members of the GRAC were either long-serving Maryland Democrats or advisors close to the then-Democratic governor.

The GRAC was tasked with drafting a recommended plan for Maryland's congressional redistricting in light of the 2010 census results. Although the GRAC held public hearings around the Maryland, these hearings were mere window dressing. All of the GRAC's public meetings were held before the GRAC released its draft Congressional map to the public and none were held after. In addition, several public hearings were held at times when many citizens interested in the redistricting process could not attend.

In fact, the GRAC's plan was developed in secret by the four Democratic members of the GRAC with the assistance of a cadre of senior aides to Governor O'Malley, Senate President Thomas V. Mike Miller, Jr., and Speaker Michael E. Busch. Many of these senior aides had access to the GRAC's draft Congressional Plan before it was made public, including: Patrick Murray, a former legislative aide to Senate President Thomas V. Mike Miller, Jr.; Yaakov Weissman, a legislative aide to Senate President Thomas V. Mike Miller, Jr.; Jeremy Baker, a legislative aide to Maryland House of Delegates Speaker Michael E. Busch; and Joseph E. Bryce, an aide to former Governor Martin O'Malley.

The GRAC and these aides used data reflecting citizen's voting history and party affiliation for the purpose of making it harder for Republican voters in western Maryland to achieve electoral success because of the views they had previously expressed. These aides and the Democratic GRAC members had access to Maryland voter registration data, including information regarding party registration, voting histories, and the precinct-level data regarding the percentage of voters that that voted for the Republican and Democratic candidates in the 2008 presidential election and 2010

Maryland gubernatorial election. Using this data, aides to Senate President Miller drafted four proposed Congressional maps. These maps known colloquially as Option 1, Option 2, Option 3, and Option 4 were considered by the GRAC. Information regarding the percentage of voters that that voted for the Republican and Democratic candidates in the 2008 presidential election and 2010 Maryland gubernatorial election were appended to these maps. For example, for Option 1, which was also known as "Dem Option 1," the following information was provided to Democratic GRAC members and Democratic members of the Maryland General Assembly:

Dem Option 1

District	Population	Deviation	% Deviation	G10G_D	G10G_RW	G10P_D	G10P_RW	10s_Pop	10s_Blk	% 10s_Blk
1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
7	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
8	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

In the above chart, "District" refers to the eight Congressional districts in Maryland; G10G_D refers to the number of votes cast for the Democratic candidate in the 2010 Maryland

Gubernatorial election; G10G_RV refers to the number of votes cast for the Republican candidate in the 2010 Maryland Gubernatorial election; G08P_DV refers to the number of votes cast for the Democratic candidate in the 2008 Presidential election; and G08P_RV refers to the number of votes cast for the Republican candidate in the 2008 Presidential election. The GRAC, key aides to the GRAC, and the General Assembly thus explicitly considered the voting histories and party affiliations of Republican voters in western Maryland.

As shown in the map below, "Dem Option 1" became the basic blueprint of the GRAC's draft plan and the plan that was ultimately approved by the General Assembly. Like the draft and final plans, Dem Option 1 added heavily Democratic portions of Frederick, Maryland and western portions of Montgomery County to Maryland's Sixth Congressional District.

Maryland 2011 Congressional District 6
Senate Bill 1
October 20, 2011

More specifically, the GRAC cracked the effective Republican majority in the old Sixth District by removing over 360,000 residents from mostly-Republican northern counties of the district and adding nearly 350,000 residents from predominantly Democratic and urban Montgomery

County. In particular, the Congressional Plan removed from the Sixth District all of Carroll County, which had voted 68% Republican and 27% Democratic in the previous congressional election. The removal of Carroll County generated a loss of 24,000 registered Republican voters from the Sixth District. The Congressional Plan also moved specific, majority-Republican precincts of Frederick County to Maryland's Eighth Congressional District, while leaving the majority-Democratic precincts of the county in the Sixth District. The Frederick County precincts that remained in the Sixth District contained over 6,000 more registered Democrats than registered Republicans. The opposite pattern is true with regard to the transfer of voters from Montgomery County. Of the Montgomery County precincts that were added to the Sixth District by the Congressional Plan, registered Democrats outnumbered registered Republicans by a two-to-one margin. Moving these cherry-picked portions of Montgomery County into the Sixth District generated a gain of tens of thousands of Democratic voters. In total, the Congressional Plan accomplished a net transfer of over 65,000 Republican voters out of the Sixth District and over 30,000 voters into the district. As a result, whereas Republican voters had comprised 47% of all voters in the Sixth District before the Congressional Plan, they comprise just 33% of the Sixth District after the Congressional Plan.

In redrawing the boundaries of the Sixth District, the GRAC and their aids, the Governor and his aides, and the Maryland General Assembly on their aides were motivated by a specific intent to burden Republican voters in Western Maryland. "[I]t is not a well-kept secret that the plan for the sixth congressional district was developed for the purpose of disadvantaging an incumbent Republican legislator." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 905-06 (D. Md. 2011). Contrary to their position in this litigation, the Office of Attorney General has admitted that:

- "The [Congressional] Plan the product of the careful consideration of a variety of . . . principles, including . . . partisan considerations." State's Opening Summary Judgment Brief

at 41, *Fletcher v. Lamone*, No. 11-cv-3220-RWT (D. Md.).

- "[T]he plan was driven, to a large extent, by the desire to make an additional district more politically competitive while protecting the other current incumbents." *Id.* at 42.
- The Governor, the GRAC, and the General Assembly "all considered and gave effect to a variety of . . . considerations . . . [including] partisan political considerations." State's Reply Brief in Support of Summary Judgment at 18, *Fletcher v. Lamone*, No. 11-cv-3220-RWT (D. Md.).

In an October 31, 2012 speech at the Community College of Baltimore County, Essex Campus, the then-Attorney General of Maryland, Douglas Gansler, provided a frank admission that the 2011 Congressional Plan was designed to burden Republican voters in the Old Sixth District:

> The third issue is redistricting. And the redistricting is interesting because I actually have to defend the legislature in its drawings of the map. . . . So many people have a problem with the way in which the state was gerrymandered this last time. For example, in the Sixth District . . . Garrett County, Maryland, a very rural, agrarian part of the state is couple with Potomac, Maryland in Montgomery County, which is perhaps the most wealthy and lest agrarian part of the state. And, yet, they are voting for the same representative in the election between Roscoe Bartlett, a long-time Congressman, and John Delaney, sort of a new-comer on the political scene. . . . So, what happened, we have eight congressional districts, . . . the Democrats had the ability . . . to look at the state gerrymandered in such a way to make it 7 [Democratic representatives] to 1 [Republican representative]. . . . They were looking do they want to make the Eastern Shore, try that again, to make it even more Democratic and make that the seventh Democratic district, or Western Maryland. They chose Western Maryland, and its actually a 53% Democratic district.

https://www.youtube.com/watch?v=kZHVOvB8fBY. Attorney General Gansler went on to explain that even if the boundaries of the Sixth Congressional District were thrown out, the Democratic General Assembly would simply burden Republicans in the Sixth District once again:

> But the long shot of that is, even if [the Congressional Plan] gets overturned, the Democratic legislature will just go back in January redraw the lines, and they can draw essentially the same lines again.

Id.

The Attorney General was not the only senior Maryland Democrat who out-rightly confessed a specific intent to burden Republican voters in the Sixth Congressional District. Prior to the Congressional Plan being announced to the public, Democratic Senator Richard Madaleno made the following statements in a series of taped interview on September 13, 20'1:

> What you see going on elsewhere is clearly in other states that are Republican controlled they are drawing maps to try to take out Democrats, so I think there is pressure on saying look, if they are playing that game elsewhere, then in states like Maryland where Democrats control we've got to do the opposite.
>
> * * *
>
> This is a conflict between, what you could say, the heart and the mind of the Democratic party. The heart is 'Frank Kratovil had that seat [the First District] before, Frank Kratovil won before, he made hard votes on behalf of Barrack Obama, we should find a way to reward our friend Frank Kratovil.' The head is telling you, 'Look, Western Maryland, a new district focused toward western Maryland is one that you could actually pick up easier. . .' Do you reach out and help your good old friend Frank Kratovil, or do you go where, in fact, you probably have a better chance at a pick up.
>
> * * *
>
> If you go with a competitive Western Maryland district, the way that works is clearly the district comes further into Montgomery County, substantially into Montgomery County.
>
> * * *
>
> I think trying to achieve both [goals] makes it a little more difficult for everyone trying to draw the maps. But you're dealing with—one of the things that's interesting is—you're dealing with people like Mike Miller or some of the staff of the legislature who have done this several cycles, so it's not like they are a bunch of people experimenting for the first time on how to do this.

Donna Edwards, a democratic representative from the Fourth District, stated on October 11, 2011 in referenced to the Congressional Plan: "I have been one of the strongest proponents as a Democrat of drawing a seventh district for Democrats. But we can accomplish that in a different way . . . Where I have a real disagreement is in making superior the political interests to minority voting rights interests."

A week later, on October 18, 2011, on the floor of the Maryland Senate, Senator C. Anthony Muse stated:

> [L]et's just be frank. As it stands, the plan dilutes minorities, minority power and parcels out minority populations—voters—to other very different communities in order to strengthen the chances of a Democrat being elected.
>
> * * *
>
> Yes, the party walks away with maybe seven seats, but what do our minority populations walks away with?
>
> * * *
>
> I cannot support this map. It may well like up to the letter of the law, but surely not the spirit of the law nor the spirit of the democratic process. I think minorities lose with this map. Yes, the party gains. But honestly I believe the people, not the party, are the losers.

On the same day, Senator Jamie Raskin, also spoke from the Senate floor:

> [T]his is not a Maryland problem with redistricting and gerrymandering. It's an American problem. All across America, people are complaining about extremely spliced and diced, curvy, swervy districts, where elected officials choose voters before voters choose elected officials. That's the system we've got in 50 states today, in the United States. And it's a process where we dress up partisan and political ambition on both sides of the aisle in high principal, but we can all tell what's really going on. * * *
>
> To my distinguished colleagues on the other side of the aisle, the disappointment that they feel today is shared by Democrats in North Carolina, a state won by President Obama in 2008, which just had districts redrawn, ten majority Republican, three majority Democrat, with all the Democrats packed in there. In Ohio, a state that was won by the President Obama in 2008, 12 majority Republican districts have been drawn, four majority Democratic districts have been drawn. So they've gone way beyond anything that's been seen here. The basic problem is that we are trying to build a whole range in multiplicity of interest and factors into these single member districts, and we now have the convenience of computer technology to be able to accomplish very strange looking figures on the map.

On the floor of the House of Delegates, Delegate Emmett C. Burns, Jr. stated that he supported the Congressional Plan because it meant "more Democrats in the House of Representatives." Likewise, Democratic Speaker Michael Busch said of the Plan, "I think you will have a

very competitive 6th District when you didn't have that in the past."

Democratic Delegate Curt Anderson described an October 3, 2011 briefing given by GRAC Chair Jeanne Hitchcock about the redrawn Sixth District: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Furthermore, in an October 17, 2011 interview, Delegate Anderson stated, "What we're doing is we are trying to get more, in terms of—currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming out of Montgomery County and going into Western Maryland that would give the Democrats more."

On November 7, 2011, Democratic Senator Jamie Raskin explained of the redistricting process: "Democrats control the redistricting process in Maryland" and exercising that control, they "hoped to pick up a seventh House seat through redistricting."

In a letter dated October 20, 2011, Attorney General Douglas Gansler stated: "As indicted by those who participated in developing and adopting the redistricting plan, including the [GRAC], the Governor, and the General Assembly, the boundaries of the newly adopted Congressional districts reflect a number of considerations, including . . . partisan consideration."

GRAC members openly acknowledged that their intent was to crack the Sixth District. For example, GRAC member Michael Busch, the Maryland House Speaker, said: "I think the numbers will show that [the Congressional Plan] makes [the Sixth District] pretty competitive," in favor of Democrats, where as it previously was a safely Republican district. GRAC Chair Jeanne Hitchcock confirmed that purpose, noting that the Sixth District was now "dominated" by the Democratic voters in Montgomery County.

3. The GRAC and General Assembly's Specific Intent to Crack Republicans in the

Sixth District Was Successful in Changing the Outcome of Congressional Elections under the Plan. The Republican vote dilution in the Sixth District brought about by the 2011 Congressional Plan was sufficiently serious to produce a demonstrable and concrete adverse effect on Republican voters' right to have an equally effective voice in the election of a representative. Democrat John Delaney defeated Roscoe Bartlett in the election for representative to the United States Congress for the Sixth District by a 20.9% margin in 2012. He has won reelection in each election since. Moreover, as Plaintiffs will show in their forthcoming expert reports, by several statistical measures the 2011 Congressional Plan seriously diluted the votes of Republicans in the Sixth District and impaired those voters from having an equally effective voice in future congressional elections. And the Plan's dilutive effect cannot be explained by compliance with legitimate redistricting criteria, such as respect for existing communities of interest.

INTERROGATORY NO. 8:

> State all facts upon which you rely for your contention that the 2011 Maryland redistricting plan has discouraged voters in Maryland from casting votes, actively campaigning for their chosen candidates, or otherwise participating in the political process.

RESPONSE: Plaintiffs object to this interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege, work product immunity, or any other privilege or immunity. Plaintiffs object to this interrogatory to the extent that it calls for the premature, non-reciprocal disclosure of expert reports in violation of the Court's scheduling order. Plaintiffs also object to this interrogatory to the extent that it seeks the disclosure of information that is already in the possession, custody, or control of Defendants. Plaintiffs object to this request as overly broad and unduly burdensome as it seeks all facts regarding a particular contention. Plaintiffs further object to this request as vague and ambiguous to the extent that the terms "discouraged," "actively campaigning," and "otherwise participating in the political process" are undefined.

Further, contention interrogatories may not be used to require a party to set forth all factual

information obtained in discovery regarding a particular topic. Defendants' interrogatories, "insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications—supporting the identified allegations, are overly broad and unduly burdensome." *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010); *see also Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, 2010 U.S. Dist. LEXIS 127125, at *25-37 (M.D. Pa. 2010) (denying motion to compel detailed responses to interrogatories requesting "all facts" supporting a particular contention, holding that defendants' demand for specific and "narrative response[s]" to contention interrogatories was "little more than a mark-work request. . . . since they do not only have the information, they have the written materials themselves.").

Moreover, Plaintiffs object to this interrogatory because it is an improper "blockbuster interrogatory" that "is overbroad and unduly burdensome on its face." *Bat v. A.G. Edwards & Sons, Inc.*, 2005 WL 6776838, at *3 (D. Colo. 2005). "[C]ourts have held that unnecessarily broad interrogatories, or 'blockbuster' interrogatories, which require a party to state every fact supporting all of its allegations, as well as identify each person with knowledge of each fact and all documents supporting each count, are impermissible." *HBC Fin. Corp. v. Kennedy*, 2016 WL 6216179, at *2 (S.D. Miss. 2016); *see also Nieman v. Hale*, 2013 WL 6814789, at *11 (N.D. Tex. 2013) (denying motion to compel response to "blockbuster" interrogatory); *Brassell v. Turner*, 2006 WL 1806465, at *2 (S.D. Miss. 2006) (finding interrogatories overly broad an unduly burdensome where they sought an open-ended narrative that was not tailored in any way); *Gynberg v. Total S.A.*, 2006 WL 1186836, at *7 (D. Colo. 2006) (denying motion to compel answer to "blockbuster" interrogatory). "Indiscriminate use of blockbuster interrogatories, such as these, do not comport with the just,

speedy, and inexpensive determination of an action. To require answers for them would more likely cause delay and unreasonable expense of time, energy, and perhaps money." *Hilt v. SFC, Inc*, 170 F.R.D. 182, 186-87 (D. Kan. 1997) (denying motion to compel interrogatory response).

Accordingly, Plaintiffs do not cite every document or fact responsive to this interrogatory. Instead, Plaintiffs will make a good faith effort to cite representative documents and facts that support their response. *See, e.g., K.R.S. v. Bredford Cmty. School Dist.*, 2014 WL 11513167, at *3 (S.D. Iowa 2014) (Courts emphasize that '[c]ontention interrogatories should not require a party to provide the equivalent of a narrative account of the case.' . . . When faced with contention interrogatories with overly broad language, courts typically direct that an answer still be provided but narrow the scope of the needed response to the 'material' or 'principal' facts supporting a specific claim or defense.") (citations omitted).

In addition, Plaintiffs object to this interrogatory because "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J. 1990); *see also In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 336 (N.D. Cal. 1985) ("the wisest general policy is to defer propounding and answering contention interrogatories until near the end of the discovery period."). Plaintiffs have not completed all discovery (fact and expert), their investigation of the facts, or its preparation for trial in this case, and therefore Plaintiffs reserve the right to rely on any legal theories, facts, documents, testimony, or evidence which may come to light during fact and expert discovery.

Subject to and without waiving the foregoing objections, Plaintiffs will supplement their answer to this interrogatory on January 16, 2017.

FIRST SUPPLEMENTAL RESPONSE: Plaintiffs further object that they are not required to show that Republican voters were chilled from registering to vote, nor are they required to identify

each such Republican voter. *See Shapiro v. McManus*, --- F. Supp. 3d ---, 2016 WL 4445320, at *10-11 (D. Md. 2016) (discussing facts that Plaintiffs must prove at trial). As a consequence, this interrogatory is not relevant to any party's claim or defense and is not proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

Subject to and without waiving the foregoing objections, Plaintiffs state that to the extent that a further response is required, after the 2011 Congressional Plan was adopted, voters in Maryland's Sixth District were chilled from participating in the political process, including registering to vote, voting, and/or supporting Republican candidates because they believed that their votes did not matter and their candidates did not have a reasonable chance of winning due to the cracking of Republicans in the former Sixth District.

More specifically, the dilution of Republican's voters in Maryland has chilled and manipulated political participation since 2011. Gerrymanders that "pack" or "crack" votes chill political participation because objectively reasonable voters in such manipulated districts understand that their votes "will not count" because they cannot affect the outcome. Such voters also understand that other like-minded voters' votes "will not count" and thus are less likely to participate actively in campaigning for their chosen candidates.

Vote "cracking" chills political speech in an even more pernicious way in Maryland because Maryland employs a closed primary registration system. For a voter to participate in a particular political party's primary, the voter must be a registered member of that party. Registered Republicans cannot participate in Democratic primaries, and registered Democrats cannot participate in Republican primaries. In districts where the Democratic Party's candidate is very likely to win the general election, the only real opportunity to influence what person is ultimately elected is the Democratic primary race. Under the closed primary system, residents must register as members of

the Democratic party in order to vote in the Democratic primary.

In addition, the Congressional Plan chilled participation in general elections. Objectively reasonably voters who feel that the outcomes of elections are preordained by the legislature's map-drawing are discouraged from casting their votes or engaging in the political process at all.

Dated: January 16, 2016

/s/ Michael B. Kimberly

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NCEC Services is a Washington, DC-based political consulting firm founded in 1985. It specializes in electoral analysis, campaign strategy, political targeting, and GIS services.

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Subject: Re: meeting next wek
From: Brian Romick <brianromick@gmail.com>
Date: 3/8/2011 10:46 AM
To: jason.gleason03@gmail.com

Eric Hawkins is drawing the maps and Mark Gersh is the boss

On Tue, Mar 8, 2011 at 10:24 AM, <jason.gleason03@gmail.com> wrote:
What was the name of the other guy at NCEC? Eric and ?

Sent from my Verizon Wireless BlackBerry

From: Brian Romick <brianromick@gmail.com>
Date: Thu, 24 Feb 2011 18:12:39 -0500
To: <jason.gleason03@gmail.com>
Subject: Re: meeting next wek

Cummings asked us to move the meeting, we are going to try for after votes on Monday, which I think may actually be better

On Thu, Feb 24, 2011 at 6:10 PM, <jason.gleason03@gmail.com> wrote:
That's what I thought. Thanks.

Sent from my Verizon Wireless BlackBerry

From: Brian Romick <brianromick@gmail.com>
Date: Thu, 24 Feb 2011 18:09:40 -0500
To: Jason Gleason<jason.gleason03@gmail.com>
Subject: Re: meeting next wek

Other than the map drawing guy, my understanding from Hoyer is that he wants no staff

On Thu, Feb 24, 2011 at 5:55 PM, Jason Gleason <jason.gleason03@gmail.com> wrote:

Brian,

Is staff barred from the entire meeting next week? I know Hoyer said something about this but wasn't sure if he meant the whole thing or just a part of it.

During the previous round of redistricting, my colleagues and I developed open-source, web-accessible redistricting software called DistrictBuilder.[1] We deployed this software in Arizona, Minnesota, Michigan, Ohio, New York, Virginia, and the city of Philadelphia to support redistricting advocacy. As an open-source application others were free to use it, which occurred in Contra Costa County, California and Burlington, Vermont.

I am compensated at a rate of $280 an hour for my work on this report. I have no financial interest in the outcome of this litigation and the opinions that I offer here are in no way dependent upon my compensation.

Materials Considered In This Report

The opinions expressed in this report are based on my review of this information as well as my training and experience. In the production of this report, I have reviewed the following information:

- The Census Bureau's geographic boundary files, which include the census block assignments of the prior, benchmark congressional districts.[2]
- The block assignments for the adopted Maryland congressional districts.
- 2010 census population data adjusted by Maryland for the location of prisoners.[3]
- 2010 voter registration data by precinct and corresponded to census geography, produced in discovery for this case.
- A map of Montgomery County's 2007 precincts to address unassigned census geography in the 2010 voter registration data.[4]
- County and precinct results for the following elections: 2016 President, 2016 U.S. Senate, 2016 U.S. House, 2014 Governor, 2014 Comptroller, 2014 Attorney General, 2014 U.S. House, 2012 President, 2012 U.S. Senate, 2012 U.S. House.
- To apportion voter registration data to census blocks, I use the National Land Coverage Database to improve allocation by identifying where dwellings are located.[5]

Details of how these data were combined to produce statistics and maps presented in this report are provided in the methodology appendix. I understand that certain materials bearing on my conclusions may be produced at later stages of this case. I expect to have the opportunity to review those materials and reserve the right to revise my report and opinions, if necessary.

---

[1] See: www.districtbuilder.org

[2] See: https://www.census.gov/rdo/about_the_program/public_law_94-171_requirements.html

[3] For census block assignments for Maryland's congressional districts and Maryland's prison-adjusted population data are available see: http://planning.maryland.gov/redistricting/2010/dataDownload.shtml.

[4] See: http://web.archive.org/web/20100528043305/http://www.montgomerycountymd.gov/eletmpl.asp?url=/Content/Elections/electionMapsNEW.asp.

[5] See: https://www.mrlc.gov/nlcd2011.php.

Summary

I have been retained by the Plaintiffs in this action to address the following questions:

1) Whether Maryland's 2011 Congressional Plan resulted in vote dilution that was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters?
2) Whether the Maryland General Assembly or its mapmakers specifically intended to burden the representational rights of certain citizens because of how they voted in the past and the political party with which they had affiliated?
3) Whether the lines of the Sixth Congressional District would have been drawn as they were but for the map drawer's and General Assembly's consideration of partisan goals to the detriment of traditional redistricting principles?

With respect to the first question, the evidence is incontrovertible that Maryland's adopted Sixth Congressional District was drawn in a manner that has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district. This vote dilution had a concrete impact on electoral outcomes because Republican voters in the adopted district have, as a consequence, been unable to elect a candidate of their choice.

With respect to the second question, it is my opinion that Maryland's adopted Sixth Congressional District was drawn in an intentional manner to affect the ability of registered Republicans to elect candidates of their choice compared to the previous, benchmark district.

With respect to the third question, it is my opinion that paying due respect to traditional redistricting principles, a clearly superior alternative district exists that would produce a Sixth Congressional District that would not impair as greatly the ability of registered Republicans to elect candidates of their choice. It is my opinion that, but for consideration of partisan goals – aided by map drawers' use of party registration and voting history data—the lines of the adopted district would not have been drawn as they were, and the ability of registered Republican voters to elect candidates of their choice would not have been so substantially diminished.

Methodology

I determine whether vote dilution of Republicans occurred with respect to Maryland's manipulation of the Sixth Congressional District in a manner similar to that used in voting rights litigation. This approach is drawn from my previous experience as an expert witness in voting rights litigation. Most recently, I was the plaintiff's only expert witness in *Page v. Virginia State Board of Elections*, where a federal three-judge panel found Virginia's Third Congressional District to be an unconstitutional racial gerrymander. The U.S. Supreme Court affirmed this decision.

The approach typically used in voting rights litigation includes the following steps, which closely mirror the questions Plaintiff's counsel has asked me to address:

1) First, establish the presence of racially polarized voting. Do individuals of one group reliably vote against the candidate of choice of another group?
2) Second, determine if the disfavored group's ability to elect a candidate of their choice was diminished by district lines that had an effect of diluting their vote. When assessing patterns of polarized voting and vote dilution, experts typically give more weight to *endemic* elections—those held for the office under examination, in this case the U.S. House elections to the Sixth Congressional District—than other *exogenous* elections.
3) Third, probe a redistricting authority's intent by determining whether any other reasonable discretionary criteria explain the shape of the district.

I apply this methodology to assess the effect of the 2011 redistricting on the Sixth Congressional District:

1) I find that Republican and Democratic voters have different preferences over candidates running as Republicans and Democrats. This is unsurprising given the United States' current polarized political environment.
2) I find that on balance, the current Sixth Congressional District has the effect of diluting the vote of Republicans. In the ten recent elections that I analyzed, Republicans were able to elect a candidate of their choice in only one election. For the endemic elections, Republicans were unable to elect a candidate of their choice in any congressional election in the current Sixth Congressional District.
3) I explore the intentionality by examining how well the Sixth Congressional District followed traditional redistricting principles of minimizing county splits and compactness. I find multiple violations of these traditional redistricting principles that appear to be politically motivated. Districts are not drawn in isolation to others. The adopted Sixth Congressional District is bordered by only one other district, the Eighth Congressional District. I further analyze the detrimental impact of configuring the Sixth Congressional District on traditional redistricting principles to the Eighth Congressional District. I show how the Sixth and Eighth Congressional Districts can better follow traditional redistricting principles in a manner that does not dilute Republican votes and does not affect any other congressional districts.

Factual Background

The U.S. House of Representatives has 435 members. Seats in the U.S. House of Representatives are apportioned according to population after each U.S. Census. After the 2000 Census, Maryland was entitled to eight representatives in the U.S. House of Representatives; after the 2010 Census, Maryland was again entitled to eight representatives.[6]

On July 4, 2011, Maryland Governor Martin O'Malley appointed the five members of the Governor's Redistricting Advisory Committee, or GRAC. The members of the GRAC were: (1) Jeanne D. Hitchcock, the Governor's Appointments Secretary; (2) Democratic Delegate and

[6] My recitation of the factual background is taken from the parties' Joint Stipulations of Law and Fact, Dkt. No. 104.

Speaker of the Maryland House of Delegates, Michael E. Busch; (3) Democratic Senator and President of the Maryland Senate, Thomas V. Mike Miller, Jr.; (4) Richard Stewart, a private business owner who chaired Governor O'Malley's 2010 reelection campaign in Prince George's County, Maryland; and (5) former Maryland Delegate James J. King, who was the only Republican appointed to the GRAC. The GRAC announced its proposed congressional map on October 4, 2011.

On October 15, 2011, Governor O'Malley announced that he would submit to the Maryland Legislature a congressional map that was the same as the map proposed by the GRAC. On October 17, 2011, Senate President Miller introduced Senate Bill 1 on behalf of the governor at a special legislative session. The Maryland Senate passed Senate Bill 1 on October 18, 2011. After technical amendments, the Maryland House of Delegates passed the bill on October 19, 2011. The Senate concurred in the House of Delegates' technical amendments, and the Governor signed Senate Bill 1 into law on October 20, 2011. No Republican member of the Maryland Senate or Maryland House of Delegates voted for Senate Bill 1 in committee or on the floor in recorded roll call votes.

The Benchmark and Adopted Sixth Congressional District

Before addressing directly the questions I pose, I wish to provide context by describing the political and geographic character of the Sixth Congressional District as it existed prior to the prior redistricting—what I call the benchmark district—and how it exists currently.

The facts are that Maryland's benchmark Sixth Congressional District was a predominantly Republican district, and composed of predominantly rural communities located along Maryland's Pennsylvanian border. The adopted district is a predominantly Democratic district that subsumes Republican rural communities in Maryland's panhandle by swapping some Republican rural communities previously in the district with predominately Democratic urban portions of Montgomery County not previously in the district.

Party Registration of the Benchmark and Adopted Sixth Congressional District

	Benchmark		Adopted		Change
	Number	Percent	Number	Percent	Number
Democrats	159,661	35.8%	184,120	44.8%	+24,460
Republicans	207,966	46.7%	141,548	34.4%	-66,417
No Party	77,892	17.5%	85,535	20.8%	+7,643
Total	445,518	100.0%	411,203	100.0%	-34,315

Table One. Party Registration in Maryland's Sixth Congressional District

The changing political character of the Sixth Congressional District is described in Table One, where I present party registration statistics as of the 2010 general election for the benchmark and adopted Sixth Congressional District. The summary statistics in Table One were generated using party registration data provided by Maryland to Plaintiffs in the course of discovery for the case.

In the first and second columns of Table One, I present party registration statistics for the benchmark Sixth Congressional District. The benchmark district was predominantly Republican in character, with 46.7% of the voters registering with the Republican Party, 35.8% registered with the Democratic Party, and 17.5% registered with neither party.

In the third and fourth columns of Table One, I present party registration statistics for the adopted Sixth Congressional District. The adopted district is predominantly Democratic in character, with 34.4% of voters registered with the Republican Party, 44.8% registered with the Democratic Party, and 20.8% registered with neither party.

The fifth column reveals how this dramatic change to the Sixth Congressional District occurred. In the course of redrawing the district, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district. These changes were wrought on a district that could have reasonably been immune to substantial changes: the benchmark district was located in the northwest corner of the state and needed only to shed 10,189 total population—among whom are children and other unregistered voters—in order to reach population equality.

The Benchmark Sixth Congressional District

In Figure One, I present a map of Maryland's Sixth Congressional District as it existed prior to the post-2010 redistricting. (All Figures are provided at the end of my report.) The district was located in the northwest portion of Maryland. The benchmark district included all of Maryland's panhandle, including the counties of Garrett, Allegany, Washington, Frederick, and Carroll. The district included a small portion of northeast Montgomery County, and the northern portions of Baltimore and Harford counties. The benchmark Sixth Congressional District was largely rural in character, with the largest population centers being the cities of Frederick, Hagerstown, and Cumberland.[7]

The shape of any Western Maryland district is heavily influenced by the non-compact shape of the panhandle. That said, the boundary of the benchmark Sixth Congressional District adjacent to other districts followed a relatively regular division of the state, composed primarily of the northwest portion of the state.

Figure Two shows how partisans were distributed across Maryland and its benchmark congressional districts, using the 2010 party registration data provided by Maryland to Plaintiffs. The lowest level of geography available to display party registration is the voting-tabulation district (VTD). Voting-tabulation district is a term used by the Census Bureau to describe precincts, wards, and election districts, among the many names used by states and localities. I use the term VTD to describe Maryland's precincts since this is the most accurate term to describe the data presented in Figure Two and elsewhere. Please see the methodology appendix for more information.

In Figure Two, VTDs are represented by light grey lines, and the benchmark districts are represented by thick black lines. VTDs are shaded by the partisan registration of 2010 general

[7] The Census Bureau identifies cities as census places, which are highlighted in grey in Figure 1.

election voters. VTDs that are shaded darker red are more Republican-leaning and those shaded darker blue are more Democratic-leaning by lighter colors, with least Republican-leaning areas shaded yellow and Democratic-leaning areas shaded light blue.

Figure Two illustrates the rural and Republican character of the Sixth Congressional District. Because VTDs are roughly of equal population size, larger VTDs are generally indicative of rural areas, and smaller VTDs are indicative of urban areas. The benchmark Sixth Congressional District was largely rural in character, encompassing the mountainous panhandle and rural areas along the state's northern border with Pennsylvania. These rural areas are also predominantly Republican. There were three Democratic-leaning areas of the benchmark Sixth Congressional District: the cities of Cumberland (where there are a couple of slightly leaning Democratic VTDs), Hagerstown, and Frederick.

The Adopted Sixth Congressional District

Figure Three presents the adopted Sixth Congressional District. The adopted Sixth Congressional District retained Garret, Allegany, and Washington counties, largely located in the panhandle. The adopted Sixth Congressional District no longer includes predominantly rural portions of Carroll, Baltimore, and Horford counties. The district now splits Frederick County, by removing the predominantly rural portions of the county. The district continues to split Montgomery County, although the small predominantly rural portion of northeast Montgomery County formerly in the benchmark Sixth Congressional District is removed and the adopted district extends further southeast into urban areas that include Gaithersburg and its surrounding environs.

Party registration statistics for the adopted Sixth Congressional District are presented in the third and fourth columns of Table One. The adopted district is predominantly Democratic in character, with 34.4% of the voters registering with the Republican Party, 44.8% registered with the Democratic Party, and 20.8% registered with neither party.

Is Voting in Maryland's Sixth Congressional District Partisan Polarized?

The typical approach to addressing the question of racially polarized voting in the voting rights context is to conduct what is known as a racial bloc voting analysis, which essentially correlates populations and election outcomes within precincts. In the context of partisan polarized voting, I might correlate party registration statistics with election outcomes. This option is challenged due to lack of data availability. I only have precinct-level party registration statistics for the 2010 general election voters, which Maryland provided through discovery; I do not have statistics for subsequent elections for which I might wish to correlate party registration and election results.

Fortunately, there is another approach that can be used to analyze patterns of politically polarized voting: survey data. In voting rights cases, survey data is typically unavailable for the various elections of interest. Here, a large-sample academic election survey, called the Cooperative Congressional Election Study (CCES), sheds light on the partisan polarized voting within the Sixth Congressional District.[6]

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[6] The Cooperative Congressional Election Study data and codebooks are available at: http://projects.iq.harvard.edu/cces/data.

Versions of the CCES are available for the 2012 and 2014 general elections. I analyze questions asking respondents' pre-election candidate preferences for President, U.S. Senate, Governor, and U.S. House. The reported percentages do not sum to 100% since I do not report percentages for respondents who are uncertain, have no candidate preference, or prefer an unlisted candidate.

This is a challenging approach to determine partisan polarized voting since the estimates are pre-election candidate preferences and not post-election vote choice. Those who are ambivalent, expressing no candidate preference, are more likely to abstain from the election. The percentages of registered Democrats and Republicans voting for their candidate is likely higher. Furthermore, these are relatively small-sample survey estimates with a relatively high margin of errors, on the order of +/- 6 percentage points or lower.

I cross-tabulate candidate choice by self-reported party registration to present a measure consistent with the party registration statistics presented in Table One. I present two endemic U.S House elections in 2012 and 2014 and three exogenous statewide elections: 2012 President, 2012 U.S. Senate, and 2014 Governor.

		Registered Democrats	No Party Registration	Registered Republicans
Endemic Elections				
2012 U.S. House				
Survey	*John Delaney (D)*	69%	28%	23%
N = 133	*Roscoe Bartlett (R)*	8%	15%	64%
2014 U.S. House				
Survey	*John Delaney (D)*	66%	28%	2%
N = 124	*Dan Bongino (R)*	6%	54%	82%
Exogenous Elections				
2012 President				
Survey	*Barack Obama (D)*	91%	68%	14%
N = 108	*Mitt Romney (R)*	8%	14%	70%
2012 U.S. Senate				
Survey	*Ben Cardin (D)*	71%	38%	15%
N = 132	*Dan Bongino (R)*	5%	10%	61%
	S. Rob Sobhani (I)	3%	8%	12%
2014 Governor				
Survey	*Anthony Brown (D)*	64%	24%	2%
N = 124	*Larry Hogan (R)*	8%	58%	84%

Table Two. Election Results and Candidate Preferences Among Registered Voters in the Sixth Congressional District

The CCES estimates presented in Table Two reveal that in all five elections for which data are available, Democrats and Republicans have distinct candidate preferences in that at least a majority of registered Democrats prefer the Democratic candidate and at least a majority of

registered Republicans prefer the Republican candidate. These survey estimates are different from 50% at conventional levels of statistical significance.[9] I am thus highly confident within prevailing professional standards that registered Democrats in the Sixth Congressional District prefer Democratic candidates and registered Republicans prefer Republican candidates. This common sense conclusion should be of no surprise. Since a seminal 1960 book called *The American Voter* scholars have repeatedly found party identification is a strong predictor of vote choice.[10]

Can Republicans in the Sixth Congressional District Elect a Candidate of Their Choice?

To address whether registered Republicans in the adopted Sixth Congressional District are able to elect candidates of their choice, I examine ten elections within the district. Three are the endemic U.S. House elections in 2012, 2014 and 2016. Seven are exogenous statewide elections, for which I report the portion of the statewide vote cast within the adopted Sixth Congressional District.[11]

The election results within the adopted Sixth Congressional District are reported in Table Three.

In the three endogenous U.S. House election, registered Democrats' preferred candidate prevailed in all three elections.

In the seven exogenous statewide elections, registered Democrats' preferred candidate prevailed in six of seven elections.

The average margin of victory for the Democratic candidate over the Republican candidate in all ten elections was ten percentage points.

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[9] The worst-case election in terms of not finding a preference among registrants of a party is different than 50% is in the 2014 Governor election. Here, 64.1% of registered Democrats expressed a preference for the Democratic candidate, Anthony Brown. The margin of error for this estimate is +/- 6.4%, which means that the true population value could range from 57.7% to 70.5%. Thus, in all five instances, the registered Democrats and Republicans express a preference for their party's candidate that is different from 50% at conventional levels of statistical significance.

[10] See Campbell, Converse, Miller, and Stokes. 1960. *The American Voter*. New York: John Wiley & Sons, Inc. Evidence in this case supports the same conclusion. Eric Hawkins, a mapmaker at NCEC Services, testified that his consulting firm tracked the voting history of Maryland voters in order to draw the map that became the Congressional Plan. *See, e.g.*, Hawkins Dep. at 84:17-86:1 (noting that NCEC Services tracked two-way voting percentages); Hawkins Dep. Exs. 55-57, 59, 66, 68.

[11] I did some estimation to construct statewide election results within the adopted Sixth Congressional District. Maryland reports complete election results by county and election results for early voters only by precinct. Election results are thus available for Allegany, Garrett, and Washington counties, which are entirely contained within the Sixth Congressional District. I estimated precinct-level Election Day candidate tallies for the parts of the Sixth Congressional District contained in Frederick and Montgomery counties. I apportioned the county total Election Day vote for the candidates by the proportion of the early vote a candidate received within a given precinct, relative to the county. I added the known early vote total and estimated Election Day vote total for each precinct, and sum the votes across Frederick and Montgomery counties' precincts assigned to the Sixth Congressional District. I then summed the votes for all counties to produce district-wide totals for the Sixth Congressional District.

It is my opinion based on the preponderance of this evidence that registered Republicans are disfavored in electing a candidate of their choice.

	Election Result
Endemic Elections	
2012 U.S. House	
John Delaney (D)	59%
Roscoe Bartlett (R)	38%
2014 U.S. House	
John Delaney (D)	50%
Dan Bongino (R)	48%
2016 U.S. House	
John Delaney (D)	56%
Amy Hoeber (R)	40%
Exogenous Elections	
2012 President	
Barack Obama (D)	55%
Mitt Romney (R)	43%
2012 U.S. Senate	
Ben Cardin (D)	50%
Dan Bongino (R)	35%
S. Rob Sobhani (I)	14%
2014 Governor	
Anthony Brown (D)	42%
Larry Hogan (R)	56%
2014 Attorney General	
Brian Frosh (D)	49%
Jeffery Pritzker (R)	48%
2014 Comptroller	
Peter Franchot (D)	54%
William Campbell (R)	46%
2016 President	
Hillary Clinton (D)	58%
Donald Trump (R)	39%
2016 U.S. Senate	
Chris Van Hollen (D)	57%
Kathy Szeliga (R)	40%

Table Three. Election Results Within the Sixth Congressional District

Was Vote Dilution of Registered Republicans Intentional?

To assess if the vote dilution of registered Republicans was intentional, I examine how Maryland's General Assembly affected the Sixth Congressional District through redistricting. I note how the changes made to the benchmark district produced an adopted district of distinctly different geography with distinctly different political character. I assess the intentionality of these changes by showing how the district could have been drawn while better respecting the traditional redistricting principles of compactness and respect for county boundaries.

Changes to Maryland's Sixth Congressional District

The 2010 census revealed that Maryland had a total population of 5,773,552 people. State law requires the 2010 census to be adjusted for the location of prison populations for the purposes of redistricting, which yielded a statewide population of 5,772,231. The ideal equal population congressional district was the state's adjusted total population divided by eight, which yields 721,529 people (with one district needing one less person due to rounding).

Using the prison-adjusted numbers, the benchmark Sixth Congressional District had 731,718 people, which was 10,189 more than the ideal equal population congressional district. Since the Sixth Congressional District was located in a corner of the state and it needed to shed only 1.4% of its population to achieve population equality, it should have been reasonably immune to major boundary disruptions during redistricting.

This is not what happened. As is clear from Table One, the Sixth Congressional District had a major transformation from a predominantly Republican district to a predominantly Democratic district. Such a transformation is only possible through substantial shifts of people and geography.

The population changes from the benchmark to the adopted Sixth Congressional District that occurred during redistricting are presented in Table Four. The first column identifies the district in the benchmark plan, the second column identifies the district in the adopted plan, and the third column presents the prison-adjusted total population that was moved from the benchmark plan to the target adopted district. *Continuing portions* are those populations that were in the benchmark and adopted Sixth Congressional District. *Shed portions* are those populations that were removed from the benchmark Sixth Congressional District to a different adopted district. *Gained portions* are populations that were removed from different benchmark districts and added to the adopted Sixth Congressional District.

Only 371,350 people in the benchmark Sixth Congressional district (just 50.75% of the benchmark population) are also in the adopted district. The panhandle portion of the Sixth Congressional District—comprising Garrett, Allegany, and Washington counties, with a total adjusted population of 245,249 persons—is effectively locked into the district. While it is technically possible to split these three panhandle counties, doing so would raise glaring concerns that traditional redistricting principles were being subverted for some other goal. Thus,

within the constrained options available to Maryland, only 126,101 (371,350 minus 245,249) people of whom Maryland had a reasonable option of continuing in the district actually did so.

Continuing Portions					
Benchmark District	Adopted District	Total Reg.	Dem Reg.	Rep Reg.	Other Reg.
6	6	213,565	82,902	92,983	37,680
Shed Portions					
Benchmark District	Adopted District	Total Reg.	Dem Reg.	Rep Reg.	Other Reg.
6	1	68,764	21,980	36,153	10,631
6	2	3	1	1	0
6	7	17,203	6,557	7,908	2,738
6	8	145,984	48,221	70,921	26,842
6	All	231,953	76,759	114,983	40,212
Gained Portions					
Benchmark District	Adopted District	Total Reg.	Dem Reg.	Rep Reg.	Other Reg.
4	6	68,646	34,578	17,711	16,358
8	6	128,992	66,641	30,855	31,497
All	6	197,638	101,218	48,565	47,855

Table Four. Party Registration Changes to the Maryland Sixth Congressional District

Maryland's General Assembly respected few people who it had a discretion of continuing in the district: 360,368 people were moved out of t he district and 350,179 people were moved in. All of this activity occurred for a district that needed to only shed 10,189 people.

The political effect of these moves is clear. Maryland's Sixth Congressional District experienced substantial changes in its partisan character during the last redistricting. As reported in Table One, the benchmark district changed a district with a margin of 10.8 percentage points favoring the Republican Party to an adopted district with a 10.4 percentage favoring the Democratic Party. A change of the partisan character of this magnitude would not have been possible by merely removing 10,189 people from the Sixth Congressional District. Massive population shifts as documented in Table Four were needed. The changes from the benchmark to the adopted Sixth Congressional District—presented in the fifth and sixth columns of Table One—further illustrate that the population shifts had a profound effect on the partisan character of the district. A net of 66,417 registered Republicans were removed from the district; 24,460 registered Democrats were added; and 7,643 persons with no party registration were added. That more Republicans were removed than Democrats added is also indicative of the partisan effect, in that Democratic communities, compared to Republican communities, tend to have greater number of ineligible populations, such as under age youth and noncitizens.

Respect for Traditional Redistricting Principles

I rule out that respecting traditional redistricting principles, such as minimizing splits of local political boundaries and improving compactness, were the guiding principles behind the crafting of the adopted Sixth Congressional District. It is my opinion that but for the consideration of partisan goals—aided by map drawers, use of party registration and voting history data – the lines of the Sixth District would not have been drawn as they were, and Republican votes would not have been so diluted.

It is true that the adopted Sixth Congressional District has fewer county splits than the benchmark district. The benchmark Sixth Congressional District contributed to (three) splits of Carroll, Harford, and Montgomery counties, while the adopted Sixth Congressional District contributes to (two) splits of Frederick and Montgomery counties. However, if minimizing county splits was a priority, there is a simple solution to reduce the split of Frederick County, and to reduce the overall number of county splits in the entire plan.

The adopted Eighth Congressional District, presented in Figure Five, is the only congressional district that borders the Sixth Congressional District. These two districts split Frederick County and the Eighth Congressional District splits Carroll County with the First Congressional District. Maryland could have assigned all of Frederick County to the Sixth Congressional District, and the portion of Carroll County split by the Eighth Congressional District to the Sixth. The balance of the population lost from the Eighth Congressional District to the Sixth could be given back in from the Sixth's population located in Montgomery County. This simple solution would have reduced the number of counties split in the overall redistricting plan by one. I can thus rule out minimizing county splits as a rationale for the creation of the adopted Sixth Congressional District.

Why this solution was not pursued is clear from the partisan character of the Eighth Congressional District's registered voters in the Frederick and Carroll county areas assigned to it. The Frederick and Carroll county VTDs assigned to the adopted Eighth Congressional District are visible in Figure Four. These are predominantly rural, heavily Republican areas. A zoomed-in map of the Frederick area—Figure Six—shows how Frederick was retained within the adopted Sixth Congressional District. The figure illustrates two important points.

First, the panhandle portion of the adopted Sixth Congressional District is joined to the remainder by way of a neck hugging the Virginia border that is composed of a string of single VTDs joined together. When this string reaches the VTDs to the south of Frederick, another narrow neck extends upward to encompass Frederick. It is these narrow necks that join Frederick in a non-compact and unnecessary manner. In my map drawing experience, it would have been easy to add additional VTDs to the Sixth Congressional District to round off its shape in a more compact manner and trade back population with the Eighth Congressional District elsewhere. I can thus eliminate creating compact districts as a rationale for the drawing of the Sixth Congressional District.

Second, the effect of including Frederick is to increase the Democratic registration in the Sixth Congressional District, as the city and VTDs to the immediate south are generally Democratic

leaning. Three VTDs are split around Frederick in such a manner that neighborhoods further away from Frederick—and presumably more Republican in character—are removed from the adopted Sixth Congressional District. Adding the portions of these split VTDs, and indeed more VTDs to improve the compactness of the Sixth Congressional District would have meant adding more Republicans to the district and, given where population could be swapped with the Eighth Congressional District in Montgomery County, Democrats removed from the district.

After looping in Frederick, the adopted Sixth Congressional District crosses the Montgomery County line and continues into heavily Democratic areas in the suburbs of the District of Columbia. The environs of Gaithersburg and Rockville are presented in Figures Seven. The city of Gaithersburg is included in its entirety in the adopted Sixth Congressional District and the district hugs two arms around Rockville. Trading the portions of Frederick and Carroll counties located in the adopted Eighth Congressional District to the adopted Sixth Congressional District would require giving some of these Democratic areas located in the Sixth to the Eighth District. This could be accomplished in a more compact manner than currently exists, thus again providing evidence that Maryland was not seeking compactness when drawing the Sixth Congressional District.

While the focus of Plaintiffs' claims are the Sixth Congressional District, it is important to reflect again on how the geography and population of the Sixth Congressional District affected its only neighbor, the Eighth Congressional District. Table Four presents the party registration shed from the benchmark Sixth Congressional District to other adopted districts, and party registration gained to the adopted Sixth Congressional District from other benchmark districts. The Sixth District gained a net of 18,420 registered Democrats (66,642 minus 48,221) from the Eighth Congressional District and gave a net of 40,067 registered Republicans (70,921 minus 30,855) to the Eighth District.

The party registration trades between the Sixth and Eighth Congressional Districts are indicative of a classic gerrymandering strategy known as *cracking*. In cracking, a district that leans towards one political party is cut into two or more pieces so that the influence of the party that was the former majority is diminished. As mentioned previously, the Eighth Congressional District was given much of the former rural and Republican portions of the benchmark Sixth District in Frederick and Carroll counties. As evident in Figure Four, these areas bordering Pennsylvania were combined with heavily Democratic areas in the areas immediately bordering the District of Columbia. As evident in Figure Five, at a point along Olney Laytonsville Road, the Eighth Congressional District narrows to a neck less than a half a mile wide, traversing the Oaks Landfill, to join the two geographically and politically disparate portions of the district. The result of these trades, and others, with the Eighth District reduced the Democratic registration advantage from a 38.8 point Democratic margin (58.4% to 19.6%), to a 23.2 point Democratic margin (51.4% to 28.3%).

An Alternative Approach to the Sixth and Eighth Congressional Districts

Since the adopted Sixth Congressional District is contiguous only with the Eighth Congressional District, a simple alternative exists that avoids diluting the votes of registered Republicans, better

adheres to redistricting principles, and does not affect any choices made when the Maryland General Assembly constructed the other districts.

A Sixth Congressional District can be constructed that is more compact and results in fewer county splits in the entire plan by assigning to the Sixth District portions of Frederick County and the split portion of Carroll County, which are currently assigned to the Eighth Congressional District. Population traded to the Sixth can be easily balanced back in Montgomery County, where the Sixth and Eighth Congressional Districts also share a common border. These trades could reduce the number of split VTDs between the Sixth and Eight districts in Frederick and Montgomery counties, in a compact manner. As a by-product, the shape of the Eighth Congressional District can also be greatly improved.

Figure Eight presents an alternative configuration of the Sixth and Eighth Congressional Districts that affects only the boundaries of these two districts. A simple comparison to a map of the adopted district in Figure 3 shows the alternative Sixth District is visually more compact than the adopted district. Most notably, whereas the adopted district has contorted boundaries in Frederick County, this district assigns all of Frederick to the district. Furthermore, this configuration has a beneficial effect on the Eighth Congressional District. In comparison to Figure Five, the Eighth Congressional District is now entirely contained within Montgomery County and no longer has a narrow neck connecting portions of Montgomery County with portions of Carrol and Frederick counties.

Figure Nine illustrates how the alternative Sixth Congressional District no longer subsumes predominantly Republican rural portions of Western Maryland into the predominantly Democratic urban areas of Montgomery County.

In Table Five, I present 2010 party registration statistics for this alternative Sixth Congressional District, using the same underlying party registration data in Table One. The statistics for this alternative district confirm that this district is now slightly Republican leaning; 42.6% of registered voters registering with the Republican Party and 38.4% registering with the Democratic Party, for a difference of 4.2 percentage points. In comparison, the benchmark district had a 10.8 percentage point Republican Party registration advantage and the adopted district has a 10.6 percentage point Democratic Party registration advantage.

	Alternative	
	Number	Percent
Democrats	162,616	38.4%
Republicans	180,226	42.6%
No Party	80,405	19.0%
Total	423,246	100.0%

Table Five. Party Registration in Maryland Alternative Sixth Congressional District

I examined elections within the alternative Sixth Congressional District to determine if Republicans would more often be able to elect a candidate of their choice. I did not examine U.S. House races since the district now extends across two U.S. House districts that did not have similar electoral circumstances.

	Election Results
Exogenous Elections	
2012 President	
Barack Obama (D)	44%
Mitt Romney (R)	53%
2012 U.S. Senate	
Ben Cardin (D)	38%
Dan Bongino (R)	43%
S. Rob Sobhani (I)	16%
2014 Governor	
Anthony Brown (D)	30%
Larry Hogan (R)	68%
2014 Attorney General	
Brian Frosh (D)	38%
Jeffery Pritzker (R)	58%
2014 Comptroller	
Peter Franchot (D)	46%
William Campbell (R)	54%
2016 President	
Hillary Clinton (D)	42%
Donald Trump (R)	51%
2016 U.S. Senate	
Chris Van Hollen (D)	44%
Kathy Szeliga (R)	51%

Table Six. Election Results Within the Alternative Sixth Congressional District

Election results for the seven statewide offices in 2012, 2014, and 2016 for the portions contained within the alternative Sixth Congressional District are presented in Table Six. The Table shows that in all seven exogenous statewide elections the Republican candidate of choice received more votes than the Democratic candidate. The average margin of victory for the Republican candidate is 13%.

Conclusion

Given the current high levels of political polarization in the United States, it should come as no surprise that party registrants within Maryland's Sixth Congressional District disagree over their candidates of choice, with registered Democrats preferring Democratic candidates and registered Republicans preferring Republican candidates.

Maryland's adopted Sixth Congressional District's geography and political composition are a clear result of a classic partisan gerrymandering strategy known as cracking. A district that was predominantly rural and Republican in character was transformed into a district where the political strength of Democratic suburbs of the Washington, D.C. suburbs outweighs the Republican rural areas, predominantly in the panhandle.

As a consequence of the configuration of the adopted Sixth Congressional District, registered Republicans do not have an opportunity to elect a candidate of their choice. Their preferred candidate lost all three endemic U.S. House elections within the district and received less than the Democratic candidate in six of seven exogenous statewide elections. It is extremely unlikely that this would have happened if Republicans' voter histories and party affiliation had not been taken into account while drawing the adopted district's lines.

The gerrymandering strategy that was executed to produce this political outcome had a detrimental effect on traditional redistricting principles. The Republican rural communities along the Pennsylvania border were fragmented in a classic cracking gerrymandering strategy, by transferring registered Republicans in Carroll and Franklin counties to the Eighth Congressional District in exchange for Democratic urban areas in Montgomery County formerly in the Eighth Congressional District.

An alternative map approach exists that better respects traditional redistricting principles by reducing the overall number of counties split by districts, doing so in a more compact manner for both the Sixth and Eighth congressional districts. It is my opinion this approach would have been easily discoverable to the Maryland General Assembly, if they wished to pursue it. I envisioned this configuration following a brief inspection of the district. Notably, this alternative Sixth Congressional District would affect the political character of the district, making it more Republican. Thus, the violation of traditional redistricting principles serves as an indicator that politics, not good government goals, was a major motivating factor behind the creation of the adopted Sixth Congressional District.

Date: April 7, 2017

Prof. Michael P. McDonald, PhD

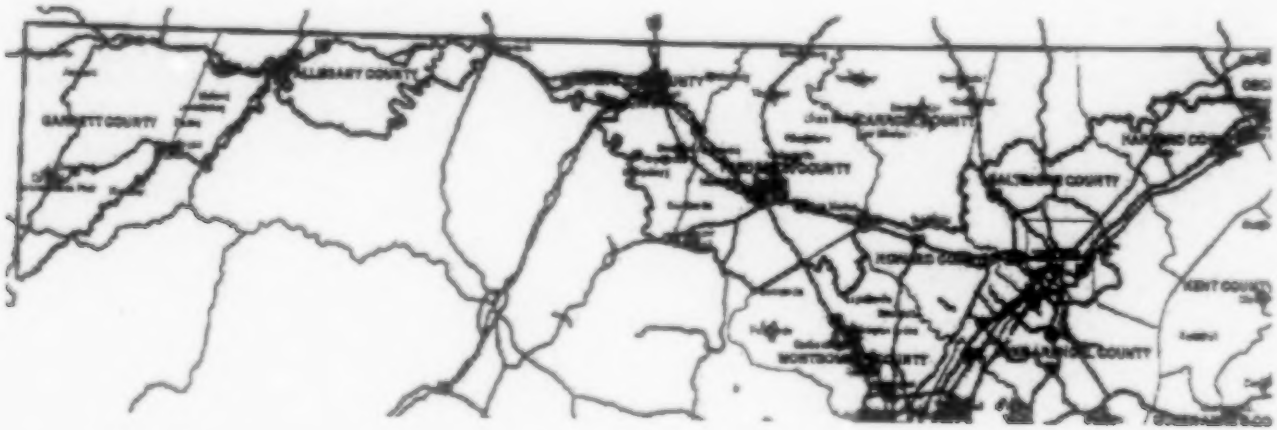


Figure One. Benchmark Maryland Sixth Congressional District

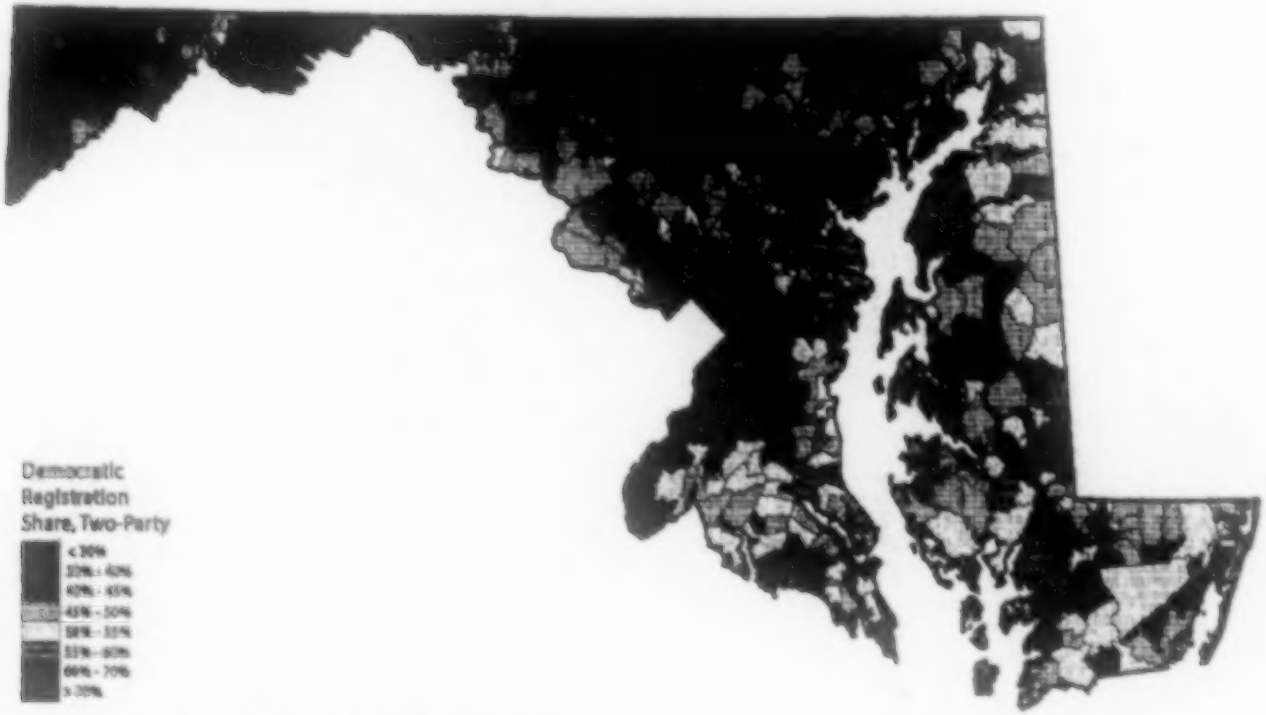


Figure Two. Party Registration in Maryland's benchmark Congressional Districts

Note: Congressional districts are represented by thick black lines and VTDs boundaries are represented by light grey lines. VTDs are shaded by their partisan registration, with Republican areas shaded in red and Democratic areas shaded in blue.

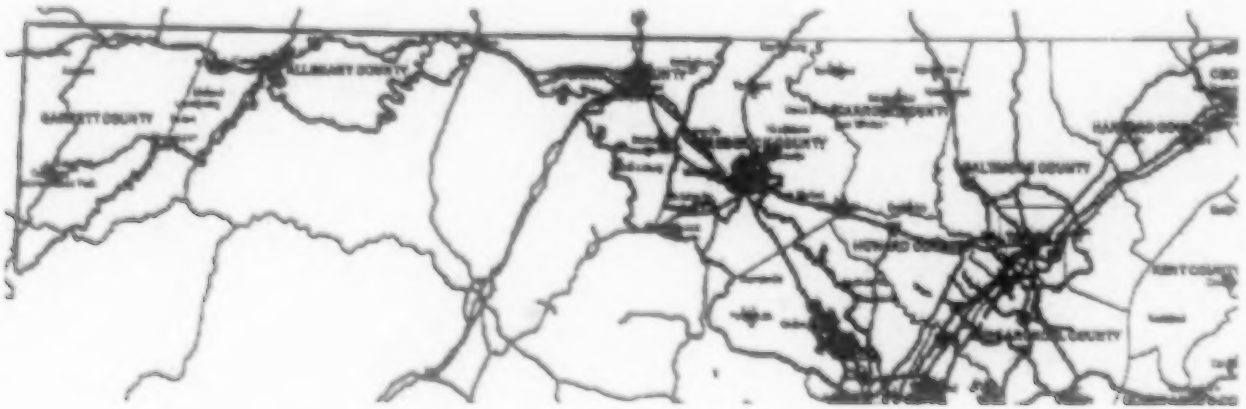


Figure Three. Adopted Sixth Congressional District

Figure Four. Party Registration in Maryland's benchmark Congressional Districts

Note: Congressional districts are represented by thick black lines and VTDs boundaries are represented by light grey lines. VTDs are shaded by their partisan registration, with Republican areas shaded in red and Democratic areas shaded in blue.

Figure Five. Adopted Eighth Congressional District

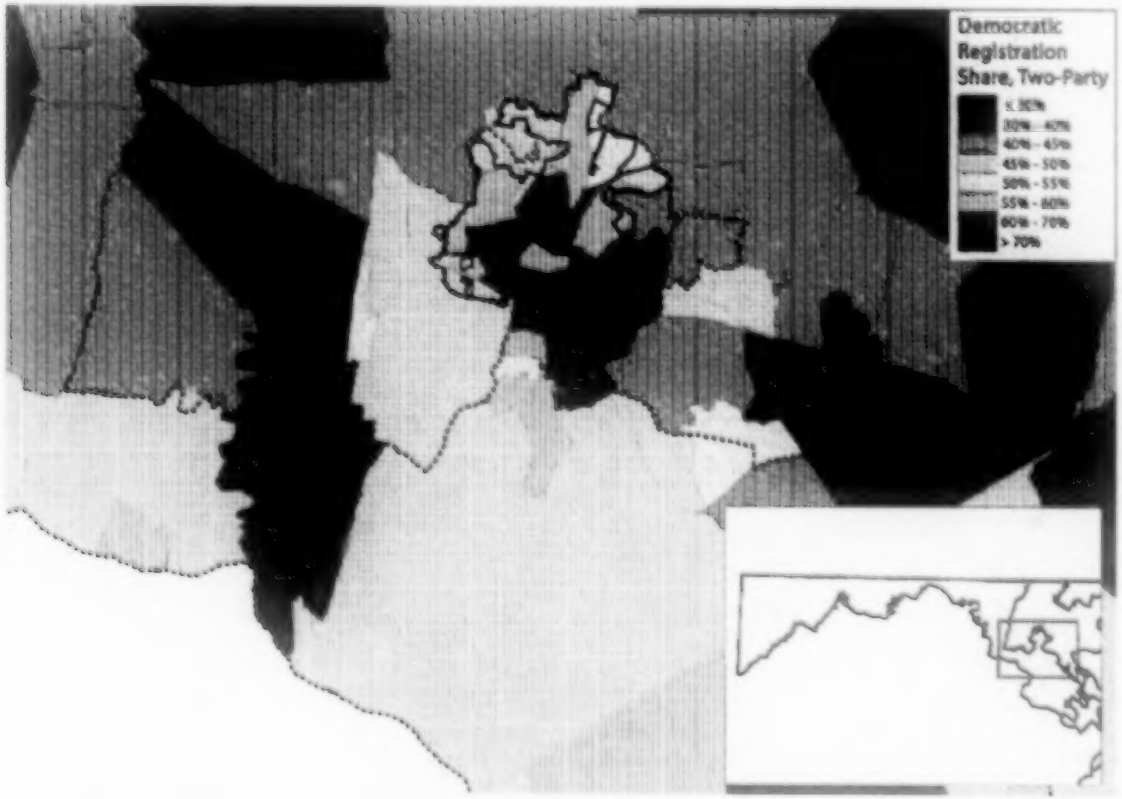


Figure Six. Zoom of City of Frederick with Current Congressional Sixth District

Note: Congressional district boundaries are represented by dotted black lines, the city of Frederick is represented by a dark green line, and VTDs boundaries are represented by light grey lines. VTDs are shaded by their partisan registration, with Republican areas shaded in red (most Republican) to yellow and Democratic areas shaded in dark blue (most Democratic) to light blue.

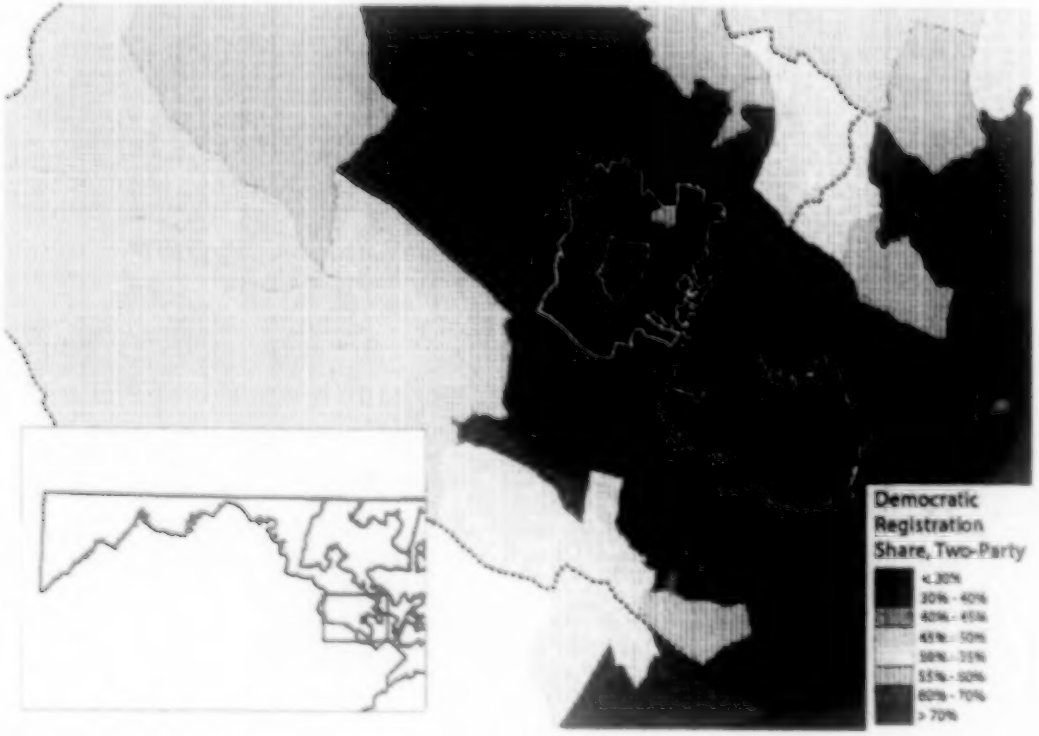


Figure Seven. Zoom of Gaithersburg and Rockville with Current Sixth Congressional District

Note: Congressional district boundaries are represented by dotted black lines, the cities of Gaithersburg and Rockville are represented by light yellow and green lines (respectively), and VTDs boundaries are represented by light grey lines. VTDs are shaded by their partisan registration, with Republican areas shaded in red (most Republican) to yellow and Democratic areas shaded in dark blue (most Democratic) to light blue.

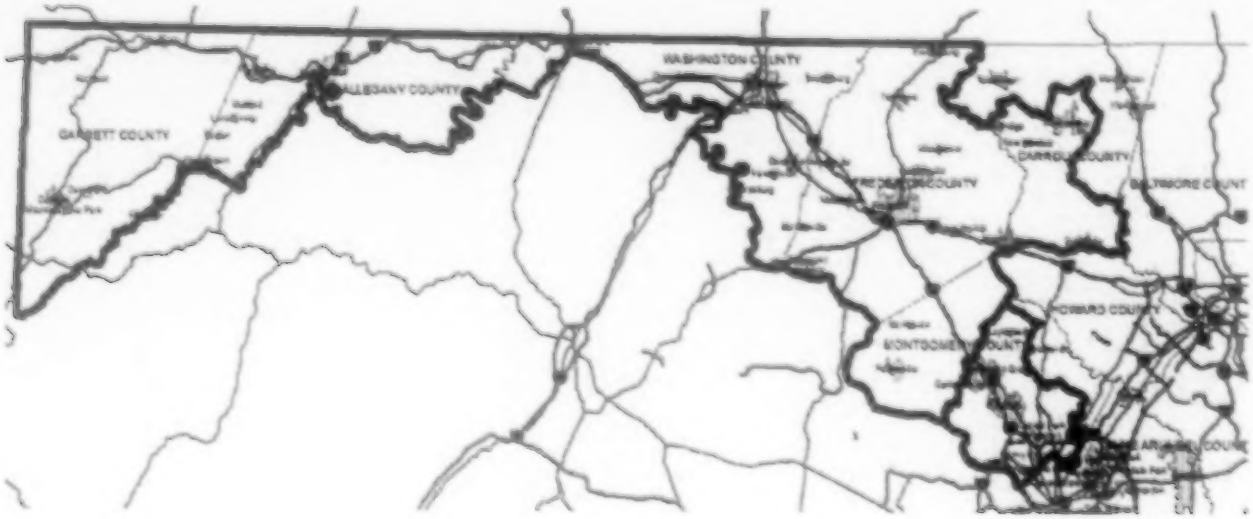


Figure Eight. Alternative Sixth and Eighth Congressional Districts

Figure Nine. Alternative Sixth Congressional District

Note: Congressional districts are represented by thick black lines and VTDs boundaries are represented by light grey lines. VTDs are shaded by their partisan registration, with Republican areas shaded in red and Democratic areas shaded in blue.

Appendix 1: Methodology

Voting-tabulation districts is a term used by the Census Bureau to describe precincts, wards, and election districts, among the many names used by states and localities. States transmit these boundaries to the Census Bureau circa a year ending in '7' for inclusion in the next census.

I obtained from counsel Maptitude (a commercial redistricting software) data files that contained 2010 voter registration information for Maryland's precincts. These precincts were assigned to VTDs. In the course of merging these data with the Census Bureau's PL-94-171 redistricting data file for Maryland, I identified eleven Montgomery County VTDs that were not assigned a precinct from the Maptitude data files. I obtained from 2007 a map of the Maryland's 2007 precincts via an internet archive. From this map I deduced where two precincts were consolidated into one between 2007—when precinct boundaries were transmitted to the Census Bureau—and 2010. I assigned the geography to the parent VTD from which it was consolidated. These orphaned precincts were combined as follows:

02-009 and 02-002 into 02-002
02-010 and 02-003 into 02-003
02-011 and 02-006 into 02-006
04-026 and 04-016 into 04-016
05-022 and 05-005 into 05-005
05-024 and 05-012 into 05-012
06-014 and 06-005 into 06-005
09-032 and 09-020 into 09-020
09-038 and 09-026 into 09-026
13-041 and 13-002 into 13-002
13-062 and 13-049 into 13-049

In some cases two or more districts share or split a precinct. I use a method known as "dasymetric mapping" to assign party registration numbers to census blocks, and then aggregate party registration data from census blocks to compute party registration statistics presented in this report.[12]

[12] See: Brian Amos, Michael P. McDonald, and Russell Watkins. Forthcoming. "When Boundaries Collide: Constructing a Database of Election and Census Data." *Public Opinion Quarterly*.

From: Jeremy Baker <bakerjeremypaul@gmail.com>
Sent: Thursday, December 29, 2016 2:37 PM
To: Brantley, Sandra
Subject: Fwd: Refutation
Attachments: Edwards Data.xlsx

Sent from my iPhone

Begin forwarded message:

From: "Yaakov \"Jake\" Weissmann" <[redacted]>
Date: October 17, 2011 at 5:41:45 PM EDT
To: [redacted], "Delaney, Patrick" <[redacted]>, Jeremy Baker <[redacted]>, "John P. McDonough" <[redacted]>
Subject: Refutation

Hey All,

Secretary McDonough and I looked over the map and Press release. Thoughts:

First off, it should be noted that this plan significantly lowers the 6th, 8th and 3rd's DPI to help the 4th and 5th.

The 6th is now at 51.8% (was at 52.7%)
The 8th is now at 59.8% (was at 60.4%)
The 3rd is now at 55.0% (was at 58.4%)

It should be noted that in the last wave, 10 incumbent Democrats lost seats that were at 54.9% or higher, placing the 3rd in danger and making the 6th much harder to pick up.

Refutations:

Edwards 1: Allows for the possibility of minority representation in one of the congressional districts in Montgomery County

Counter: We argue that the electoral history in Montgomery County clearly suggests that both districts in the Governor's plan (6&8) can be won by a minority candidate.

Edwards 2: Unifies the Latino/Hispanic populations on the Montgomery-Prince George's County border in one congressional district;

Counter: (It should be noted that her argument is no longer percentages, it is now Communities). To combine these communities (Langley park), she also takes silver spring which contain precincts with little Hispanic population relative to other nearby precincts (see image 1 attached). This isn't about reuniting neighborhoods or strengthening communities, it's about preferred territory for a Congresswoman.

Edwards 3: Enables a significant Asian population in North Potomac to remain as a cohesive unit in Congressional District 8;

Counter: The Asian territory in North Potomac causes the bulk of the 1% DPI drop in the 8th and it dilutes the percentage of the Asian population in the 6th (from 10% to 9.2%). There are again, precincts she did not take (see image 2).

Edwards 4 & 5: Enables African American communities in Montgomery to remain in Congressional District 4 under the Voting Rights Act; 5) Strengthens the Black voting age population in Congressional Districts 4 and 5 and provides more cohesiveness in Prince George's County;

Counter: She actually bypasses heavier African-American precincts in Montgomery County to choose Silver Spring precincts she wanted even though they are less African-American (see Image 3). She even bypassed precincts she previously represented. Why do that if this is all about minority representation?

Other general issues:

- Montgomery County gets 4 CDs
- Howard County gets 4 CDs
- Edwards is not even standing by this map. At the hearing she freely suggested changing it again to eject the 3rd from Montgomery County which will disrupt the Baltimore area.

Overall Message:

A vote for this amendment would put 4 in MoCo, 4 in Howard, just increases her margin in the General Election, slightly increases AA in 5th which is increasing due to demographic growth. Causes CD8 disruption, endagers effort to win the 6th and puts the 3rd in jeopardy. Dilutes the power of Asians and Hispanics in other parts of MoCo. Pure political selfishness and actually undermines the possibility of minority candidates winning the 6th or 8th CDs in the future.

Thanks!
Jake

Attached is:

- Images discussed
- An image of the areas of the state impacted
- A close up on Montgomery County
- A new spreadsheet with DPI with this map

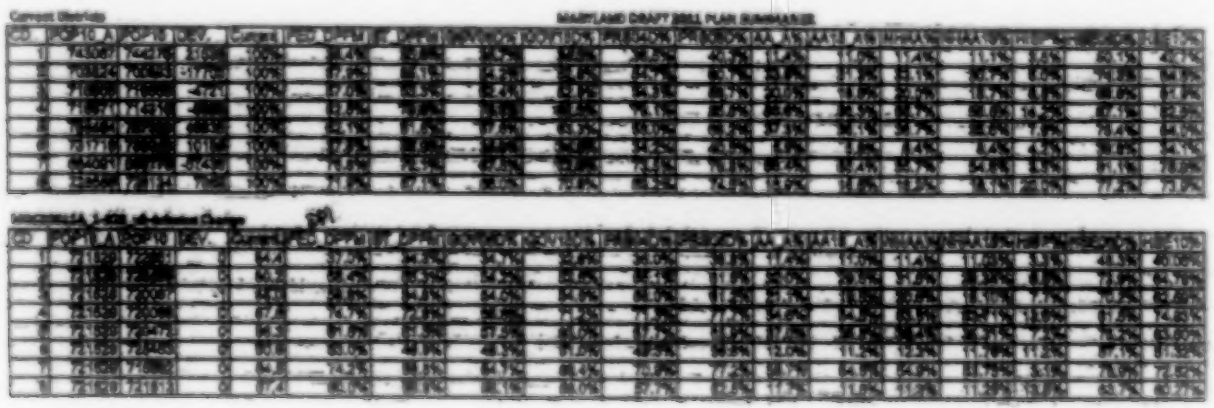


EXHIBIT
BUSCH
120
4/19/17 OJ

Gmail Robert Garagiola <

CD6

Elizabeth Paul Tue, Oct 4, 2011 at 8:13 PM
Reply-To: [redacted]
To: robgaragiola

Great to hear - I'm keeping my fingers crossed until 10/17! Thanks for keeping me posted - Elizabeth

----Original Message----
From: robgaragiola
Sent: Tuesday, October 04, 2011 8:20 PM
To: Elizabeth Paul
Subject: CD6

Elizabeth,

The map will be public today. There still may be minor changes before the General Assembly convenes in less than two weeks. The 8th District would comprise about 40% of Montgomery County, including northern and western parts. It would include southern Frederick and the City of Frederick. The rest of Frederick would be in Van Hollen's district. All of Washington, Allegheny, and Garrett would remain in the 6th. The Dem performance would be 53%. All good news.

Rob
Sent from my Verizon Wireless BlackBerry

EXHIBIT
15
[illegible]

Subject: Re: (No subject)
From: MG2590@aol.com
Date: 9/1/2011 3:06 PM
To: brianromick@gmail.com

No problem

In a message dated 9/1/2011 2:43:41 P.M. Eastern Daylight Time, brianromick@gmail.com writes:

> if we can get you parking, you mind driving separately then? we need to do 3 meetings, if Miller and Busch are in Annapolis.
>
> On Thu, Sep 1, 2011 at 2:31 PM, <mg2590@aol.com> wrote:
> Brian:
>
> OK. Have to come back to NCEC after meeting with the Governor, as I have much to do on the first day with everyone returning.
> c
>
> -----Original Message-----
> From: Brian Romick <brianromick@gmail.com>
> To: MG2590@aol.com <mg2590@aol.com>
> Sent: Thu, Sep 1, 2011 2:09 pm
>
> 10am on Tuesday

EXHIBIT Miller 135 4/24/17

HOV000035

Confidential

MARYLAND DRAFT MAP PLAN SUMMARIES

Current Districts

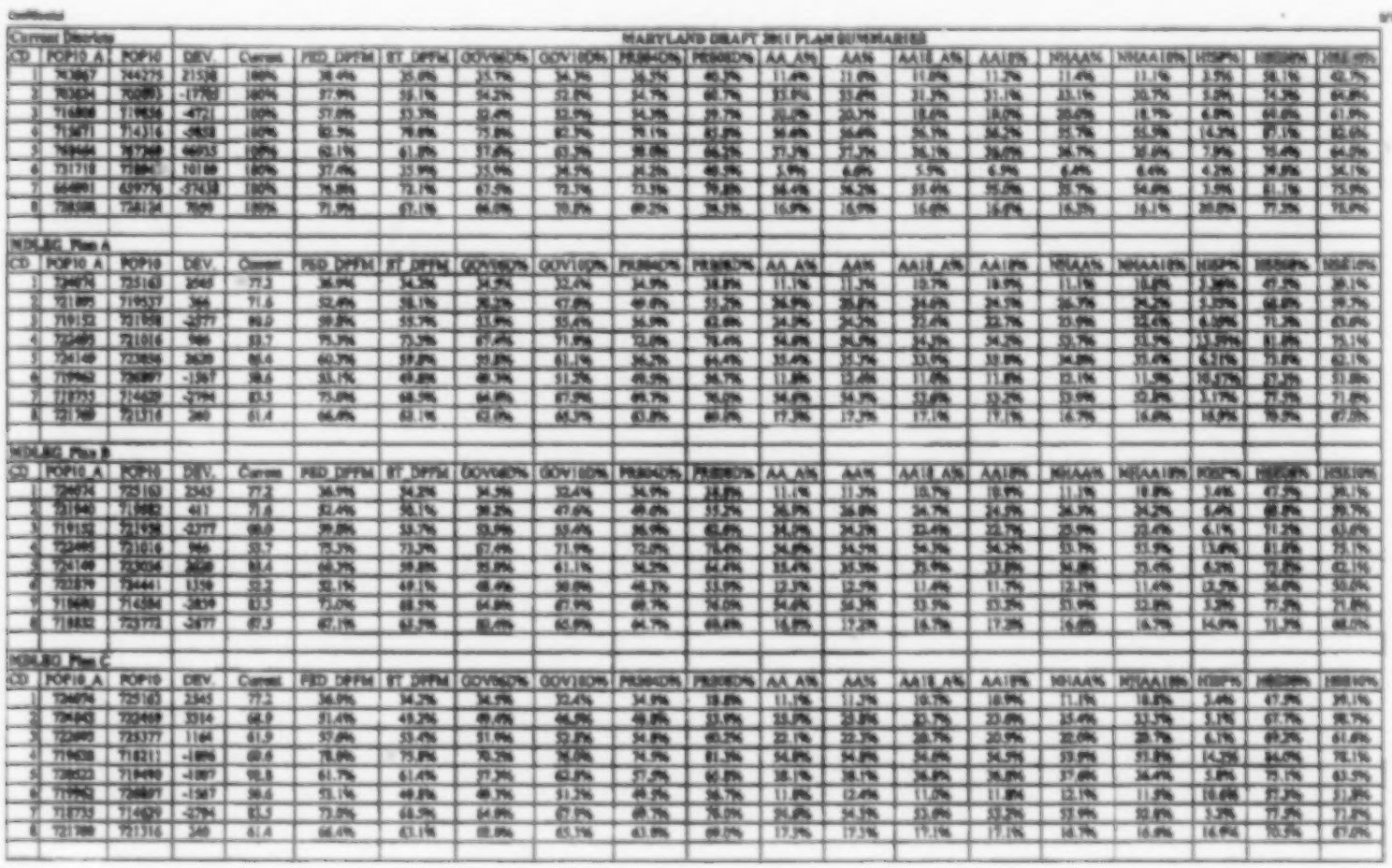
CD	POP10_A	POP10	DEV.	Current	BVAP	DPSM	ST. DPSM	GOVWORN	GOV16DEM	PRESWON	PRES16DEM	AA_AVG	AA16_AVG	AA18	AA18_A/B	AA18_PW	NHAA18	NHAA18_A/B	NHAA18_PW	HISP18	HISP18_A/B	HISP18_PW
1	743957	744773	21,506	100%	33.4%	35.6%	35.7%	35.7%	67.7%	34.8%	67.4%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	3.5%	3.5%	3.5%
2	709764	709960	-13,306	100%	37.9%	33.1%	33.1%	34.3%	67.7%	34.8%	67.4%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	3.5%	3.5%	3.5%
3	716608	716604	-6721	100%	37.0%	33.0%	33.0%	33.7%	68.3%	34.8%	68.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	11.0%	3.5%	3.5%	3.5%
4	715671	714314	-8018	100%	63.3%	78.8%	78.8%	31.3%	34.3%	30.7%	34.0%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	6.7%	6.7%	6.7%
5	746464	747748	44892	100%	62.1%	61.8%	61.8%	31.3%	34.3%	30.7%	34.0%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	6.7%	6.7%	6.7%
6	701716	718843	1818	100%	37.9%	35.3%	35.3%	31.3%	34.3%	30.7%	34.0%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	6.7%	6.7%	6.7%
7	664304	687770	-27618	100%	36.9%	72.1%	67.3%	31.3%	34.3%	30.7%	34.0%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	6.7%	6.7%	6.7%
8	726498	726124	20.0	100%	71.3%	67.3%	67.3%	31.3%	34.3%	30.7%	34.0%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	30.7%	6.7%	6.7%	6.7%

Black Caucus A

CD	POP10_A	POP10	DEV.	Current	BVAP	DPSM	ST. DPSM	GOVWORN	GOV16DEM	PRESWON	PRES16DEM	AA_AVG	AA16_AVG	AA18	AA18_A/B	AA18_PW	NHAA18	NHAA18_A/B	NHAA18_PW	HISP18	HISP18_A/B	HISP18_PW
1	721,539	722,712	0	62.3%	36.6%	35.5%	35.5%	35.2%	61.2%	36.1%	60.7%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	3.5%	3.5%	3.5%
2	721,539	721,670	0	73.1%	46.3%	46.3%	46.3%	41.0%	57.0%	41.1%	56.7%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	3.5%	3.5%	3.5%
3	721,539	725,924	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
4	721,539	726,061	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
5	721,539	726,670	-1	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
6	721,539	726,811	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
7	721,539	721,952	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
8	721,539	721,147	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%

Black Caucus B

CD	POP10_A	POP10	DEV.	Current	BVAP	DPSM	ST. DPSM	GOVWORN	GOV16DEM	PRESWON	PRES16DEM	AA_AVG	AA16_AVG	AA18	AA18_A/B	AA18_PW	NHAA18	NHAA18_A/B	NHAA18_PW	HISP18	HISP18_A/B	HISP18_PW
1	721,539	722,712	0	62.3%	36.6%	35.5%	35.5%	35.2%	61.2%	36.1%	60.7%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	11.3%	3.5%	3.5%	3.5%
2	721,539	719,963	0	73.0%	46.3%	46.3%	46.3%	41.0%	57.0%	41.1%	56.7%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	21.3%	3.5%	3.5%	3.5%
3	721,539	723,184	0	63.1%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
4	721,539	726,060	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
5	721,539	726,670	-1	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
6	721,539	726,811	-1	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
7	721,539	721,952	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%
8	721,539	721,147	0	63.0%	36.3%	35.4%	35.4%	35.4%	61.0%	35.8%	60.5%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	11.1%	3.5%	3.5%	3.5%



Current Districts			MARYLAND DRAFT 2011 PLAN SUMMARIES																
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOV16DIFF	GOV10DIFF	PRES40%	PRES60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP18%	HISP 10%
1	703867	744279	21538	100%	38.4%	35.6%	35.7%	34.3%	36.5%	40.3%	11.4%	11.6%	11.8%	11.2%	11.4%	11.1%	3.5%	58.1%	42.7%
2	703824	703883	-17782	100%	57.9%	59.1%	54.2%	52.8%	54.7%	60.7%	53.8%	53.4%	51.3%	51.1%	53.1%	50.7%	5.9%	34.3%	64.8%
3	716858	719836	-4721	100%	57.0%	53.3%	52.4%	52.5%	54.3%	59.7%	20.0%	20.3%	18.6%	18.0%	20.6%	18.7%	6.9%	64.6%	61.9%
4	713671	714316	-5458	100%	82.5%	79.6%	75.8%	82.3%	79.1%	83.8%	36.6%	36.6%	36.3%	36.3%	35.7%	35.9%	14.3%	37.1%	82.6%
5	749644	747268	66935	100%	62.1%	61.8%	57.6%	63.3%	58.0%	66.3%	37.3%	37.3%	36.1%	36.0%	36.7%	36.6%	7.9%	52.4%	64.5%
6	731718	731861	10189	100%	37.4%	35.9%	35.9%	34.5%	36.2%	40.5%	5.9%	6.0%	5.9%	6.0%	6.4%	6.4%	4.2%	34.8%	36.1%
7	664891	659776	-57438	100%	76.8%	72.1%	67.5%	72.3%	73.3%	79.8%	34.4%	34.2%	33.6%	33.6%	33.7%	34.0%	3.9%	61.1%	73.9%
8	738508	734134	7099	100%	71.9%	67.1%	66.0%	70.8%	69.2%	74.7%	16.9%	16.9%	16.6%	16.6%	16.3%	16.1%	30.8%	77.3%	73.0%
NDLEG Plan A																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOV16DIFF	GOV10DIFF	PRES40%	PRES60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP18%	HISP 10%
1	726674	725163	2545	77.2	36.9%	34.2%	34.5%	32.4%	34.9%	38.8%	11.1%	11.3%	10.7%	10.5%	11.1%	10.8%	3.36%	47.5%	39.1%
2	721895	719537	366	71.6	52.4%	58.1%	48.2%	47.0%	49.6%	53.2%	36.9%	36.8%	34.6%	34.5%	36.3%	34.2%	5.25%	44.8%	59.7%
3	719152	721938	-2377	68.0	39.8%	53.7%	53.9%	53.4%	36.9%	63.8%	34.3%	34.3%	32.4%	32.7%	33.9%	32.6%	6.59%	71.3%	63.6%
4	722495	721016	966	83.7	75.3%	73.3%	67.4%	71.9%	72.0%	78.4%	34.8%	34.5%	34.3%	34.2%	33.7%	33.5%	33.59%	81.8%	75.1%
5	724149	723836	3628	86.4	60.3%	59.8%	55.8%	61.1%	56.2%	64.4%	35.4%	35.3%	33.9%	33.9%	34.8%	33.4%	6.21%	73.8%	62.1%
6	719962	720897	-1397	38.6	33.1%	49.8%	48.3%	51.2%	49.5%	46.7%	11.8%	12.0%	11.6%	11.8%	12.1%	11.5%	10.47%	57.3%	51.8%
7	718735	714439	-2794	83.5	73.8%	68.5%	64.8%	67.9%	69.7%	76.8%	34.8%	34.3%	33.6%	33.2%	33.9%	33.8%	3.17%	77.5%	71.8%
8	721388	721316	360	81.4	66.4%	63.1%	62.0%	66.3%	63.8%	69.8%	17.3%	17.3%	17.1%	17.1%	16.7%	16.6%	14.9%	70.5%	67.0%
NDLEG Plan B																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOV16DIFF	GOV10DIFF	PRES40%	PRES60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP18%	HISP 10%
1	726674	725163	2545	77.2	36.9%	34.2%	34.5%	32.4%	34.9%	38.8%	11.1%	11.3%	10.7%	10.5%	11.1%	10.8%	3.4%	47.5%	39.1%
2	721840	719882	411	71.8	52.4%	58.1%	48.2%	47.6%	49.6%	53.2%	36.9%	36.8%	34.7%	34.5%	36.3%	34.2%	5.4%	44.8%	59.7%
3	719152	721938	-2377	68.0	39.8%	53.7%	53.9%	53.4%	36.9%	63.8%	34.3%	34.3%	32.4%	32.7%	33.9%	32.6%	6.1%	71.3%	63.6%
4	722495	721016	966	83.7	75.3%	73.3%	67.4%	71.9%	72.0%	78.4%	34.8%	34.5%	34.3%	34.2%	33.7%	33.5%	33.6%	81.8%	75.1%
5	724149	723836	3628	86.4	60.3%	59.8%	55.8%	61.1%	56.2%	64.4%	35.4%	35.3%	33.9%	33.9%	34.8%	33.4%	6.2%	73.8%	62.1%
6	722879	724441	1359	82.2	52.1%	49.1%	48.4%	50.8%	48.3%	53.9%	12.3%	12.5%	11.4%	11.7%	12.1%	11.4%	12.7%	56.8%	50.6%
7	718488	714584	-3854	83.5	73.0%	68.5%	64.8%	67.9%	69.7%	76.0%	34.8%	34.3%	33.5%	33.3%	33.9%	33.8%	3.3%	77.5%	71.8%
8	718832	723772	-3477	87.3	67.1%	64.7%	63.4%	65.9%	64.7%	69.8%	16.9%	17.2%	16.7%	17.2%	16.8%	16.7%	14.9%	71.3%	68.0%
NDLEG Plan C																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOV16DIFF	GOV10DIFF	PRES40%	PRES60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP18%	HISP 10%
1	726674	725163	2345	77.2	36.9%	34.2%	34.5%	32.4%	34.9%	38.8%	11.1%	11.3%	10.7%	10.5%	11.1%	10.8%	3.4%	47.5%	39.1%
2	726840	722469	3316	68.9	51.4%	49.2%	49.4%	46.5%	49.8%	53.9%	35.8%	35.8%	33.7%	33.6%	35.4%	33.3%	5.1%	67.7%	58.7%
3	723695	725377	1164	81.9	57.6%	53.4%	51.9%	52.8%	54.8%	60.2%	22.1%	22.3%	20.7%	20.9%	22.0%	20.7%	6.1%	69.2%	61.6%
4	719638	718211	-1896	69.6	78.8%	73.8%	70.2%	74.0%	74.5%	81.3%	34.8%	34.8%	34.6%	34.5%	33.9%	33.8%	14.2%	84.0%	78.1%
5	728622	719490	-1807	90.8	61.7%	61.4%	57.3%	62.8%	57.9%	66.8%	38.1%	38.1%	36.8%	36.8%	37.6%	36.4%	5.8%	73.1%	63.5%
6	719962	720897	-1397	38.6	33.1%	49.8%	48.3%	51.2%	49.5%	46.7%	11.8%	12.0%	11.6%	11.8%	12.1%	11.5%	10.6%	57.3%	51.8%
7	718735	714439	-2794	83.5	73.8%	68.5%	64.8%	67.9%	69.7%	76.8%	34.8%	34.3%	33.6%	33.2%	33.9%	33.8%	3.2%	77.5%	71.8%
8	721388	721316	360	81.4	66.4%	63.1%	62.0%	65.3%	63.8%	69.8%	17.3%	17.3%	17.1%	17.1%	16.7%	16.6%	14.9%	70.5%	67.0%

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MIDLEG_Flex D																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOVT60%	GOVT10%	PERM40%	PERM60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP10%	HISP10%
1	726974	725163	2545	77.2	36.9%	34.2%	34.5%	32.6%	34.9%	36.8%	11.1%	11.3%	10.7%	10.9%	11.1%	10.8%	3.4%	67.5%	39.1%
2	723537	723719	838	69.6	50.8%	48.8%	49.4%	46.2%	48.2%	53.2%	23.5%	23.3%	20.8%	21.1%	22.9%	20.8%	5.9%	67.7%	38.7%
3	718719	717993	-3810	30.5	39.8%	36.6%	52.4%	53.7%	55.9%	62.0%	38.2%	38.2%	25.2%	25.1%	25.8%	24.9%	4.2%	67.5%	60.3%
4	723695	721816	966	53.7	77.3%	73.3%	67.4%	71.9%	72.0%	76.4%	54.6%	54.3%	54.3%	54.2%	53.7%	53.5%	13.8%	61.8%	75.1%
5	724149	723656	3459	85.4	60.3%	59.8%	55.8%	61.1%	56.3%	64.6%	36.4%	33.3%	33.9%	33.8%	34.8%	33.4%	6.2%	73.8%	62.1%
6	723879	724441	1359	72.2	52.1%	49.1%	48.4%	50.6%	44.3%	53.9%	12.3%	12.5%	11.4%	11.7%	12.1%	11.4%	12.5%	58.0%	58.0%
7	718726	714412	-3805	66.4	38.4%	72.5%	66.9%	72.5%	73.0%	79.5%	56.1%	55.9%	54.8%	54.3%	55.4%	53.8%	4.5%	83.1%	77.8%
8	718832	723772	-3677	67.3	67.1%	63.7%	62.4%	68.9%	64.7%	69.8%	16.8%	17.2%	16.7%	17.2%	16.8%	16.7%	14.8%	71.3%	68.0%
MIDLEG_Flex E																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOVT60%	GOVT10%	PERM40%	PERM60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP10%	HISP10%
1	726974	725163	2545	77.2	36.9%	34.2%	34.5%	32.6%	34.9%	36.8%	11.1%	11.3%	10.7%	10.9%	11.1%	10.8%	3.4%	67.5%	39.1%
2	724843	723469	3314	68.9	51.4%	49.2%	49.4%	46.5%	48.8%	53.8%	23.9%	23.7%	23.0%	23.0%	23.0%	22.3%	5.1%	67.7%	38.7%
3	723693	725377	1164	61.9	57.8%	53.4%	51.9%	52.8%	54.8%	60.3%	22.1%	22.3%	20.7%	20.9%	22.0%	20.7%	6.1%	60.3%	61.8%
4	721364	719931	-185	63.4	79.3%	77.3%	71.9%	77.7%	73.8%	82.5%	55.9%	55.5%	54.3%	55.3%	54.8%	54.5%	14.3%	83.2%	79.7%
5	721718	720488	189	91.7	61.7%	61.4%	57.3%	62.3%	57.3%	65.7%	38.0%	38.8%	36.7%	36.7%	37.5%	36.1%	5.7%	72.0%	63.4%
6	719062	726897	-1567	50.6	33.1%	48.8%	49.3%	51.2%	49.3%	56.7%	11.8%	12.4%	11.8%	11.8%	12.1%	11.5%	10.8%	57.3%	51.8%
7	718735	714429	-2794	83.5	73.8%	68.5%	64.8%	67.9%	69.7%	76.8%	54.8%	54.3%	53.8%	53.2%	53.9%	53.8%	3.3%	77.5%	71.8%
8	721564	721199	69	56.1	65.8%	62.3%	61.3%	64.8%	63.1%	68.3%	16.1%	16.1%	15.7%	15.7%	15.8%	15.2%	13.4%	69.5%	66.3%
MIDLEG_Flex F																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOVT60%	GOVT10%	PERM40%	PERM60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP10%	HISP10%
1	726974	725163	2545	77.2	36.9%	34.2%	34.5%	32.6%	34.9%	36.8%	11.1%	11.3%	10.7%	10.9%	11.1%	10.8%	3.4%	67.5%	39.1%
2	724843	723469	3314	68.9	51.4%	49.2%	49.4%	46.5%	48.8%	53.8%	23.9%	23.7%	23.0%	23.0%	23.0%	22.3%	5.1%	67.7%	38.7%
3	723693	725377	1164	61.9	57.8%	53.4%	51.9%	52.8%	54.8%	60.3%	22.1%	22.3%	20.7%	20.9%	22.0%	20.7%	6.1%	60.3%	61.8%
4	721364	719931	-185	63.4	79.3%	77.3%	71.9%	77.7%	73.8%	82.5%	55.9%	55.5%	54.3%	55.3%	54.8%	54.5%	14.3%	83.2%	79.7%
5	721718	720488	189	91.7	61.7%	61.4%	57.3%	62.3%	57.3%	65.7%	38.0%	38.8%	36.7%	36.7%	37.5%	36.1%	5.7%	72.0%	63.4%
6	719062	726897	-1567	50.6	33.1%	48.8%	49.3%	51.2%	49.3%	56.7%	11.8%	12.4%	11.8%	11.8%	12.1%	11.5%	10.8%	57.3%	51.8%
7	718735	714429	-2794	83.5	73.8%	68.5%	64.8%	67.9%	69.7%	76.8%	54.8%	54.3%	53.8%	53.2%	53.9%	53.8%	3.3%	77.5%	71.8%
8	718842	718394	-2687	66.8	65.2%	61.7%	60.6%	63.9%	62.6%	67.8%	16.5%	16.5%	16.2%	16.2%	16.0%	15.8%	14.9%	68.3%	65.7%
Black Caucus A																			
CD	POP10_A	POP10	DEV.	Current	FED_DIFFM	ST_DIFFM	GOVT60%	GOVT10%	PERM40%	PERM60%	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	HISP%	HISP10%	HISP10%
1	721539	722712	0	82.2%	36.0%	35.8%	35.3%	33.9%	36.1%	38.8%	11.3%	11.4%	11.0%	11.1%	11.3%	11.0%	3.6%	69.6%	41.4%
2	721539	719370	0	75.1%	46.8%	44.3%	44.0%	43.0%	46.3%	51.1%	21.5%	21.4%	19.5%	19.3%	21.1%	19.1%	5.0%	64.3%	53.3%
3	721539	723634	0	63.9%	34.9%	34.9%	33.1%	34.8%	35.7%	40.0%	23.8%	23.4%	23.9%	24.3%	23.8%	24.0%	4.3%	69.8%	61.7%
4	721539	720083	0	69.8%	86.1%	86.1%	82.2%	89.4%	85.1%	96.9%	58.8%	58.7%	58.8%	57.9%	57.7%	57.8%	18.3%	92.3%	90.8%
5	721538	720439	-1	93.7%	62.1%	61.8%	57.6%	63.4%	57.9%	66.2%	39.8%	39.8%	38.5%	38.5%	39.1%	38.1%	6.4%	73.4%	64.0%
6	721539	728811	0	61.2%	39.0%	37.5%	37.2%	36.5%	35.6%	42.4%	6.5%	7.2%	6.1%	7.6%	7.8%	6.9%	4.7%	41.5%	36.3%
7	721539	715935	0	91.7%	80.8%	76.4%	72.3%	76.6%	77.8%	83.8%	58.7%	58.5%	56.7%	55.6%	58.0%	56.2%	3.8%	86.4%	83.9%
8	721538	721147	0	80.7%	68.8%	63.6%	63.9%	67.7%	65.9%	71.7%	13.8%	13.9%	13.2%	13.2%	13.4%	12.8%	17.4%	74.5%	70.4%

Block Census 9																			
CD	POP10_A	POP10	DEV.	Current	PRD_DIFFM	ST_DIFFM	GOV%ED%	GOV18U%	PRIM%ON	PRIM%ON	AA_A%	AA%	AA18_A%	AA18%	NHAA%	NHAA18%	H%P%	H%P18%	H%E10%
1	721529	722712	0	32.2%	34.0%	33.7%	33.3%	33.0%	36.1%	36.8%	11.3%	11.4%	11.0%	11.1%	11.3%	11.0%	3.4%	49.6%	41.4%
2	721528	719085	0	70.5%	68.7%	66.1%	46.8%	43.3%	46.4%	50.8%	19.9%	19.8%	17.8%	17.4%	19.6%	19.1%	5.8%	65.8%	58.1%
3	721527	725198	0	65.1%	53.1%	51.1%	49.3%	46.9%	52.1%	58.0%	18.3%	19.8%	18.0%	18.0%	19.5%	18.3%	5.6%	65.7%	58.2%
4	721525	720683	0	94.0%	88.1%	86.1%	82.2%	80.4%	83.1%	90.9%	38.8%	38.7%	38.0%	37.9%	37.7%	37.0%	18.3%	92.3%	90.8%
5	721526	720470	-1	83.7%	82.1%	81.9%	77.8%	63.4%	57.9%	66.2%	39.8%	39.6%	32.9%	38.5%	38.1%	38.1%	6.6%	73.4%	64.8%
6	721529	728811	0	93.2%	39.8%	37.5%	37.2%	36.5%	35.6%	43.4%	6.5%	7.3%	6.1%	7.8%	7.0%	6.9%	4.7%	41.5%	36.3%
7	721529	716046	0	63.3%	83.9%	79.4%	75.2%	81.4%	80.6%	87.1%	66.1%	65.8%	64.2%	63.9%	63.3%	63.3%	3.8%	89.1%	85.8%
8	721529	721167	0	80.7%	68.8%	63.8%	62.9%	67.7%	65.5%	71.7%	13.9%	13.9%	13.2%	13.2%	13.4%	12.8%	17.4%	76.3%	70.4%

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boundaries of the newly adopted Congressional districts reflect a number of considerations, including . . . partisan consideration."[213]

121. On November 7, 2011, Democratic Senator Jamie Raskin explained of the redistricting process: "Democrats control the redistricting process in Maryland" and exercising that control, they "hoped to pick up a seventh House seat through redistricting."[214]

122. GRAC member Michael Busch, the Maryland House Speaker, said: "I think the numbers will show that [the Congressional Plan] makes [the Sixth District] pretty competitive," in favor of Democrats, where as it previously was a safely Republican district.[215]

123. GRAC Chair Jeanne Hitchcock explained that under the Congressional Plan the Sixth District was "dominated" by Democratic voters in Montgomery County.[216]

IV. OBJECTIVE DEMOGRAPHIC EVIDENCE DEMONSTRATES THAT THE MARYLAND LEGISLATURE INTENDED TO BURDEN THE REPRESENTATIONAL RIGHTS OF REPUBLICANS LIVING IN NORTHWESTERN MARYLAND

124. Changes to the 6th Congressional District in the 2011 Congressional Plan severely altered the partisan composition of its registered voters. The interchange of population among districts far exceeded the modest changes needed to rebalance the District's total population based on the 2010 decennial census. (*See* Paragraph 20, above.) My partisan gain and loss accounting presented below reveals a telltale

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[213] *Id.*

[214] *Id.*

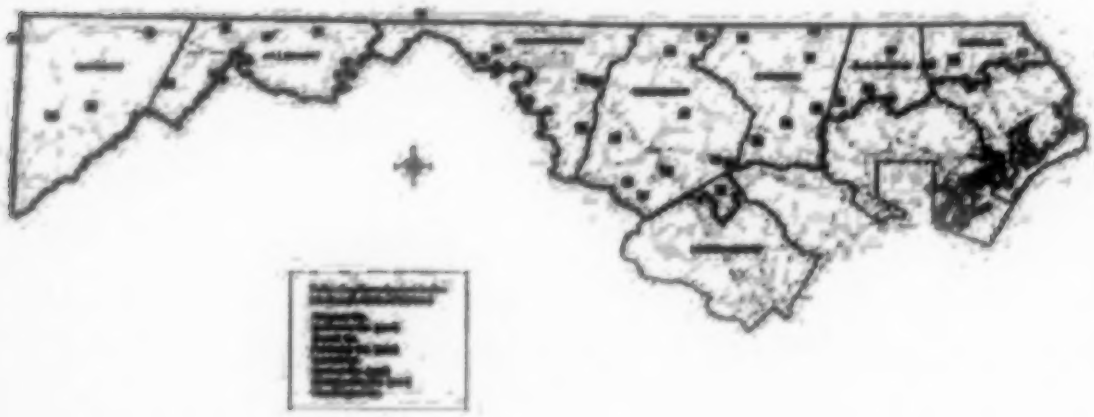
[215] *Id.*

[216] *Id.*

statistical footprint which exposes an underlying partisan intent as the predominant motivation behind redrawing CD6 in its current form. In my opinion, that obvious statistical footprint presents unambiguous evidence of partisan intent as the predominant motivating factor for dismembering CD6. The legitimate aims of equalizing the District's total resident population and respecting existing communities of interest insofar as possible were subordinated in favor of that single-minded partisan intent. (*See* Paragraph 21, above.)

125. Prior to redistricting, 2002 Congressional District 6 included all of western Maryland and extended across the State's northern border, encompassing mostly rural areas and a heavily Republican electorate (see Figure 1). In 2010, registered Republicans outnumbered registered Democrats by 1.3 to 1 among eligible active voters there and comprised 47% of all eligible active voters.

Figure 1. 2002 Congressional District 6



126. Redistricting drastically altered the 6th Congressional District as reconfigured in 2012 (see Figure 2). A total of 189 precincts were interchanged—i.e., either switched out of the former district or into the newly redrawn district. In 2012, it was Democrats who outnumbered Republicans by 1.3 to 1 among eligible active voters, and Republicans' share stood at just 33%.

Figure 2. 2011 Congressional District 6

127. This 189-precinct interchange left an indelible statistical footprint of partisan intent. To show its pattern, I reconstructed how the redrawn boundaries of CD6 altered the assignment of each individual precinct that was ever part of CD6, either before or after redistricting. Table 1 summarizes the results of my analysis (based on the precinct-level reconstruction documented in Appendix A). The reader can follow the geographic pattern of changes by referring to Figures 1 and 2, which show CD6 before and after that 189-precinct interchange.

128. On the northeast, the original 111th Congressional District 6 included part of Harford County (Figure 1, top right). Redistricting removed all 9 of that county's precincts from the newly redrawn 113th Congressional District 6. This decision had the effect of subtracting 11,426 of its existing Republican registrants and 6,757 of its existing Democratic registrants.

129. In Baltimore County (to the west), redistricting removed all 11 of that county's precincts from the newly redrawn 113th Congressional District 6. This decision had the effect of subtracting 2,745 of its existing Republican registrants and 9,576 of its existing Democratic registrants.

130. In Carroll County (further west), redistricting removed all 36 of that county's precincts from the newly redrawn 113th Congressional District 6. This decision had the effect of subtracting 56,870 of its existing Republican registrants and 32,778 of its existing Democratic registrants.

131. In Frederick County (still further west), redistricting removed 29 of that county's 40 precincts entirely, plus portions of the 11 other precincts, from the newly redrawn 113th Congressional District 6. This decision had the effect of subtracting nearly 41,265 of its existing Republican registrants and nearly 28,284 of its existing Democratic registrants.

132. In Montgomery County (to the south), redistricting removed just three of that county's precincts from the newly redrawn 113th Congressional District 6. This decision had only a slight effect, subtracting 2,065 existing Republican registrants and 1,624 existing Democratic registrants. However, redistricting added 90 precincts from former Districts 4 and 8 in the original 111th Congressional District plan. This decision increased Republican registrants by 48,913 but boosted Democratic registrants by 107,119—a net gain of over 58 thousand Democratic voters.

133. All in all, decisions to amputate communities of interest in Harford, Baltimore, and Carroll counties evidence a singular purpose: to subtract Republican voters. The

decision to remove 11 precincts from Baltimore County (favoring Republican voters) created the further possibility of attaching Republican Frederick county—and the added possibility of connecting Montgomery County, for a further net gain of thousands of Democratic voters.

134. The overall effect of the 189-precinct interchange that I reconstructed and show in Table 1 was a net reduction of 65,458 Republican registrants and an offsetting net increase of 28,100 Democratic registrants. Together, these changes favored Democrats with a *net gain* of 93,558 registrants. Recall that the legitimate aim of equalizing the total resident population of CD6 necessitated simple boundary adjustments to register a *net removal* of just 17,249 district residents.

Table 1. Precinct-Level Accounting of Partisan Gain and Loss

Partisan Gain and Loss Accounting			
113th District 6:	Redistricting action	Effect on 113th District 6	
Baltimore County	Removed all 11 precincts	Voters FROM D6 (to D1):	
		Republican	-2,74[illegible]
		Democrat	-9,57[illegible]
Carroll County	Removed all 36 precincts	Voters FROM D6 (to D8):	
		Republican	-58,87[illegible]
		Democrat	-32,77[illegible]
Frederick County	Removed 40 precincts	Voters FROM D6 (to D8):	
		Republican	-41,2[illegible]
		Democrat	-38,79[illegible]
Harford County	Removed all 9 precincts	Voters FROM D6 (to D1):	
		Republican	-11,4[illegible]
		Democrat	-8,757
Montgomery County	Added 90 precincts	Voters TO D6 (from D4 & D8):	
		Republican	48,91[illegible]
		Democrat	107,11[illegible]
	Removed 3 precincts	Voters FROM D6 (to D8):	
		Republican	-2,[illegible]
		Democrat	-1,[illegible]
Total, all 3 counties	189 precincts interchanged	Net Effect of Interchanges:	
		Republican	-65,4[illegible]
		Democrat	+28,10[illegible]
Source: See Appendix B.			
Note: 18 precincts unaccounted for due to missing/inconsistent precinct accounting.			

135. An unmistakable partisan logic and intent drove the redistricting of CD6. The former district was dismembered and reassembled so as to exclude its existing registered Republicans in four counties (Baltimore, Carroll, Frederick, and Harford) and to incorporate registered Democrats by attaching portions of Montgomery County where they were concentrated.

V. THE NEW BOUNDARIES OF THE SIXTH DISTRICT CANNOT BE EXPLAINED BY TRADITIONAL REDISTRICTING PRINCIPLES, SUCH AS MAINTAINING EXISTING COMMUNITIES OF INTEREST

136. The net gain of over 58 thousand Democratic registrants from attaching portions of Montgomery County has been justified as a legitimate effort to respect a "community of interest." This implausible justification has a necessary premise: that Montgomery County residents who are employed share a common interest because most of them commute to work in the District of Columbia, via Interstate 270. This DC-bound commuter population, so the argument goes, is a vital "community of interest," which necessitated adding a portion of Montgomery County to CD6 and retaining only a portion of Frederick County in the newly drawn CD6.

137. This "community of interest" justification fades in the face of US Census Bureau data on journey to work (see Table 2). Only 21.3% of workers living in Montgomery County commute to a job in DC; most commute to jobs located *within* Montgomery County (59.4%) or in neighboring Frederick, Howard, Anne Arundel, or Prince George's counties. Among workers in Frederick County, a miniscule 3.4% commute to a job in DC; and in Washington County, just 1.1% do so.

Table 2

Residence and Workplace Commuting: 2006-10					
County of Residence	Total workers		Commuting to workplace in:		
	No.	%	District of Columbia	Own county of residence	All other workplaces
Montgomery	485,954	100%	21.5%	59.4%	19.1%
Frederick	118,462	100%	5.4%	57.7%	36.9%
Washington	89,709	100%	1.1%	66.4%	32.5%
Source: US Census Bureau, American Community Survey, 5-year 2010 file.					

138. Communities of interest are diverse and varied. The most clearly recognized communities of interest center on the residents of established communities, such as incorporated cities and towns and Census Designated Places. The U.S. Census Bureau defines such established communities collectively as Census "Places," recognizing that their residents share well-defined commonalities of interest tied to place. Census Designated Places (CDPs) have been recognized and identified in each decennial census since 1980 as the counterparts of incorporated cities, towns, and villages. CDPs are populated areas that generally include one officially designated but currently unincorporated small community, for which the CDP is named, plus surrounding inhabited countryside of varying dimensions and, occasionally, other, smaller unincorporated communities as well. CDPs include small rural communities, *colonias* located along the U.S. border with Mexico, and unincorporated resort and retirement communities and their environs. Current Census Bureau criteria require that a CDP name "be one that is recognized and

used in daily communication by the residents of the community" (not "a name developed solely for planning or other purposes") and recommend that a CDP's boundaries be mapped based on the geographic extent associated with inhabitants' regular use of the named place.[217]

139. Communities of interest exist, as well, in the eyes of the beholder. Conceivably, one could imagine the 21.3% of Montgomery County workers, plus the 3.4% of Frederick County workers, who commute to jobs in DC as a "community of interest." This imagined possibility poses a real question of balance: Does any purported shared interest, unifying some small fraction of commuters, outweigh in importance the officially recognized shared interests among residents of an established Census Place within a Congressional district? That is, in balancing traditional redistricting criteria, can anyone justify according more importance to an imagined "community of interest" embodying daily commuters than to established communities of interest that are officially recognized over many years as "Census Places" by the U.S. Census Bureau?

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[217] *See* US Census Bureau, "Geographic Terms and Concepts—Place," https://goo.gl/T7aKiL (last visited April 5, 2017).

Table 3

Established Communities of Interest Split by Redistricting						
	No. of communities of interest within 111th CD 6			No. of communities of interest within 113th CD 6		
Type of place	Whole	Portion	% split	Whole	Portion	% split
Incorporated						
Cities	3	0	0%	1	2	67%
Towns	14	0	0%	3	1	25%
Unincorporated						
CDPs	14	4	22%	5	10	67%
Other						
Total, all places	31	4	11%	9	13	59%

Source: Author's tabulation of all Census Places wholly or partly within 111th and 113th CDs.

140. The post-2010 reconfiguration of CD6, as shown above, entailed a massive interchange of territory. Accompanying that interchange was the dismemberment of many existing communities of interest; specifically, the majority of established Census Places within the 113th CD6. Table 3 documents this unmistakable effect.

141. Prior to redistricting, all the three incorporated cities and all 14 incorporated towns within the 111th CD6 were wholly intact; not a single one of these established communities of interest was split. After redistricting, two of the three incorporated cities and one of the four incorporated towns within the 113th CD6 was split.

142. As noted above (see Paragraph 140), an unincorporated CDP is an officially recognized community that bears a locally recognized name. Prior to redistricting, only 22% of the 18 CDPs within the 111th CD6 was split. After redistricting, 67% of the 15 CDPs within the 113th CD6 were split.

143. The bottom row of Table 3 summarizes the overall collateral damage inflicted on recognized communities of interest in the wake of redistricting. Only 11% of such communities in the 111th CD6 were split; fully 59% of such communities ended up being split in the 113th CD6. In my opinion, this disparity is an indelible statistical footprint of intent.

144. The data in Table 3 discredit any suggestion that a purported shared interest among a small fraction of resident commuters could justify splitting the majority of established Census Places within the 113th CD6. Even granting the existence of that purported shared interest, its significance pales relative to the collective shared interests of the 13 established Census places whose boundaries ended up being split in the 113th CD6.

145. The total population of CD6 could easily have been rebalanced without splitting so many existing Census Places. The post-redistricting increase in non-intact Census places (from 11% to 59% of all places) is a "smoking gun" that exposes motives beyond simply rebalancing total population. The predominant emphasis on "cracking" the 6th District blatantly subordinated the preservation of existing communities of interest to removing Republican registered voters and scattering them across other districts.

VI. THE PROPOSED CONGRESSIONAL PLAN UNDERMINES ENDURING COMMON INTERESTS SHARED AMONG ITS ORIGINAL RESIDENTS

146. Enduring commonalities of interest are apparent within the 111th CD6. Recurrent themes voiced in deposition testimonies[218] reflect common values deriving from the origins and economic circumstances of its residents, the low-density rural and small-town communities in which they live and work, and the traditional livelihoods their local economies have offered its residents.

147. Before redistricting, the population of the 111th CD6 was relatively uniform. Its residents were mostly native Marylanders, living and working in exurban and rural communities beyond the District of Columbia and its daily commuter shed. Many of these residents had modest levels of educational attainment and per capita income, and their communities registered comparatively high levels of poverty and economic dependence.

148. Figures 3 through 7 provide a visual overview of various aspects of these uniformities. Specifically, they highlight key differences between newly added Montgomery County and other counties in the original 111th CD6 (from Garrett County on the west to Harford County on the east).

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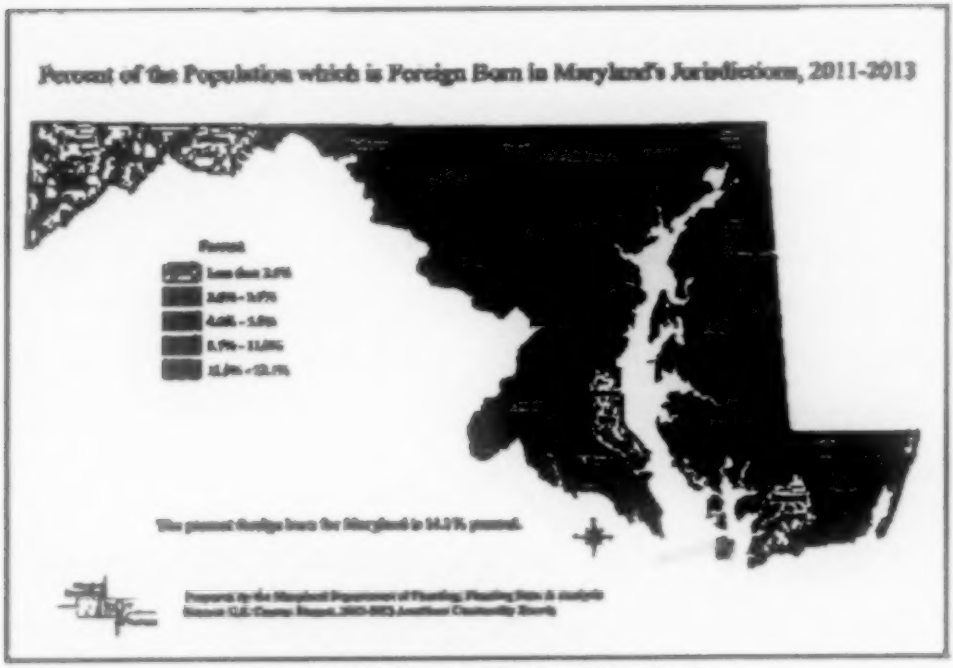
[218] *See, e.g.*, Deposition of Edmund Cueman (quoted at Paragraph 31 above); and Ropp Dep. at 67:2-13 (referencing being harmed by the 2011 redistricting: "I found that I was separated from areas that I aligned with. Like take, for example, speaking geographically, I live 10 miles away from a friend voting in a different congressional district. There was a disconnect between myself and my community as to who we would be voting for these positions. . . . I also felt very harmed because I saw many people in my community very frustrated with the process and very frustrated that there were not clear lines drawn to keep everybody together.").

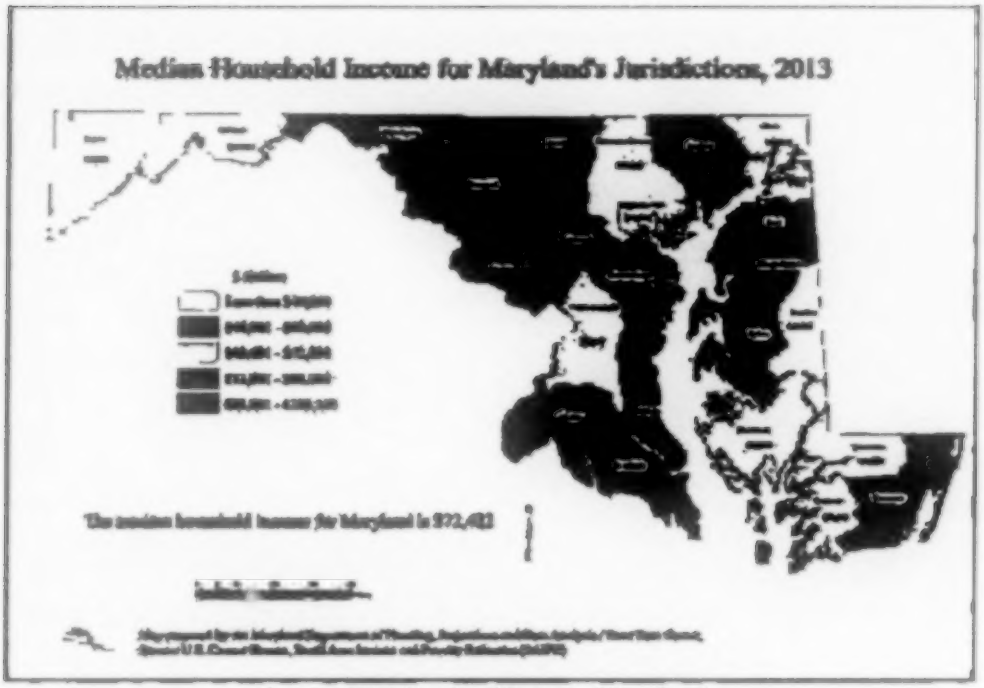
Figure 3.



Source: *2014 Maryland Statistical Handbook.*

149. As seen in Figure 3, foreign-born residents range from just 2% to no more than 11% of the population in any of the original counties in the 111th CD6. In Montgomery County, by contrast, foreign-born residents constitute 32% of the population.

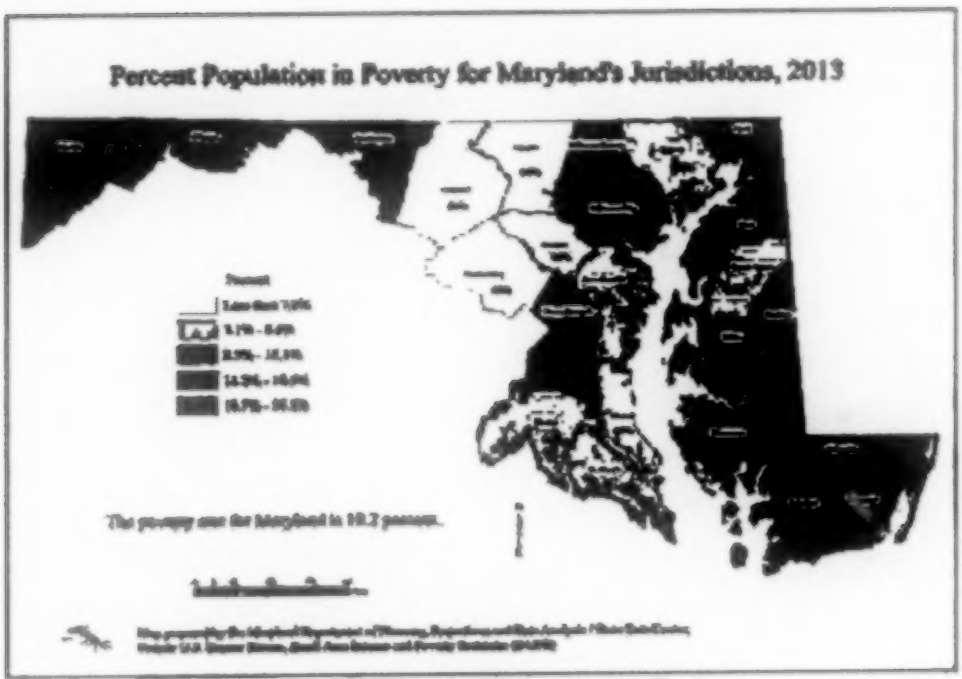
Figure 4



Source: *2014 Maryland Statistical Handbook.*

150. As seen in Figure 4, median household income is under $56,000 in Garrett, Allegany, and Washington counties (and under $83,500 in any other of the district's original counties). In Montgomery County, by contrast, median household income is $97,873.

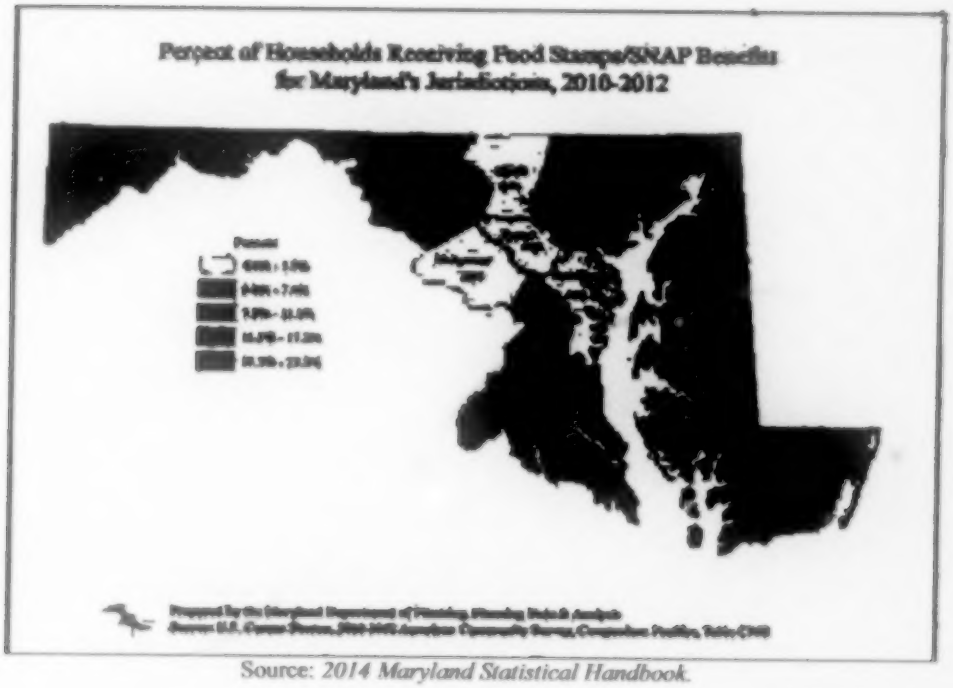
Figure 5



Source: *2014 Maryland Statistical Handbook.*

151. As seen in Figure 5, the percentage of residents in poverty ranges from 12.0% to 18.6% in Garrett, Allegany, and Washington counties, compared with 7.0% in Montgomery County.

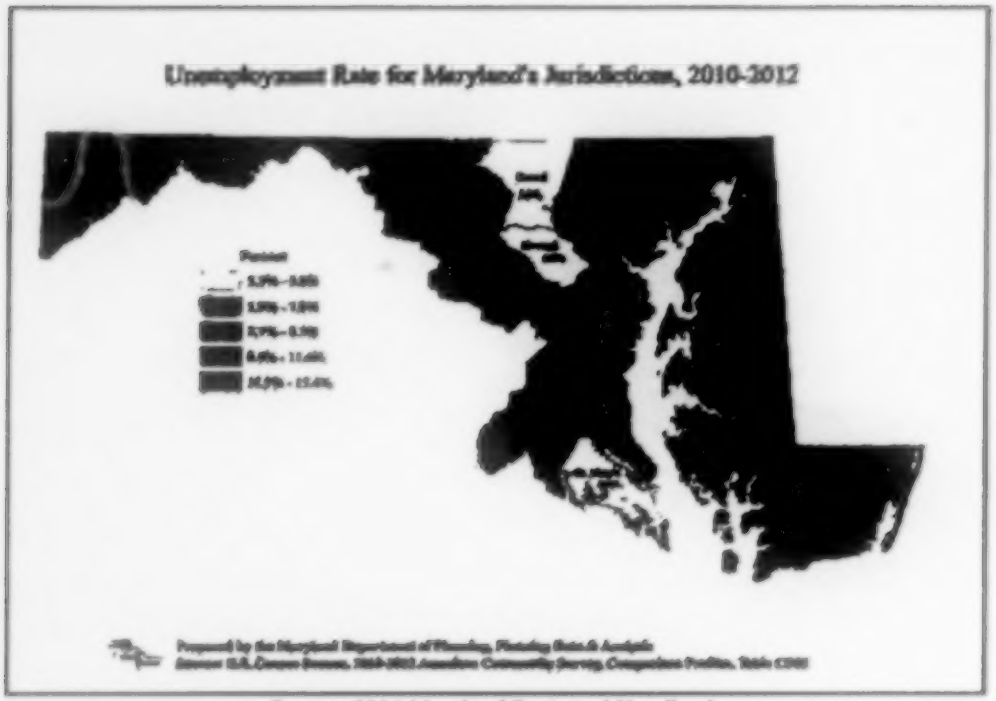
Figure 6



Source: *2014 Maryland Statistical Handbook.*

152. As seen in Figure 6, the percentage of households receiving food stamps/SNAP benefits ranges from 12.5% to 17.2% in Garrett, Allegany, and Washington counties, compared with 5.3% in Montgomery County.

Figure 7



Source: *2014 Maryland Statistical Handbook.*

153. As seen in Figure 7, the unemployment rate ranges from 7.3% to 9.5% in all but two of the counties originally in 2011 CD6, compared with 6.7% in Montgomery County.

154. Table 4 further amplifies on my central point here: The residents of the original 111th CD6 share long-standing common interests and values deriving from their origins and economic circumstances, the low-density rural and small-town communities in which they live and work, and the traditional livelihoods their local economies have offered its residents.

Table 4 County Socioeconomic Indicators

Maryland County	Density (persons per sq. mi.)	Farms per 1,000 residents	Per capita personal income (2009 $)	% of H'holds receiving Food Stamps or SNAP	% of persons 25+ with:		% Maryland born	% Foreign born	% Speaking Non-English Language at Home
					No HS diploma	BA degree or higher			
Characteristics of Counties Within Original 111th Congressional District 6									
Garrett	47	22.8	$36,001	14.1%	15%	19%	82%	2%	n.a.
Allegany	178	3.9	$32,186	17.2%	14%	17%	72%	2%	4%
Washington	325	5.8	$36,133	12.5%	14%	19%	83%	5%	7%
Frederick	360	5.5	$45,747	6.6%	8%	28%	50%	10%	13%
Carroll	334	8.5	$45,309	5.8%	8%	33%	57%	4%	5%
Baltimore	1,399	0.8	$48,819	9.2%	10%	35%	65%	12%	13%
Harford	565	2.3	$48,686	7.3%	8%	32%	69%	5%	8%
Median, all 7 counties	360	5.5	$45,309	9.2%	10%	33%	65%	5%	7%
Characteristics of Montgomery County Newly Added to 113th Congressional District 6									
Montgomery	2,021	0.5	$68,838	5.3%	9%	57%	24%	32%	35%
Source: US Census Bureau, American Community Survey 3-Year 2012 file. Access at: www.mdp.state.md.us/MSDC/American_Community_Survey/2010-2012ACS.shtml									

155. The reconfigured 113th CD6 switched out many of these small-town native-born Marylanders and replaced them with outsiders with more varied and dissimilar interests. This reconfiguration was accomplished by replacing several entire counties (Carroll, Frederick, and Harford) with portions of Montgomery County, thereby inserting into the new 113th CD6 various enclaves and other groups of persons born out-of-state and abroad.

156. As shown in Table 4, the socioeconomic profile of Montgomery County differs sharply from those of the seven original counties within the original 111th CD6:

- Montgomery County's population density (2,021 persons per square mile) is over five times the median population density of those seven original counties.
- The presence of farms per thousand residents, which is infinitesimal in Montgomery County, is 11 times more common on average in those seven original counties.
- Montgomery County residents register higher per capita personal income ($68,830) than the corresponding median value for residents of those seven original counties.
- In each of the seven original counties, the percentage of households receiving food stamps or SNAP benefits exceeds the corresponding 5.3% value for Montgomery County.
- On average, only 32% of residents in those seven original counties are four-year college graduates with a BA degree, compared with 57% of all Montgomery County residents.
- On average, 65% of residents in those seven original counties were born in Maryland, compared with 24% of all Montgomery County residents.
- 32% of Montgomery County residents are foreign-born (vs. 5% on average of those in the seven original counties), and 39% speak a language other than English at home (vs. 7% on average among residents of the seven original counties).

157. The pervasive, often sharp differences documented in Table 4 underscore the overall breadth of difference between the existing population of the 111th CD6 and the

newly-added population that has been attached to the 113th CD6. The low density and often rural character of communities, the economic circumstances and educational attainment of residents, and their origins and languages, show the extent to dissimilarity between these two fundamentally dissimilar populations.

158. Of particular note is the infusion into the new 113th CD6 of residents born out-of-state. In the new 113th CD6, the majority of residents (61%) are newcomers to Maryland rather than native-born Marylanders (vs. 43% in the former 111th CD6). One of every four residents of the 113th CD6 is foreign-born, compared with only one of every 13 residents of the 111th CD6.

159. This infusion of outsiders has produced a second-order effect. It has intensified neighborhood residential separation of native-born Marylanders from outsiders of dissimilar origins and backgrounds within CD6. Residential separation, as used here, denotes populations residing apart from one another, in different neighborhoods within CD6. Commonplace neighborhood residential separation—homeowners' separation from renters, for example, or retirees' separation from families with young children—reflects such communities of interest.

160. To quantify residential separation before and after redistricting, I have computed the Index of Dissimilarity (DI), which is widely used to gauge neighborhood residential segregation of Blacks and Whites.[219] This index ranges from 0.0 (absence of separation) to 1.0 (complete separation).

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[219] *See* U.S. Bureau of the Census, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, Appendix B: Measures of Residential Segregation. https://goo.gl/t9Lq7Y (last visited April 5, 2017).

161. DI furnishes me an objective metric for gauging how evenly two segments of the resident population are distributed across neighborhoods within CD6 both before and after redistricting. Residential separation would be least when native-born Marylanders and outsiders were found to be distributed in equal proportions in every census place within CD6. In this hypothetical case, DI would equal 0.0. Conversely, if both groups were entirely separate from each other, DI would equal 1.0. Conceptually, DI measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as in CD6 overall.

162. The Dissimilarity Index increased from 21.0% in the 111th CD6 to 29.3% in the 113th CD6. Such an increase over so brief a period of time shows that redistricting had the second-order effect of separating the district's native-born Marylanders from outsiders incorporated into the district through district boundary changes.

163. Increased residential separation within an election district is potentially corrosive. Where it is generated abruptly by administrative action (as here) instead of emerging gradually through residential choices by individuals over many years, residential separation may undermine the long-standing commonalities of interest within that district. What once unified the district's residents may be supplanted by a heightened "us" vs. "them" mentality, fueling perceived differences among its residents.

VII. CONCLUSIONS

164. The original 111th CD6 was a legitimate "community of interest." Its residents shared long-standing common interests and values deriving from their origins and

economic circumstances, the low-density rural and small-town communities in which they live and work, and the traditional livelihoods their local economies have offered.

165. There is objective demographic evidence showing that the Maryland legislature intended to burden the representational rights of Republicans living in northwestern Maryland because of how they had voted in the past and the political party with which they had affiliated.

166. The 2011 reconfiguration of Maryland's Sixth Congressional District displays an unnecessarily extreme interchange of territory and population. That interchange of approximately 375,000 residents (fully half the district's population) far exceeded what was needed to accomplish the legitimate aim of equalizing the total resident population of CD6. Equalization necessitated only a slight 2.39-percent downward adjustment, easily accomplished through straightforward boundary adjustments to reduce the district's population by just 17,249 residents instead of interchanging ("swapping") over twenty times that number (375,000 district residents).

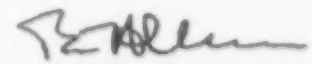
167. The reconfiguration of CD6 caused by the 2011 Congressional Plan cannot be explained by legitimate districting considerations, such as the preservation of existing communities of interest. In fact, the 2011 Congressional Plan dismembered CD6 itself and many well-defined established local communities of interest that existed within CD6. The direct cause of that dismemberment was the excessive interchange of territory and population.

168. The reconfiguration of CD6 caused by the 2011 Congressional Plan has had a latent divisive effect within the new district, evidenced by the abrupt increase in the value

of the Dissimilarity Index. That discernible increase is directly attributable to the infusion of outsiders, which has intensified neighborhood residential separation of native-born Marylanders from outsiders of dissimilar origins and backgrounds newly assigned to the 113th CD6. This abrupt increase in neighborhood residential separation has the potential to divide the district's native-born Marylanders from outsiders incorporated into the district through unnecessary district boundary changes.

169. Lastly, the Plan clearly manifests (and has accomplished) the obvious aim of replacing Republican-registered voters with non-Republican ones. This predominant emphasis on "cracking" the 6th District—that is, amputating territory so as to replace half of its inhabitants with former inhabitants of other districts—largely ignored existing communities of interest. Thus, its most inexplicable and therefore most telling effect was to single out Republican voters and diminish their presence in CD6.

Date: April 7, 2017



Dr. Peter A. Morrison

Subject: Re: LBC letter
From: jason.gleason03@gmail.com
Date: 5/19/2011 9:37 AM
To: "Brian Romick" <brianromick@gmail.com>

Um yea. Its a recipe for 5-3 not 7-1.
------Original Message------
From: Brian Romick
To: Jason Gleason
Subject: Re: LBC letter
Sent: May 19, 2011 9:28 AM

Not a good letter at all, I am worried that it will spook Cummings

On Wed, May 18, 2011 at 10:08 PM, <jason.gleason03@gmail.com> wrote:

> Have you seen the letter from the Leg Black Caucus in follow up to our meetings with them?
> Sent from my Verizon Wireless BlackBerry

Sent from my Verizon Wireless BlackBerry

CONFIDENTIAL

Gmail

Jason Gleason <jason.gleason03@gmail.com>

RE: Follow up question on maps

1 message

Eric Hawkins <ehawkins@ncecservices.com> Sun, Mar 20, 2011 at 6:20 PM
To: jason.gleason03@gmail.com

Jason,

I have worked out a new version of the 7-1 plan in which you have nothing new in AA (keeping 144k of what Sarbanes currently have). Additions to the district include 79k in Howard with a 60% Dem. Performance, 16.6k in PG with at 69.8% Dem. Performance, and 63k in Montgomery at 67.8% DPFM. The district is currently overpopulated by ~23k and has a total Democratic Performance of 60%. Ruppersburger is under by ~23K and a Democratic Performance of 56.7% – a decline of 1.2% which we need to fix somehow.

I will be traveling back from Denver on Monday morning and will contact you on Tuesday with more details.

Eric

Eric Hawkins
NCEC Services, Inc.
202-459-2170
ehawkins@ncecservices.com

—Original Message—
From: jason.gleason03@gmail.com [mailto:jason.gleason03@gmail.com]
Sent: 03/17/2011 11:24 AM
To: Eric Hawkins
Subject: Re: Follow up question on maps

Understood. But I think my boss's reaction will be that he gave up Annapolis and will be picking up 200,000 new people all in the name of helping the 1st. No one else can claim a similar sacrifice and he can't pick up new, tough areas in AAC as well.

In reality, I think that if our dem performance is only improving by a little over a point, our actual election numbers may decrease if we get those new areas in AAC in the new map. He performs way above the dem average in his current AAC areas because he's spent four years of blood sweat and tears in those areas. He wouldn't have that same benefit in the new areas.

Maybe the 2nd can pick up a few of those areas in AAC? I think the constraints on the 7th may have to be reexamined in that context.
Sent from my Verizon Wireless BlackBerry

—Original Message—
From: "Eric Hawkins" <ehawkins@ncecservices.com>
Date: Thu, 17 Mar 2011 11:03:26
To: <jason.gleason03@gmail.com>
Subject: RE: Follow up question on maps

Completely understood. Just so you know the reason why this has been done is because we are able to improve the 3rd with other areas outside

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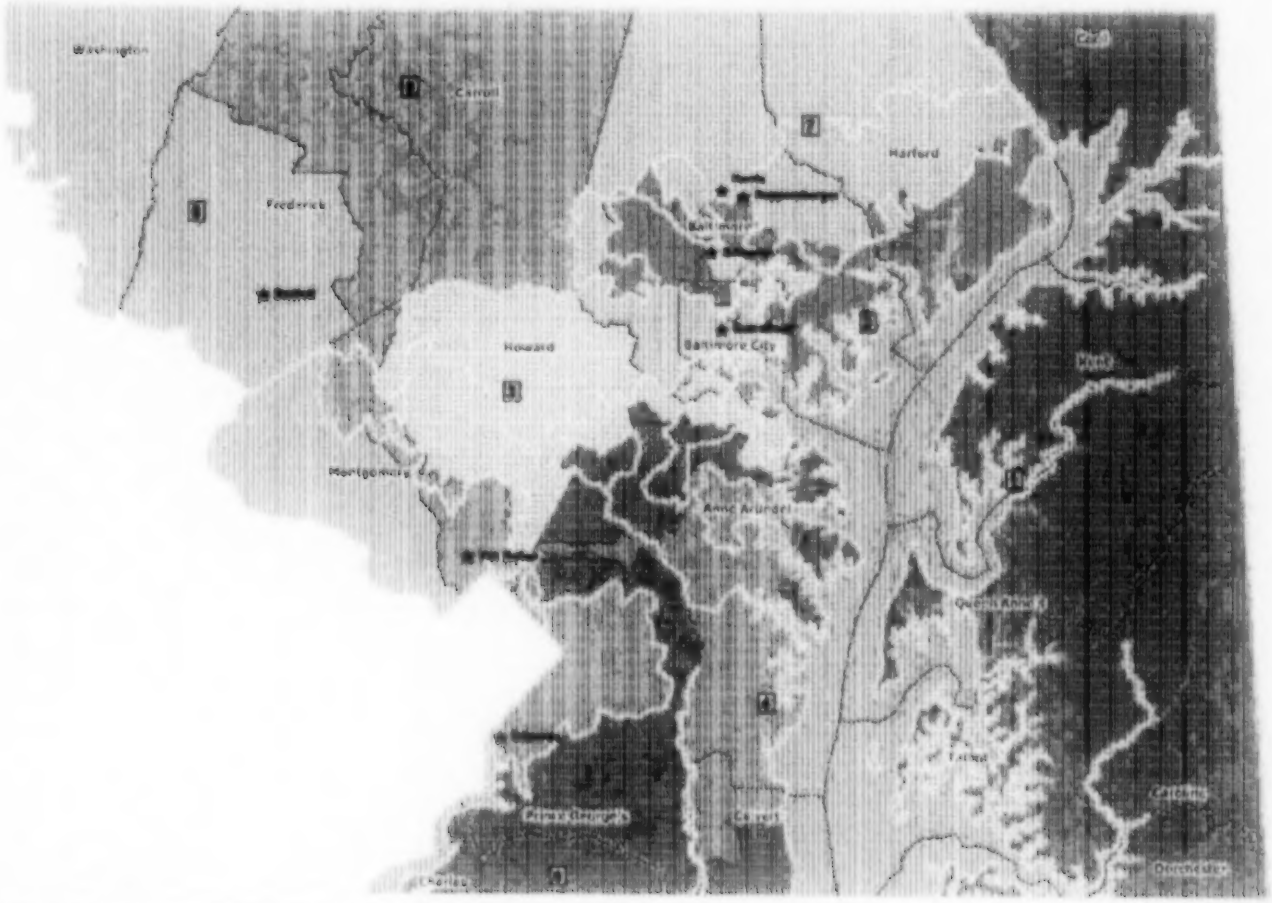
[redacted]


Carroll
Frederick
Howard
Harford
Baltimore City
Anne Arundel
Queen Anne's
Caroline

Gmail

Jason Gleason <jason.gleason03@gmail.com>

Re: Precincts

1 message

[redacted].com> Thu, Oct 13, 2011 at 2:35 PM

[redacted]

Thank you!
Sent from my Verizon Wireless BlackBerry

----Original [redacted]----
From: "Eric [redacted]ins@ncecservices.com>
Date: Thu, [redacted]:15
To: <jason[redacted].com>
Subject: RE: Precincts

Here's what I got from the state.

Eric Hawkins
NCEC Services, Inc.
202-459-2170
ehawkins@ncecservices.com

----Original Message----
From: jason.gleason03@gmail.com [mailto:jason.gleason03@gmail.com]
Sent: 10/13/2011 10:13 AM
To: Brian Romick; Eric Hawkins
Subject: Precincts

Have you guys gotten anything back from the Gavs people yet?
Sent from my Verizon Wireless BlackBerry

Confidential

10/3/2011

Current Districts

MARYLAND DRAFT 2011 PLAN SUMMARIES

CD	POP10_A	POP10	DEV.	Current	FED_DPFM	ST_DPFM	GOV06D%	GOV10D%	PRS04D%	PRS08D%	AA_A%	AA18_A%	NHAA%	NHAA18%	HISP%	HSE08D%	HSE10%
1	743067	744275	21538	100%	38.4%	35.6%	35.7%	34.3%	36.5%	40.3%	11.4%	11.0%	11.4%	11.1%	3.5%	50.1%	42.7%
2	703824	700893	-17705	100%	57.9%	55.1%	54.2%	52.8%	54.7%	60.7%	33.8%	31.3%	33.1%	30.7%	5.0%	74.3%	64.8%
3	716808	719856	-4721	100%	57.0%	53.3%	52.4%	52.9%	54.3%	59.7%	20.0%	18.6%	20.0%	18.7%	6.8%	69.6%	61.9%
4	715671	714316	-5858	100%	82.5%	79.8%	75.8%	82.3%	79.1%	85.8%	56.6%	56.3%	55.7%	55.5%	14.2%	87.1%	82.6%
5	758464	767369	46935	100%	62.1%	61.8%	57.6%	63.3%	58.0%	66.2%	37.3%	36.1%	36.7%	35.8%	7.9%	75.4%	64.0%
6	731718	738943	10189	100%	37.4%	35.9%	35.9%	34.5%	34.2%	40.5%	5.9%	5.5%	6.4%	6.4%	4.2%	39.8%	34.1%
7	664091	659776	-57438	100%	76.8%	72.1%	67.5%	72.3%	73.5%	79.8%	56.4%	55.4%	55.7%	54.6%	3.5%	81.1%	75.9%
8	728588	728124	7059	100%	71.9%	67.1%	66.0%	70.8%	69.2%	74.5%	16.9%	16.6%	16.3%	16.1%	20.0%	77.2%	73.5%

Commission Plan

CD	POP10_A	POP10	DEV.	Current	FED_DPFM	ST_DPFM	GOV06D%	GOV10D%	PRS04D%	PRS08D%	AA_A%	AA18_A%	NHAA%	NHAA18%	HISP%	HSE08D%	HSE10%
1	721529	722661	0	84.4	37.0%	34.3%	34.7%	32.6%	35.0%	38.8%	11.4%	11.0%	11.4%	11.03%	3.3%	48.3%	40.06%
2	721529	723456	0	80.2	58.4%	55.3%	54.2%	53.6%	55.1%	61.5%	32.0%	29.5%	31.6%	29.34%	5.5%	73.9%	64.76%
3	721528	720067	-1	68.0	58.6%	54.8%	54.0%	54.5%	56.0%	61.2%	21.1%	19.5%	20.6%	19.10%	7.7%	70.2%	62.59%
4	721529	720068	0	57.6	74.7%	72.8%	66.8%	71.2%	71.3%	77.7%	54.6%	54.5%	53.8%	53.71%	13.6%	81.5%	74.83%
5	721529	720472	0	96.3	61.8%	61.5%	57.5%	63.0%	57.7%	65.9%	37.0%	35.8%	36.4%	35.31%	7.2%	75.2%	63.60%
6	721529	728453	0	50.6	53.0%	49.8%	49.3%	51.0%	49.3%	56.6%	12.0%	11.2%	12.3%	11.76%	11.2%	57.1%	51.32%
7	721529	716862	0	84.5	74.2%	69.5%	64.7%	68.4%	70.9%	77.2%	55.7%	54.5%	54.9%	53.75%	3.1%	78.9%	72.52%
8	721529	721513	0	57.4	60.0%	56.8%	56.1%	58.0%	57.7%	62.5%	11.7%	11.6%	11.3%	11.29%	13.5%	63.7%	60.27%

finalist for the Los Angeles Times Book Prize in history. My most recent book, *The Case for Impeachment* was an independent bookstore best seller, and a bestseller in several academic categories on Amazon.com.

I have worked as a consultant or expert witness for both plaintiffs and defendants in more than eighty redistricting, voting and civil rights cases. These include several cases in the state of Maryland. In the U.S. Supreme Court case, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), the majority opinion written by Justice Kennedy authoritatively cited my statistical work. I have testified several times for plaintiffs and defendants on the issues of intentional discrimination in the adoption of state redistricting plans and other state laws affecting voter registration and turnout. A three-judge panel in litigation challenging the 2011 state of Illinois redistricting plan also cited my work on behalf of defendants in support of the panel's *rejection* of plaintiffs' claim that the plan intentionally discriminated against minority voters in *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, 2011 U.S. Dist. Lexis 117656 (N.D. Ill. Oct. 12, 2011). I testified on intentional discrimination in the landmark case of *North Carolina State Conference of the NAACP v. McCrory, et al.*, in which a unanimous panel of the Fourth Circuit affirmed my finding of intentional racial discrimination on the part of the state: 831 F.3d 204 (4th Cir. 2016). I was also the plaintiffs' expert on partisan gerrymandering in the case of *Vieth v. Jubelirer* that was ultimately decided by the U.S. Supreme Court. 51 U.S. 267 (2004).

III. SUMMARY OF OPINIONS

* After examining the reports of plaintiffs' experts, I conclude that these reports establish only what is already the obvious: that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan.

* Even taken fully at face value, the reports of plaintiffs' experts fail to establish that Maryland's congressional plan is a partisan gerrymander that unfairly burdens voters inclined to vote for Republican candidates. The reports consider *only* changes made by the plan in CD6. Yet scholarly work in the field, including Dr. McDonald's own published work and expert reports, demonstrate that a partisan gerrymander, as that term is understood in the social science literature, must be evaluated through the analysis of the *entire* plan.

* Scrutiny of Maryland's 2011 congressional plan through multiple modes of analysis demonstrates that the plan is *not* a partisan gerrymander.

* Maryland's 2011 redistricting plan established a community of interest in CD6, according to methodology applied by Dr. Morrison in *Fletcher v. Lamone*.

* The analysis of the intent behind the 2011 congressional plan in the reports of plaintiffs' experts is fundamentally flawed conceptually. The analysis fails to follow standard historical methodology or the framework for intent analysis established by the U.S. Supreme Court in the *Arlington Heights* case.

* The analysis of intent also fails to consider four plausible alternative explanations for the crafting of the plan that are unrelated to an intent to retaliate against Republican-leaning voters for their political views, voting decisions, or party affiliation.

* The reports of plaintiffs' experts contain serious errors and omissions and demonstrate a lack of knowledge of circumstances in Maryland essential to the inquiry.

Before examining other issues raised in plaintiffs' expert reports, I first address the critical question of whether Maryland's 2011 congressional plan constitutes an invidious partisan gerrymander that unfairly burdens Republican-leaning voters.

IV. MARYLAND'S 2011 REDISTRICTING PLAN IS NOT A PARTISAN GERRYMANDER

A. Deficiency of Plaintiffs' Analysis

Both the Morrison Report and the McDonald Report examine only one of the eight congressional districts in Maryland's 2011 plan, CD6. Such a limited study cannot establish whether a redistricting plan represents an invidious partisan gerrymander. The scholarship on this issue makes it clear that the possible existence of a partisan gerrymander must be assessed by examining the plan as a whole.

A redistricting plan is an interactive system, where every district in the plan affects every other district. This is a principle so well-recognized that one of plaintiffs' experts, Dr. McDonald, has espoused it several times himself. The other of plaintiffs' experts, Dr. Morrison, acknowledges that the proper inquiry is statewide but then neglects to address statewide factors in his report in *this* litigation. In his testimony in *Backus v. South Carolina*, plaintiffs' expert Dr. McDonald affirms the principle that districts interact with one another in a plan and that redistricting experts cannot analyze any single district in isolation.

"Well, I don't know if it's a scientific principle, but among people who do redistricting we call it a ripple effect. So one district, if you change one district it's going to affect all of the neighboring districts, and then that in turn, it's like a row of dominoes, can spread entirely across the state. And so *you really can't look at one district in isolation* because it can be affected by changes to other districts."[1]

Much the same point was asserted in his report on partisan gerrymandering in the litigation of Texas' post-2010 redistricting plans, where Dr. McDonald made clear the need to examine all the districts in assessing partisan gerrymandering. Dr. McDonald first observed that "[a] commonly used method to determine the potential political consequences of a redistricting plan is to aggregate statewide election returns *into proposed districts*. The resulting statistics can be used to evaluate if a redistricting plan is a partisan gerrymander. The methodology clearly illustrates the burdens that partisan gerrymanders place upon voters and political parties."[2] Dr. McDonald then

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[1] McDonald Test. at 55:22-56:4 (emphasis added), *Backus v. South Carolina*, No. 3:11-3120 (D.S.C. March 4, 2012), ECF No. 207.

[2] Designation of Expert Witnesses, Ex. A, McDonald Expert Report at 1, *Perez v. Perry*, No. 5:11-00360 (W.D.

examined three adopted Texas redistricting plans for congressional districts, state house districts and state senate districts, and examined all the districts in each plan before concluding that these plans were partisan gerrymanders. He said, "the adopted redistricting plans are Republican gerrymanders, designed with a purpose to dictate electoral outcomes by strategically grouping voters within districts based on their political orientation and that the representational rights of Democratic voters and the Democratic Party are thereby disfavored on the basis of their political views."[3]

Similarly, Dr. McDonald's scholarly work in partisan gerrymandering litigation also establishes the necessity of examining the complete redistricting plan to assess gerrymandering. This body of work includes his 2015 Social Science Research Network (SSRN) paper; his 2012 article in the *Case Western Reserve Law Review*; and his 2013 article in the *University of Richmond Law Review*.[4] Likewise, the scholarly sources cited in plaintiffs' second amended complaint examine the issue of partisan gerrymandering through a consideration of the entire plan, not just one district.[5]

In his deposition in the South Carolina case of *Backus v. South Carolina*, Dr. McDonald was asked: "is it possible to, if you have a statewide plan with – for instance, in the House map there are 124 districts. Is it possible to draw each one of those 124 districts individually without considering their impact on the surrounding districts?" Dr. McDonald answered simply, "No."[6]

Dr. Morrison, the plaintiffs' other expert, specifically frames his inquiry as pertaining generally to Republicans in Maryland, not just Republicans in CD6:

"I have also been asked to determine whether there is objective demographic evidence supporting the conclusion that the Maryland General Assembly specifically intended to burden *the representational rights of Maryland Republicans* because of how they had voted in the past and the political party with which they had affiliated."[7]

Yet the substance of the Morrison Report considers only CD6 and not the impact of the entirety of the 2011 congressional redistricting plan on "Maryland Republicans."

Likewise, plaintiffs' Second Amended Complaint refers frequently to the plan as a whole, and its scope is not limited to CD6. For example:

Tex. Aug. 8, 2011), ECF No. 130-2 (emphasis added).

[3] *Ibid.*, at 5.

[4] Micah Altman & Michael P. McDonald, "Redistricting Principles for the 21st Century," 62 *Case Western Law Review* 1179 (2012); Micah Altman & Michael P. McDonald, "A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights and Participation," 47 *University of Richmond Law Review* 771 (2013); and Micah Altman, Brian Amos, Michael P. McDonald, & Daniel R. Smith, "Revealing Preferences: Why Gerrymanders are Hard to Prove and What to do About It," *SSRN* (March 22, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583528.

[5] Samuel S. H. Wang, "Three Tests for the Practical Evaluation of Partisan Gerrymandering," 68 *Stanford Law Review* 1263 (2016); Nicholas O. Stephanopoulos & Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," 82 University of Chicago Law Review 831 (2015).

[6] McDonald Dep. at 53:7-53:14, *Backus v. South Carolina*, No. 3:11-03120 (D.S.C. Feb. 27, 2012), ECF No. 158.

[7] Opening Expert Report of Dr. Peter A. Morrison (hereinafter Morrison Report) at 4 (emphasis added).

"The Plan is widely regarded as one of the worst partisan gerrymanders in American history." (p. 4)

"The crux of every partisan gerrymander is the dominant party's effort to dilute the effectiveness of the votes in favor of the disfavored party. ... This end is achieved by drawing district lines so that the dominant party wins a large number of seats by narrow margins and the disfavored party wins a small number of seats by wide margins." (pp. 9-10)

"As a result of both increasing partisanship and more sophisticated voter data collection and analysis, map-drawers in recent decades have been able to create redistricting plans in ways that crack and pack with unprecedented efficiency and accuracy." (pp. 10-11)

"The 1st District covers Maryland's Eastern Shore and stretches across a portion of the northern border of the State. It is the State's 'packed' Republican district." (p. 19)

Pages 19-29 of the complaint include allegations about every one of the 8 congressional districts in Maryland's 2011 redistricting plan, not limited to CD6. Yet neither the Morrison nor the McDonald Report provides any detailed analysis of the overall plan, showing that it unfairly packs and cracks Republican voters. Instead their analyses are limited only to CD6.

B. Multiple Analyses Demonstrate That Maryland's 2011 Congressional Plan is Not a Partisan Gerrymander

1. Dr. McDonald's Own Methodology for Detecting Partisan Gerrymanders Demonstrates that Maryland's 2011 Congressional Plan is not a Partisan Gerrymander

In his Texas reports, Dr. McDonald establishes a methodology for assessing whether a redistricting plan represents an unfair partisan gerrymander. He references my work in *Vieth v. Jubelirer* as a foundation for this methodology.[8] According to Dr. McDonald's prior testimony, the correct methodology calls for the analyst to take the following steps:

1) Calculate statewide election returns within districts. This requires the reaggregation of statewide results into each of the individual districts of a plan.
2) Calculate the average share of "two-party" vote across districts.
3) Compare the relationship between seats to votes at various average votes for the two major parties across the districts.[9]

Using this methodology, Dr. McDonald found that the adopted Texas congressional, state senate, and state house plans were partisan gerrymanders disfavoring Democrats, the minority party in the Texas legislature.[10] However, as shown below, this same methodology yields a contrary finding for Maryland's 2011 congressional redistricting plan.

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[8] McDonald Expert Report at 2, *Perez v. Perry*, No. 5:11-00360 (W.D. Tex. Aug. 8, 2011), ECF No. 130-2.
[9] *Ibid.* at 3-5.
[10] Designation of Expert Witnesses, Ex. B, McDonald Apx. at 3, 7, 9, *Perez v. Perry*, No. 5:11-00360 (W.D. Tex. Aug. 8, 2011), ECF No. 130-3.

Tables 1 and 2 below set forth the results of applying to Maryland's 2011 congressional redistricting plan the same methodology that Dr. McDonald endorsed in the Texas case of *Perez v. Perry*. Table 1 calculates the average share of the "two-party" vote for statewide elections for each of the districts in the 2011 congressional plan from 2012 to 2016.[11] Table 2 examines the relationship between Republican votes and seats for the Maryland plan and compares these results to the results found for Texas by Dr. McDonald.

The results reported in Table 2 indicate that, in contrast to Dr. McDonald's Texas findings, the 2011 Maryland congressional redistricting plan is highly responsive to a hypothetical Republican majority. If Republicans were to achieve a bare majority of 51 percent of the vote, according to Dr. McDonald's methodology they would win 63 percent of the seats. If they won a 54 percent vote majority, Republicans would win 75 percent of the seats. In 2010, Democrats won 75 percent of the seats in Maryland's congressional delegation, but they did so with a majority vote of 64.3 percent across districts, more than 10 percentage points above the 54 percent that Republicans would have needed statewide to win that same percentage of seats. At 54 percent of the vote, under Maryland's 2011 congressional redistricting plan, Republicans would win all six of the districts that are not majority-African American voting rights districts (CD4 and CD7). By contrast, if Democrats won 54 percent of the Texas vote they would win only 49 percent of seats under the state's adopted congressional plan, 33 percent under its adopted state senate plan, and 41 percent under its adopted state house plan. Thus, under Maryland's congressional plan, Democrats are generally at a statewide *disadvantage* in converting their votes to congressional house seats, unlike the Republicans in Texas who established an anti-majoritarian statewide advantage.

[11] The Maryland State Board of Elections reports only election night results (e.g., the votes cast on Election Day) by precinct and congressional district. Through a special tabulation from the Board of Elections I also obtained the early votes cast by congressional district. Only the relatively small number of absentee votes and provisional votes (fewer than 10 percent of votes cast) are not available by congressional district.

TABLE 1
REPUBLICAN PERCENTAGE OF TWO-PARTY VOTE, STATEWIDE ELECTIONS, AGGREGATED TO DISTRICTS IN THE 2011 ADOPTED CONGRESSIONAL PLAN

CD	2012 President	2012 US Senate	2014 Governor	2014 Comptr.	2014 Attorney General	2016 President	2016 US Senate	Mean All Elections
1	62.2	56.5	78.6	53.4	66.0	65.8	64.9	63.9
2	36.1	28.2	55.9	34.3	41.1	38.3	37.9	38.8
3	38.3	31.3	54.7	36.3	41.8	34.7	36.7	39.1
4	21.3	19.0	34.0	25.6	28.2	20.6	22.2	24.4
5	33.1	28.5	46.2	37.3	38.9	33.8	33.8	35.9
6	44.6	42.4	58.4	47.1	50.6	43.8	42.5	47.1
7	23.0	20.3	37.2	24.6	28.7	21.7	25.2	25.8
8	37.6	33.7	48.9	37.8	40.5	33.4	34.5	38.1
	37.0	32.5	51.7	37.0	42.0	36.5	37.2	39.1

TABLE 2
VOTES TO SEATS RATIOS 50% TO 55% FROM MINORITY PARTY IN LEGISLATURE MARYLAND 2011 CONGRESSIONAL PLAN COMPARED TO PLANS ANALYZED BY DR. MCDONALD IN TEXAS

% of Vote By Minority Party In Legislature	Maryland Adopted 2011 Cong. Plan	Texas Adopted 2011 Cong. Plan	Texas Adopted 2011 State. Senate Plan	Texas Adopted 2011 State House
Minority Party 50%	38%	32%	33%	38%
Minority Party 51%	63%	32%	33%	38%
Minority Party 52%	63%	39%	33%	38%
Minority Party 53%	63%	40%	33%	40%
Minority Party 54%	75%	49%	33%	41%
Minority Party 55%	75%	50%	40%	42%
Source: Table 1, McDonald, *Perez* Report.				

2. Efficiency Gap Analysis Shows That the Maryland's 2011 Congressional Plan Favors Republicans

The analysis of the so-called "efficiency gap" is a methodology for detecting a partisan gerrymander developed by Nicholas Stephanopoulos, Professor at the University of Chicago Law School, and Eric McGhee, Research Fellow at the Public Policy Institute of California. It is explained and illustrated in their 2015 article in the *University of Chicago Law Review*, cited in plaintiffs' complaint and referenced above. As explained by the authors, their efficiency-gap measure accounts *for both the packing and cracking of voters* in any redistricting plan: "The efficiency gap," they write, "essentially aggregates all of a district plan's cracking and packing into a single tidy number."[12] The district court in the Wisconsin gerrymandering litigation relied heavily on their efficiency gap measure in denying defendants' motion for summary judgment in a case alleging that the plan for State Assembly districts represented a partisan gerrymander that unfairly disadvantaged Democrats.[13]

The efficiency gap, Stephanopoulos and McGhee indicate, "represents the difference between the parties' respective wasted votes in an election."[14] They define a wasted vote as a vote that "is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail."[15] Wasted votes for a losing candidate, they state, are "a result of the time-honored gerrymandering technique of 'cracking.'"[16] Wasted votes in excess of electoral majorities result from "the equally age-old mechanism of 'packing.'"[17]

The efficiency gap is relatively simple to compute:

1) Sum for each party the number of votes cast for losing candidates in each district.
2) Sum for each party the number of votes cast for winning candidates in excess of 50%.
3) Add together these two sums to obtain the total number of wasted votes for each party.
4) Subtract the total number of wasted votes for the party controlling the redistricting from the total number of wasted votes for the second party.
5) A positive result indicates that the plan disadvantages the second party, e.g., that it has more wasted votes. A negative result indicates that the plan disadvantages the redistricting party, i.e., that it has more wasted votes.
6) Divide the result by the total number of votes cast to obtain the net percentage of wasted votes for the disadvantaged party.
7) This final percentage measure represents the efficiency gap.

Table 3 applies the efficiency gap analysis to Maryland's 2011 plan using the 2012 general election results. This first post-redistricting election is the most critical election in assessing any redistricting plan, for at least two important reasons. First, this election establishes the congressional incumbencies for subsequent elections. It is well established that incumbents have

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[12] Stephanopoulos & McGhee at 833.
[13] *Whitford v. Nichol*, 180 F. Supp. 3d 583 (W.D.Wis. 2016).
[14] Stephanopoulos & McGhee at 834.
[15] *Ibid.*
[16] *Id.*
[17] *Id.*

a significant electoral advantage over challengers. As plaintiffs' expert Dr. McDonald has noted, "Much electoral competition scholarship focuses on the advantages of incumbents in election to the House of Representatives."[18] Second, circumstances change over time, including demographic and political changes, making outcomes in later elections more difficult to predict at the time of the redistricting. Political scientist Nicholas R. Seabrook explains: "A number of factors can combine to dramatically alter the underlying distribution of voters that had formed the basis of a gerrymander." He cites "generational replacement," electoral realignments, "national electoral swings and turnout variations," changes "between presidential elections and midterm years," and "residential mobility." Thus, "All else being equal, the effectiveness of a partisan gerrymander is expected to decline as the alignment of voters moves further away from that on which the redistricting plan was based."[19]

The results reported in Table 3 indicate that for the 2012 congressional elections in Maryland, the Democrats had 222,259 more wasted votes than Republicans. As also indicated in Table 3, this result translates into *an efficiency gap of 8.0 percent disfavoring Democrats*. In sharp contrast, in Wisconsin, the court cited a report by plaintiffs' expert finding that the Republicans controlling the State Assembly redistricting had created a plan with a *13 percent efficiency gap favoring Republicans*.[20] I am not suggesting that the Democrats in 2011 deliberately gerrymandered congressional districts to produce more Democratic wasted votes, but rather that this is a consequence of other factors, such as the natural distribution of partisans in the state and the creation of two voting rights districts. These districts – CD4 and C7 – are overwhelmingly packed with Democrats, with the winning Democrat in 2012 garnering about 79 percent of the vote in each district.[21] The large efficiency gap in favor of Republicans in Maryland is consistent with Stephanopoulos and McGhee's conclusion; Maryland is not identified as a partisan gerrymander under their applicable threshold test.[22]

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[18] Michael P. McDonald and John Samples, "The Marketplace of Democracy: Normative and Empirical Issues," in *The Marketplace of Democracy: Electoral Competition and American Politics* 13 (McDonald and Samples, eds., 2006).

[19] Nicholas R. Seabrook, *Constraints on Partisan Gerrymandering in U.S. Politics* 62 (2017).

[20] *Whitford v. Nichol*, 180 F. Supp. 3d at 590. In the Wisconsin case, one plaintiffs' expert found that the efficiency gap favoring Republicans was 13%. Another plaintiffs' expert, using a more elaborate district-by-district analysis, found that the overall efficiency gap favoring Republicans was 12%. *Ibid.*

[21] Maryland State Board of Elections, 2012 General Election, http://www.elections.state.md.us/elections/2012/results/general/gen_results_2012_4_008X.html.

[22] Stephanopoulos & McGhee at 890.

TABLE 3
EFFICIENCY GAP REPUBLICANS VS. DEMOCRATS 2012 CONGRESSIONAL ELECTIONS MARYLAND

Total Votes	"Wasted" Democratic Votes	"Wasted" Republican Votes	Difference in "Wasted Votes"
2,482,687	985,261	763,002	-222,259 Democrats Disadvantaged
Efficiency Gap*	222,259/2,482,687 = 8.0% Disadvantaging Democrats		
* Difference in "Wasted" Votes Divided by Total Votes. Party With More "Wasted" Votes is Disadvantaged. See, Nicholas O. Stephanopoulos & Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," *Chicago Law Review*, 81 (2015), pp. 831-900.			

V. THE MORRISON REPORT IS FUNDAMENTALLY FLAWED BY CONFIRMATION BIAS

Dr. Morrison has produced a result-driven report that exhibits the flaw of confirmation bias, defined as the marshalling of evidence to support a pre-conceived conclusion rather than the conducting of an open-ended inquiry with no fixed outcome. As explained by Raymond S. Nickerson in his article in the *Review of General Psychology*, confirmation bias occurs when "one selectively gathers, or gives undue weight to, evidence that supports one's position while neglecting to gather, or discounting, evidence that would tell against it."[23] He further elaborates that, "People may treat evidence in a biased way when they are motivated by the desire to defend beliefs that they wish to maintain."[24]

The confirmation bias of the Morrison Report is evident in the contradictory ways in which Dr. Morrison approaches analysis of communities of interest in his declaration in *Fletcher v. Lamone* as compared to the report for this litigation. It is also evident in his failure to frame his intent inquiry in an open-ended form by assessing whether the evidence *supports or refutes* the intention of legislators to burden Republicans. Rather, he considers whether he can muster evidence in support of plaintiffs' pre-set claim of intentional discrimination.

As Dr. Morrison puts it, "I have also been asked to determine whether there is objective demographic evidence *supporting the conclusion* that the Maryland General Assembly specifically intended to burden the representational rights of Maryland Republicans because of how they had voted in the past and the political party with which they had affiliated."[25]

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[23] Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises," 2 *Review of General Psychology* 175-176 (1998).
[24] *Ibid.*
[25] Morrison Report at 4 (emphasis added).

Dr. Morrison's claim that legislative intent can be inferred from "objective demographic evidence" is also illustrative of confirmation bias. No evidence, whether demographic or otherwise, simply leaps out and speaks for itself. Evidence must be culled, selected, and interpreted, especially as it relates to a complex causal question such as the intent of a legislative body. In addition, Morrison's report is not limited to demographic material, but also attempts to provide a historical analysis of the redistricting process in Maryland primarily based on non-demographic, documentary evidence.

It is also telling that in pursuing this historical inquiry to assess intent, Morrison goes well beyond his role as a demographer. In his statement of qualifications Dr. Morrison cites no expertise, training or publications related to the historical analysis of intent: "My principal expertise centers on applications of demographic analysis in tracking socioeconomic trends and envisioning their consequences for public policy. In particular, I specialize in performing demographic analysis pertaining to the *effects* of Congressional and other redistricting plans."[26] At least one court has previously cited Dr. Morrison for attempting to provide analyses and opinions beyond his demographic expertise.[27]

VI. DR. MORRISON'S DECLARATION IN *FLETCHER V. LAMONE* REFUTES HIS REPORT IN THIS LITIGATION.

Only Dr. Morrison's report addresses the key question of whether the 2011 congressional redistricting plan establishes a community of interest in CD6. Dr. Morrison concludes that the 2011 Congressional Plan "dismembered existing communities of interest" by "switch[ing] out" "small-town native-born Marylanders and replac[ing] them with outsiders."[28] But Dr. Morrison's 2011 declaration submitted on behalf on plaintiffs' in *Fletcher v. Lamone*, effectively proves, by the very criteria he deems sufficient, that adopted CD6 represents a community of interest. In his *Fletcher* declaration, Dr. Morrison opines that CD5 in plaintiffs' alternative plan represents a community of interest. As the enclosed map indicates, this district runs nearly the length of the state from Charles County in southern Maryland to Baltimore County in the north (see map below). He reaches this conclusion solely on the basis of alleged commuter flows along this long stretch of Maryland territory:

> "The counties between Baltimore and Washington D.C. comprise a regional corridor that is functionally integrated by regionwide transportation linkages facilitating extensive daily flows of commuting. The commuters between suburban residences and workplaces throughout this regional corridor constitute a natural community of interest defined by the common needs and the shared concerns of workers who reside within the vast commuter shed between Baltimore and

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[26] Morrison Report at 1.

[27] *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 291 (2014) (holding circuit court did not err in finding that Dr. Morrison "did not 'possess sufficient training or experience to prepare or to offer reliable expert testimony as to election procedures generally nor, specifically the proportion of persons eligible to vote in Wisconsin who lack a Photo ID required by Act 23.'").

[28] Morrison Report at 9, 75.

> Washington D.C. Plaintiffs' Proposed Congressional District # 5 *encompasses this natural community of shared interest*."[29]

In reaching an opposite conclusion regarding CD6 in Maryland's 2011 redistricting plan, Dr. Morrison does not analyze or even cite any of the factors that he examined in his *Fletcher v. Lamone* declaration. Conversely, in his *Fletcher* declaration regarding CD5, Dr. Morrison does not reference the cultural or educational institutions, media markets, newspapers, urban versus rural residence, socio-economic factors, foreign versus native birth, etc. that are the basis for his conclusions regarding CD6. Rather, in the *Fletcher* case, Dr. Morrison contended that patterns of transportation and commuting *are sufficient*, in and of themselves, to establish a congressional district as representing a community of interest.

According to Dr. Morrison's *sufficient standard* of transportation and commuting, CD6 represents far more of a community of interest than the CD5 that Dr. Morrison defends in his *Fletcher* declaration. The communities included in the adopted CD6 are united by the I-270 Corridor which establishes a community of interest as affirmed through a recent study by the Maryland State Department of Transportation, State Highway Administration:

> "The I-270/US 15 Corridor serves local and long distance trips between the Washington, DC metropolitan area, central and western Maryland, and beyond. Known as the "Technology Corridor", this area is home to many high-tech industries and research facilities as well as commercial, cultural and recreational activities. ... The I-270/US 15 Corridor is one of the most traveled north-south transportation corridors in Maryland. The Corridor provides an essential connection between the Washington, DC metropolitan area and central and western Maryland, and is critical from both a personal transport and goods transport perspective."[30]

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[29] Dr. Peter Morrison Decl. and Rebuttal Report at 1, *Fletcher v. Lamone*, No. 11-3220, (D.Md. Dec. 16, 2011), ECF No. 49-3 (emphasis added).

[30] Maryland State Department of Transportation, State Highway Administration, "Purpose and Need," pp. I-2, 6, https://appsods.maryland.gov/WebProjectLifeCycle/FR192_11/HTDOCS/Documents/Purpose_and_Need/Purpose%20and%20Need%20(from%20DEIS).pdf.

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Maryland Districts Plan
July 17, 2011

The State Highway Administration study goes on to elaborate upon other critical connections along the I-270 Corridor that even extend into Allegany and Garrett counties:

> "The Corridor also serves a major commuter population that works in the District of Columbia, southern Montgomery County, and Frederick County, and provides access to employment opportunities within the Corridor itself. The majority of these commuters travel from the City of Frederick or upper Montgomery County into central and lower Montgomery County (i.e. Bethesda, Rockville, and Gaithersburg) and Washington, DC. In addition, the Corridor provides the primary travel path from the population centers of the Washington metropolitan area to recreational sites located in western Maryland and to historic resources within/near the project area, such as the Monocacy National Battlefield and the C&O Canal National Historical Park."[31]

Consistent with this analysis, the Maryland State Suburban Alliance has termed the I-270 Corridor "the state's number-one job-creation corridor."[32]

In his *Fletcher* Declaration, Dr. Morrison cites no such studies in support of his contention that there is a transportation corridor comparable to I-270 that links together Charles, Prince George's, Howard, and Baltimore Counties in the *Fletcher* plaintiffs' CD5. He relies solely on his own construction of commuter flow data, which draws on out-of-date information from 2000 and 2003.

Analysis of commuter flow data additionally demonstrates that the commuting linkages existing in CD6 are substantially stronger than those Dr. Morrison found to establish a community of interest in the *Fletcher* plaintiffs' proposed CD5. Table 4 below reports the location of jobs, and corresponding commuter flow, from the District of Columbia northwest through the counties included in CD6 in the 2011 congressional plan. It compares these results to the corresponding commuter flow data from Baltimore City south through the counties included in the proposed CD5 defended by Dr. Morrison in his *Fletcher* declaration. As indicated in Table 4, CD6 establishes a much more united community of interest by Dr. Morrison's standard than did the CD5 analyzed in his *Fletcher* declaration. Only 16.4 percent of jobs are outside the commuting region of DC through counties of CD6, compared to a *more than double* 35.3 percent for the commuting regions from Baltimore City through the counties included in the *Fletcher* plaintiffs' CD5. In other words, people living in CD6 spend more of their time and work life in the same area, and, to the extent Dr. Morrison has previously indicated that such patterns establish a community of interest, the residents of CD6 exhibit this characteristic more strongly than the district he analyzed in *Fletcher*.

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[31] *Ibid.* at I-7.

[32] Suburban Maryland Transportation Alliance, "I-270," http://www.mdtransportation.org/category/i-270-corridor/.

TABLE 4
LOCATION OF JOBS, CD6 IN ADOPTED 2011 CONGRESSIONAL PLAN COMPARED TO CD5 IN DR. MORRISON'S *FLETCHER* DECLARATION

ADOPTED MARYLAND CONGRESSIONAL PLAN CD6 LOCATION OF JOBS FOR COUNTY RESIDENTS								
County	Mont.	Frederick	Wash.	DC	Alleg.	Garrett	Other	% Other
Montgomery	298,590	4,854	299	107,123	33	3	91,406	**18.2%**
Frederick	26,131	68,885	1,968	4,088	9	0	18,381	**15.4%**
Washington	3,462	10,848	48,261	788	132	0	6,350	**9.1%**
Allegany	290	109	588	35	25,541	544	3,198	**10.6%**
Garrett	45	47	78	13	1,714	10,856	1,342	**9.5%**
ALL COUNTIES	328,518	84,743	51,194	112,047	27,429	11,403	120,677	**16.4%.**
PROPOSED PLAINTIFFS' PLAN, *FLETCHER V. LAMONE*, CD5 LOCATION OF JOBS FOR COUNTY RESIDENTS								
County	Charles	Prince George's	Howard	Balt.		Balt. City	Other	% Other
Charles	27,746	14,641	457	168		315	31,081	**41.8%**
Prince George's	3,936	175,443	8,812	2,912		6,700	245,160	**55.3%**
Howard	62	13,652	58,824	11,922		15,907	47,142	**32.0%**
Baltimore	72	5,201	23,385	203,234		117,027	54,042	**13.4%**
MEAN % OTHER	31,816	208,937	91,478	218,236		139,949	377,425	**35.3%**
Source: 2010 American Community Survey, 5-Year Estimates								

TABLE 5
LOCATION OF JOBS, CD6 IN ADOPTED 2011 CONGRESSIONAL PLAN COMPARED TO CD5 IN DR. MORRISON'S *FLETCHER* DECLARATION

ADOPTED MARYLAND CONGRESSIONAL PLAN CD6 LOCATION OF JOBS OUTSIDE COUNTY OF RESIDENCE								
County	Mont.	Frederick	Wash.	DC	Alleg.	Garrett	Other	% Other
Montgomery		4,854	299	107,123	33	3	91,406	**44.9%**
Frederick	26,131		1,968	4,088	9	0	18,381	**36.3%**
Washington	3,462	10,848		788	132	0	6,350	**29.6%**
Allegany	290	109	588	35		544	3,198	**67.3%**
Garrett	45	47	78	13	1,714		1,342	**41.4%**
ALL COUNTIES	29,928	15,858	2,933	112,047	1,888	547	120,667	**42.5%**
PROPOSED PLAINTIFFS' PLAN, *FLETCHER V. LAMONE*, CD5 LOCATION OF JOBS OUTSIDE COUNTY OF RESIDENCE								
County	Charles	Prince George's	Howard	Balt.		Balt. City	Other	% Other
Charles		14,641	457	168		315	31,081	**66.6%**
Prince George's	3,936		8,812	2,912		6,700	245,160	**91.6%**
Howard	62	13,652		11,922		15,907	47,142	**53.2%**
Baltimore	72	5,201	23,385			117,027	54,042	**27.5%**
MEAN % OTHER	4,070	33,494	32,654	15,002		139,949	377,425	**62.6%**
Source: 2010 American Community Survey, 5-Year Estimates								

Table 5 provides an additional level of analysis that looks only at jobs outside the county of residence. The results reported in Table 5 indicate that for CD6 a minority of 42.5 percent of non-residential jobs are outside of CD6 and DC, whereas for the *Fletcher* plaintiffs' CD5, a majority of 62.6 percent of non-residential jobs are outside the counties of CD5 and Baltimore City. More residents of CD6 live and work in the same area as each other.

Montgomery County and DC are also connected to western Maryland not just through roadways, but also through the MARC rail line that runs from DC to Martinsburg, West Virginia as indicated in the map below. The map also indicates that there is no comparable rail line that runs from Charles County through Howard County to Baltimore County and Baltimore City.

Dr. Morrison's attack on the idea of the I-270 counties comprising a community of interest is based in part on his assertion that the relevant measure is the number of each county's residents who commute to Washington, D.C. But as the state study cited above makes clear, the I-270 corridor significantly encompasses jobs and commuter flows within the Maryland counties, not just between these counties and DC. For example, Dr. Morrison's Table 2 on page 65 of his report indicates that only 3.4 percent of Frederick County workers hold jobs in DC. However, the Table fails to report that 26,131 Frederick County workers (21.9 percent) hold jobs in Montgomery County. Moreover, in his *Fletcher* Declaration, Dr. Morrison himself focused primarily on commuting within Maryland counties included in CD5, not on commuting into Baltimore City.

Dr. Morrison also claims that the creation of an I-270 based district was not a consideration at the time of the 2011 redistricting. He relies, however, not on contemporaneous evidence but on the post-hoc testimony some six years later from the depositions of Mr. Hawkins and Robert J. Garagiola. Dr. Morrison fails to note that at the time of the redistricting, then State Senator Garagiola said, "I think there's a lot more in common with northern and western Montgomery County and Frederick County and Washington County and even further west than there is with Harford or Baltimore County."[33]

In fact, the concept of a community of interest established by linkages through the I-270 corridor was a main point of emphasis in the presentation to the General Assembly made by the Governor's Advisory Redistricting Commission (GRAC) during the redistricting process.[34] Many citizens testifying in the public hearings held by GRAC in Frederick and Shady Grove in Montgomery County stressed the community of interest along the I-270 corridor. Witnesses also noted that the proposed north/south configuration of CD6 into Montgomery County established more of a community of interest than the previous configuration that included Baltimore, Carroll, Harford counties. The following are examples from the public hearing.

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[33] Heather Keela, "Proposed Congressional Redistricting Plan Has Local Republicans Crying Foul," *Herald-Mail.Com*, October 8, 2011, http://articles.herald-mail.com/2011-10-08/news/30259492_1_congressional-districts-state-legislative-districts-special-session.

[34] *GRAC*, "Recommended Congressional Plan," http://www.washingtonpost.com/wp-srv/politics/documents/redistricting_advisory_committee_100411.pdf.

MARYLAND AREA REGIONAL COMMUTER SERVICE*

- Source, *Legislative Handbook, Volume II, Government Services in Maryland*, p. 142, http://dls.state.md.us/data/polanasubare/polanasubare_natresenvntra/Volume-II-Chapter-9.pdfp.

- **Testimony of Bob Kresslein:**

I'd like to see you consider a couple of different factors. One is, sort of the communities of interest we have – Senator Brinkley indicated – you know – if you look at Carroll County and west, we have a lot of similarity, **but I would also posit that if you go south and east, you're going to find a** lot of things in common. If you look at historically, upper Montgomery County, look toward Frederick, for many, many years that area has picked up quite a lot of population. And if you look at transportation patterns, you'll see that – you know - -70 and 270 combined right here in Frederick County. And if you're on that road every day going to work you know there's an awful lot of people from Washington County, even into Pennsylvania and West Virginia and Virginia that get on that road and go on into Montgomery County to work or into Washington, D.C. metropolitan area.[35]

- **Testimony of Dan Rupli:**

There is no community of interest between Harford County and Garrett County. There is very little community of interest between Allegany and Carroll. ... There is no community of interest either in – or a shared media that reaches the district. We're a kind of patchwork, and I would like very much to see the district go into northern Montgomery County.[36]

- **Testimony of Don DeArmon (Former Democratic Nominee State Senate D3):**

So my sense is, having campaigned in those areas, that when you start there, that Carroll, and certainly, Baltimore and Harford Counties, their orientation is much more toward a Baltimore County or a Baltimore City direction. And Frederick is increasingly, and it's – as Bob Kresslein pointed out, we're heading southeast, and our orientation is toward Montgomery County.[37]

- **Testimony of Myrna Whitworth (Democratic Chair Frederick County):**

I also understand that you and this commission are looking at two factors, diversity and national natural and political boundaries or – and I strongly believe that if you look at those, you will find that our current configuration, as others here today have indicated, makes little sense. Historic – right now, Frederick is the gateway to Western Maryland. It's the largest population center, and among Frederick County residents are those people from Urbana, who very much look south. Frederick County, many of the people here look south, go down the 270 corridor and have businesses and jobs in the Greater Washington Metropolitan area. And so, to look at Frederick and west, as well as to look at Frederick south, gives a much more natural boundary to what the Sixth Congressional District should look like.[38]

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[35] GRAC, Public Hearing Tr. at MCM000021-22.
[36] *Ibid.* at MCM000026-27.
[37] *Id.* at 31.
[38] *Id.* at MCM000032-33.

- **Testimony of Andrew Duck (Former Democratic nominee CD6):**

Frederick and Washington counties have really become part of the Washington suburbs, and I think as such, the community of interest makes it more relevant for them to be lumped with Montgomery County than with people from Harford or Baltimore County. So I think, both in terms of making it viable for someone to reach the voters, and in terms of better representing the population, it would make more sense to re-orient the district to include more of Montgomery County and less and none of Harford and Baltimore and less of Carroll, as you put those communities in with the Baltimore County area that they are naturally a part of.[39]

- **Testimony of Retired Democratic Delegate Sue Hecht:**

It's my experience that Frederick County and the greater Hagerstown area, especially along the I-270 corridor, increasingly identifies itself with the exurbia of the Washington D.C., not Baltimore City and its suburbs. Even though Frederick is in the enviable position of sitting 50 miles as an apex of both Washington and Baltimore City triangle, the more new Western Maryland residents maintain close ties with Montgomery County and D.C. area, not as much with the Baltimore. ... We've heard about the thousands of commuters that come down I-270 and Route 15, coming through Frederick. They're most of the majority -- vast majority of those folks are going to jobs in the Washington Metropolitan Area, not Baltimore. We've heard about our mass transit links that go to Washington through the [MARC], not Baltimore. Frederick is part of the Greater Washington initiative and an affiliate of the Greater Washington Board of Trade. ...
We are not included in the similar Greater Baltimore initiative. ... Frederick is part of WASHCOG, or the Washington Council of Government.[40]

- **Testimony of Elizabeth Paul (Democratic Chair, Washington County):**

[Y]ou all heard that Montgomery County is part of our district and historically that region has had close ties to the Frederick area, as well as the western counties up here, and certainly more so than upper Baltimore and Harford County which were added in 2002.

Residents of the more populated parts of the sixth district are more aligned with Washington, D.C. suburbs by transportation routes such as I-270 and the MARC Commuter Trains, by employment in the D.C. Metro area and Northern Montgomery County as opposed to Baltimore suburbs or Harford County.[41]

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[39] *Id.* at MCM000037-38.
[40] *Id.* at MCM000050-51.
[41] *Id.* at MCM000071-72.

The final testimony that I present is from Steve Shapiro. This testimony is particularly significant because Mr. Shapiro was an original plaintiff in this litigation, although he has since withdrawn.

- **Testimony of Steve Shapiro:**

Ideally, Montgomery County, with its fairly large population, would have one district entirely within its borders and share about one half of a district with an adjoining part of the state. A reasonable option to do this would be to maybe take the western third of Montgomery County and pair it with Western Maryland, which, based on history and geography, would be a reasonable situation and one that existed several decades ago. Keeping the Montgomery section about equal in size to the Western Maryland section I think would keep it from being overly dominated by the Montgomery section and, thus, would be fair to the Western Maryland residents, as well as to the Montgomery County residents.[42]

The idea of a district representing the growing communities along the I-270 corridor was also discussed in the press at the time of the redistricting process, which culminated in the 2012 referendum on the congressional plan. "'Congressional Districts 6 and 8 are drawn to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State,' the plan outline says," reported the *Herald Mail*.[43] "Maryland's congressional districts are being redrawn to conform with population changes in the 2010 census. Supporters of the changes say the new map reflects a demographic shift along the Interstate 270 corridor," reported the Associated Press.[44] "The MARC's Brunswick line, which runs from Washington's Union Station to Martinsburg, W.Va., has seen a 34 percent increase in train ridership in the past decade, and there are roughly 10,000 more cars per day on Interstate 270 than 10 years ago. Nowhere is the growth more apparent than in the rolling developments in Urbana, the first exit off I-270 in Frederick County," reported the *Baltimore Sun*.[45]

Irrespective of whether they reviewed statistical data, members of the Maryland legislature, like the citizens who testified in the public hearings, were familiar with the I-270 corridor and the role it played for commuting, jobs, and culture in the state. For example, Senate President Mike Miller, arguably the most influential member of the General Assembly, was asked in deposition if he had reviewed "any data concerning commuting patterns on I-270 before you voted on the proposed congressional map in 2011?"[46] Miller responded that "I drive it every second week or so. I spoke to the people in Frederick last week. ... Plus I'm familiar with economic development part of the state. My job is to bring jobs to the state and improve economic development, and I-

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[42] *Id.* at MCM000217.

[43] Heather Keels, "Proposed Congressional Redistricting Plan Has Local Republicans Crying Foul," *Herald Mail*, October 8, 2011, http://articles.herald-mail.com/2011-10-08/news/30259492_1_congressional-districts-state-legislative-districts-special-session.

[44] Brian Witte, "O'Malley Releases Congressional Redistricting Plan," Associated Press, October 11, 2011, available at, e.g. http://baltimore.cbslocal.com/2011/10/15/aide-omalley-redistricting-map-set-for-release/.

[45] Bret Lake, "Congressional Redistricting: Democrats Eyeing Western Maryland," *Baltimore Sun*, August 6, 2011, http://www.baltimoresun.com/news/maryland/.

[46] Miller Depo. Tr. at 19:11-13.

270 is very important to link areas that need economic development within the Washington Metropolitan Area."[47]

VII. THE MORRISON REPORT SUFFERS FROM SERIOUS ERRORS OF SELECTION AND INTERPRETATION.

The one-sided and erroneous approach to the evidence that Dr. Morrison uses in his report for this litigation further reflects its confirmation bias as well as a lack of essential knowledge of Maryland circumstances. The following are examples of such issues:

1) **Frostburg State University**. Dr. Morrison cites this University in Allegany County to claim that "western Maryland has its own institutions of higher learning." He fails to recognize that Frostburg is a cosmopolitan institution that draws students from across the state of Maryland, from out of state, and even from other countries, as indicated in Table 6.

2) **The Maryland Symphony Orchestra**. Morrison cites this orchestra located in Hagerstown, Maryland in Washington County as another example of the distinction between Western Maryland and the Washington suburbs. He cites no evidence in support of his claim that the orchestra has an audience primarily from Western Maryland and the claim is refuted by the Orchestra itself. According to the Orchestra's website: "It is one of only four professional symphony orchestras in Maryland and audience members from South Central Pennsylvania, West Virginia's Eastern Panhandle, the Shenandoah Valley of Virginia and *the Baltimore-Washington Metropolitan area* are drawn to concerts held at the historic Maryland Theatre in downtown Hagerstown."[48]

3) **Local Television**. While Dr. Morrison admits that "some Western Maryland residents can view local affiliates from Washington, D. C. or Baltimore," he goes on to state that there are also local stations in Hagerstown.[49] However, he fails to note that Frederick and Garrett counties also have local TV stations WFPT TV in Frederick and WGPT TV in Oakland. He incorrectly identifies WWPX as located in Hagerstown, when it is actually located in Martinsburg, West Virginia. The station's website notes that "a sale to Benchmark Communications (which would have converted the station to a CBS affiliate for Winchester, Virginia and Hagerstown, Maryland under the WUSQ-TV callsign) fell through."[50]

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[47] Miller Depo. Tr. at 19:14-22.

[48] Maryland Symphony Orchestra, "About the MSO," http://www.marylandsymphony.org/about-mso (emphasis added).

[49] Morrison Report at 8 n.6.

[50] *WWPX-TV*, https://www.revolvy.com/topic/WWPX&item_type=topic.

TABLE 6
GEOGRAPHIC DISTRIBUTION OF STUDENTS AT FROSTBURG STATE UNIVERSITY

County	Number	Percent
Allegany County	919	17.0%
Garrett County	192	3.5%
Washington County	375	6.9%
Frederick County	360	6.7%
Carroll County	146	2.7%
Montgomery County	461	8.5%
Prince George's County	581	10.7%
Baltimore County	360	6.7%
Baltimore City	209	3.9%
Anne Arundel County	258	4.8%
Other Maryland Counties	882	16.3%
Out-of-State	551	10.2%
Foreign	116	2.1%
TOTAL	5,410	
Source: "Enrollment Geography, Fall 2013," received from Maryland Higher Education Commission, 2 June 2015.		

4) **Local Newspapers**. Dr. Morrison again admits that "individuals in western Maryland subscribe to *The Washington Post* and *Baltimore Sun*."[51] He goes on to state that "western Maryland has its own daily newspapers," citing *The Herald-Mail* in Hagerstown.[52] Frederick, however, also has its own local newspaper, the *Frederick News-Post*; as does Allegany County, the *Cumberland Times-News*; and Garrett County, *The Republican* in Oakland. Thus, the local press actually divides rather than unites the counties associated with western Maryland.

5) **Common Media Market**: In examining media, Dr. Morrison fails to take into account the testimony of several witnesses at the public hearings who stated that western Maryland and Montgomery County share a common greater-Washington, DC media market, whereas Carroll, Harford, and Baltimore counties are oriented to the greater-Baltimore media market. For example, Elizabeth Paul, Chair of the Washington County Democratic Central Committee testified that, "We are linked by media outlets including print and television. For example, many more people subscribe to the Washington Post than the Baltimore Sun in this area. The TV markets include us in the Greater D.C. Metro area and not Baltimore, unlike Carroll, upper Baltimore and Harford."[53] Similarly, Bob Kresalein a resident of Frederick County testified that, "Those of us here in Frederick County and west primarily in our media [*sic*] from Washington, D.C. market, if you look — where, if you've got a satellite T.V., you're pretty much getting channels 4, 9, and 7. That's what you're going to get your local news. Many more people get the Washington Post than the Baltimore Sun."[54]

Data on media markets in Maryland confirms this testimony. According to the advertising company, Truck Ads, the Washington media market includes the counties of Montgomery, Frederick, Washington, and Allegany, encompassing every county within the 2011 CD6, except for the thinly populated Garrett County. Echo Star Knowledge Base, designates these same counties as part of the Washington, DC TV Market, but not the counties of Carroll, Harford, and Baltimore, which it designates as part of the Baltimore TV market.[55]

6) **The Secession Movement**. Dr. Morrison devotes two pages to describing a secession movement in western Maryland as indicative of the distinctiveness of the area of the state. Yet Dr. Morrison never demonstrates that this movement represents anything more than a small number of extremists who do not represent the people of western Maryland. According to the CBS News story that Dr. Morrison cites in his report, "more than a thousand have signed petitions" for secession. That number amounts to less than one-sixth of one percent of the total population of the five counties involved, which are home to more than 660,000 people.[56]

7) **The Referendum Vote on the 2011 Congressional Redistricting Plan**. Dr. Morrison discusses the miniscule secession movement for two pages of his report, but ignores the fact that the voters of the counties in CD6 had an opportunity to vote up or down on Maryland's 2011

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[51] Morrison Report at 8 n.7.
[52] *Ibid.*
[53] GRAC, Public Hearing Tr. at MCM0000072-73
[54] GRAC, Public Hearing Tr. at MCM0000023.
[55] Truck Ads, "Designated Market Map," http://www.truckads.com/Designated_Market/Washington_DC.htm#map; Echo Star Knowledge Base, "TV Markets," http://www.dishuser.com/TVMarkets/.
[56] Mary Bubula, "Some Western Md. Residents Want to Form Their Own State," *CBS Baltimore*, February 10, 2014, http://baltimore.cbslocal.com/2014/02/10/some-western-md-residents-want-to-form-their-own-state/.

congressional redistricting plan, which opponents petitioned for referendum in the general election of 2012. As indicated in Table 7, voters in 4 of the 5 counties included in CD6 voted in favor of the adopted congressional plan. Voters rejected the plan only in Garrett County, which cast just 11,616 votes in the referendum election and rejected the plan by just 770 votes. Voters in the other western Maryland counties of Allegany, Washington, and Frederick voted in favor of the plan.

It is most unusual for a state's redistricting plan to be tested by a vote of the people in a referendum. This vote cuts to the heart of plaintiffs' claim that the legislature sought to retaliate against the people of western Maryland in crafting Congressional District 6. If the voters in western Maryland believed that the legislature had retailed against them, the referendum gave the voters in the opportunity to express their displeasure directly and concretely. *They could have voted down the plan. They did not.* Only the very lightly populated Garrett County voted against it, by a small margin. Because of its low population, in any possibly configured congressional district, Garrett County was to be at the mercy of the other counties in congressional elections.

8) **The Rural Composition of Prior CD6**. The Morrison Report as well as the McDonald Report characterizes the prior CD6 as comprising counties that are largely rural in their demography. However, as indicated in Table 8, according to "objective" U.S. Census classifications, these counties were predominantly urban, not rural. The only exception is the very lightly populated Garrett County. It is true that these counties do not contain any major cities like Baltimore, but neither does Montgomery County.

As these examples indicate, Dr. Morrison's analysis is not "objective," but is guided by his own assumptions about what counts demographically for people as a community of interest and how to interpret the information that he does present. Dr. McDonald has criticized such a subjective approach to using demographic data for defining communities of interest, explaining that "'identifying' neighborhoods using demographic data . . .*requires making assumptions about what demographic characteristics are most relevant to community*."[57] Dr. McDonald instead advocates the inference of "neighborhoods and communities from common patterns of activity and/or shared activities," through data collection that would "identify travel patterns[and] land usage patterns." An analysis of travel patterns is provided in Section VI of this report above.[58]

[57] Altman & McDonald, "Redistricting Principles for the 21st Century" at 1196 (emphasis added).
[58] *Ibid.* at 1195-96.

TABLE 7
RESULTS OF 2012 REFERENDUM ON ADOPTED CONGRESSIONAL REDISTRICTING PLAN, 4 COUNTIES IN CD6

County	Number For Plan	Number Against Plan	Percent For Plan
Allegany County	13,250	12,671	51.1%
Garrett County	5,423	6,193	46.7%
Washington County	28,414	27,776	50.7%
Frederick County	59,538	45,863	56.5%
Montgomery County	261,122	139,546	65.2%

Source: Maryland State Board of Elections, "Congressional Districting Plan, November 2012, http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html.

TABLE 8
URBAN PERCENTAGE OF POPULATION IN COUNTIES IN CD6 UNDER MARYLAND'S 2001 CONGRESSIONAL PLAN

County	Total Population	Urban Population	Percent Urban
Allegany County	75,087	54,624	72.7%
Garrett County	30,097	4,846	16.1%
Washington County	147,430	103,953	70.3%
Frederick County	233,385	174,554	74.8%
Carroll County	167,134	101,106	60.5%
TOTAL	653,133	434,078	66.5%
U.S. Census, 2010, URBAN AND RURAL Universe: Total population, 2010 Census Summary File 1.			

VIII. THE MORRISON REPORT IS BASED ON A FUNDAMENTAL MISUNDERSTANDING BETWEEN THE SOCIO-ECONOMIC CHARACTERISTICS OF CONSTITUENTS AND REPRESENTATION

Both Dr. Morrison and Dr. McDonald claim that major differences between Montgomery County and the four more western counties in adopted 2011 CD6 are socio-economic. A series of tables that Dr. Morrison highlights in his report show that residents in western Maryland have relatively high poverty and unemployment rates, and low incomes and levels of educational attainment. As shown in Dr. Morrison's tables, the residents are also heavily dependent on welfare assistance programs such as food stamps and Medicaid. But Dr. Morrison's analysis stops here. He does not analyze whether grouping such commonalities translate into effective representation for persons sharing these socio-economic disadvantages.

Tables 9 to 11 below examine key votes by Roscoe Bartlett, the representative from the prior CD6, on education, welfare, employment, and poverty issues that affect the lives of persons who share the socio-economic characteristics of western Maryland. The results reported in these Tables demonstrate that Representative Bartlett voted no on the key programs that would benefit persons of lower socio-economic standing. Representative Bartlett's no votes cannot be explained by party affiliation given that in most of these votes Bartlett was out of line with the great majority of voters in the House of Representatives.[59]

[59] The source of key votes is VoteSmart, Roscoe Bartlett's Voting Records, https://votesmart.org/candidate/key-votes/26891/roscoe-bartlett#.WQk1DRPyvIU.

The point is that economic statistics do not speak for themselves in identifying "communities of interest." The voters of former CD6 continued to elect Roscoe Bartlett regardless of the record I note below, and I am not criticizing that choice in any way. However, it is further evidence that communities may not coalesce or identify *themselves* based on certain commonalities that a demographer could point to as "objective demographic fact." Instead, any such socio-economic statistics must be analyzed and interpreted with respect to what they mean politically for disadvantaged communities in a congressional district.

TABLE 9
KEY VOTES ON EDUCATION, REPRESENTATIVE BARTLETT

Bill	Central Provisions	Bartlett	House Vote
Student Loan Lenders & Grants 2007 HR2699	Increases Pell Grants and lowers interest rates on student loans, allows 180-day loan deferment for veterans.	No	292Y 97N
Reverse the Raid on Student Aid 2007 H Amend 772	Reduces student loan interest rates. Appropriations funds for graduate education of low income and Hispanic students.	No	199Y 220N
Higher Education Amendments of 2008 HR4137	Expands & increases value of Pell Grants for low income students. Requires publication of college costs.	No	380Y 49N
National Volunteer Program Expansion 2009 HR 1388	Expands opportunities for student service, especially disadvantaged youth, and expands Americorps teacher program.	No	321Y 105N

TABLE 10
KEY VOTES ON HEALTH, REPRESENTATIVE BARTLETT

Bill	Central Provisions	Bartlett	House Vote
Extension of Funding for Transitional Medical Assistance and Abstinence Education 2007 S1701	Extends Medicaid coverage for families with increased earnings up to 185 percent above poverty level, continues abstinence education.	No	291Y 126N
State Children's Health Insurance Program (CHIP) Reauthorization 2007 HR 976	Appropriations for the Children's Health Insurance (CHIP) program.	No	265Y 159N
Medicare Bill 2008 HR 6331	Expands Medicare benefits, especially for low-income seniors.	No	355Y 59N
Medicaid Extensions & Changes 2008 HR 5613	Prevents certain Medicaid regulations from being changed until April 1, 2009, including regulations for the Children's Health Insurance Program, graduate medical education, optional case management services, outpatient hospital services, and provider taxes.	No	349Y 62N
Children's Health Insurance Program Reauthorization and Expansion 2009 HR 2	Expands coverage of CHIP program. Prohibits aid to undocumented immigrants. Raises cigarette tax for funding.	No	289Y 139N

TABLE 11
KEY VOTES ON UNEMPLOYMENT AND PUBLIC ASSISTANCE, REPRESENTATIVE BARTLETT

Bill	Central Provisions	Bartlett	House Vote
Section 8 Voucher Adjustments Act 2007 HR 1851	Improves access to housing assistance for low income families.	No	333Y 83N
Farm, Nutrition, & Energy Act 2007 HR 2419	Increases spending on certain forms of agricultural assistance, extends selected agricultural assistance programs until 2012, provides funding for the purchase of certain foods for domestic nutrition programs, lowers income tax credits for ethanol producers,	No	231Y 191N
Emergency Extended Unemployment Compensation Act 2008 HR 5749	Allows states to enter into an agreement with the federal government to extend unemployment compensation for individuals who have already received the maximum regular compensation under state law.	No	274Y 137N
Medicaid Extensions & Changes 2008 HR 5613	Prevents certain Medicaid regulations from being changed until April 1, 2009, including regulations for the Children's Health Insurance Program, graduate medical education, optional case management services, outpatient hospital services, and provider taxes.	No	349Y 62N
Unemployment Benefits Extension 2010 HR 4851	Extends unemployment benefits.	No	289Y 112N

IX. THE RELIANCE ON VOTE DILUTION ANALYSIS UNDER THE VOTING RIGHTS ACT IN DR. MCDONALD'S REPORT IS MISPLACED

In his report, Dr. McDonald purports to apply standard vote dilution analysis under the Voting Rights Act to analyze alleged partisan gerrymandering in CD6, identifying his methodology as "[t]he approach typically used in voting rights litigation."[60] There are several problems with this approach. Dr. McDonald never explains why standards developed for protected minority groups under the Voting Rights Acts should be applied to political partisans. Unlike racial groups, there is no reliable way to identify partisan groups. Party registration or identification is a highly imperfect form of identification because party registration does not assure voting for the party in any given election. For example, Dr. McDonald's own survey data presented on page 8 of his report indicated that only 69 percent of self-identified Democrats indicated an intent to vote for Democratic candidate John Delaney in the 2012 congressional election in CD6 and only 64 percent of self-identified Republicans indicated an intent to vote for Republican candidate Roscoe Bartlett. Moreover, as of the general election of 2016, 23 percent of registered voters in CD6 were not registered as either Democrats or Republicans.[61] Dr. McDonald's survey data indicates no clear party preference in voting for this group. Their political partisan loyalties regarding Maryland's two major parties defy any clear definition.

Unlike racial identifications, people change their party affiliations. A study by the Pew Research Center found that identification as an independent serves as a transition for people moving in and out of identification as Republicans or Democrats. "The recent changes in partisan identification," the study found, "serve as a reminder that affiliation with a party is an attitude, one which can and does change. Previous research has shown that few people switch immediately from Republican to Democratic identification or vice versa. Most of the movement is from independents who assume a party label or from partisans who no longer identify with their former party." The study found that 72 percent of independents had at one time identified as a Democrat or Republican, or both.[62]

Even more unstable than changes in party identification are shifts in party voting, which can change according to the issues and personalities presented by given elections. Consider, for example, voters in Washington County, which was entirely contained within CD6 both in the 2001 and the 2011 redistricting plans. As indicated in Table 12 political loyalties in congressional elections in Washington County shifted from the presidential election year of 2008 to the presidential election year of 2012. In 2008, the Republican congressional candidate Roscoe Bartlett prevailed in Washington County with 57.1 percent of the two-party vote, whereas in 2012, Bartlett lost Washington County with 49.3 percent of the two-party vote. Both years were presidential election years, with the same Democratic candidate on the ticket. So, should

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[60] McDonald Report at 3.

[61] *Ibid.* at 3, 8; Maryland State Board of Elections, "Turnout by Party and Congressional District, 2016," http://www.elections.state.md.us/elections/2016/turnout/general/Official%20by%20Party%20and%20Congressional.pdf.

[62] Pew Research Center, "Trends in Party Affiliation," September 23, 2010, http://www.people-press.org/2010/09/23/section-3-trends-in-party-affiliation/.

Washington County be considered a Democratic or a Republican County? Its racial composition can be objectively determined through Census data, but not its partisan composition.

TABLE 12
PARTISAN VOTING IN WASHINGTON COUNTY, CONGRESSIONAL ELECTIONS OF 2008 AND 2012

Election	Vote For Democratic Candidate	Vote For Republican Candidate	Percent Republican
2012	29,381	28,565	49.3%
2008	24,277	32,278	57.1%
Source: Maryland State Board of Election, 2008 and 2012 General Elections, http://elections.state.md.us/elections/2008/results/general/gen_detail_results_2008_4_BOT00806.html; http://elections.state.md.us/elections/2012/results/general/gen_detail_results_2012_4_BOT00806.html.			

In addition, Dr. McDonald's analysis omits a crucial component of voting rights analysis, an examination of the totality of circumstances facing the protected racial group. A voting rights analysis considers whether, under the "totality of circumstances," an electoral system interacts with social and historical conditions to cause an inequality in the political process. The United States Department of Justice, in explaining how litigation is conducted under the Voting Rights Act, highlights the consideration of the "totality of circumstances" as follows:

"In 1982, Congress extended certain provisions of the Act such as Section 5 that were set to expire, and added protections for voters who required assistance in voting. At the same time, it examined the history of litigation under Section 2 since 1965 and concluded that Section 2 should be amended to provide that a plaintiff could establish a violation of the section if the evidence established that, in the context of the "totality of the circumstance of the local electoral process," the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process."[63]

[63] United States Department of Justice, Section 2 of the Voting Rights Act, https://www.justice.gov/crt/section-2-voting-rights-act.

In his *Backus* deposition, Dr. McDonald recognized that examination of the totality of the circumstances is an essential component of the "typical" voting rights analysis:

> "Well, Section 2, in the terms of the effect prong of Gingles, is that there have to be three conditions present in order to require the drawing of an effective minority district. One, that there must be a presence of racially polarized voting. One, that it's possible to draw the district in a compact manner. And thirdly, what's known as the totality of the circumstances. It's a number of other factors outside the electoral system. Essentially, they're about the past history of discrimination within the jurisdiction."[64]

While Dr. McDonald asserts that his analysis in this litigation is based in the typical voting rights analysis, he provides no such totality analysis in his current report. He has not demonstrated that Maryland has a history of officially discriminating against Republicans or whether as a result of any alleged discrimination Republicans suffer disadvantages relative to Democrats in socio-economic conditions such as income, poverty, education, housing, and health.

Without scrutiny of the totality of circumstances, Dr. McDonald's standard would lead to a violation whenever the ability of a partisan group (however defined) "to elect a candidate of their choice was diminished by district lines that had an effect of diluting their vote." By that standard, unless all district lines are frozen in place with respect to their partisan leanings, virtually every redistricting plan would exhibit vote dilution.

Consider, for example, the case of the swing state of Pennsylvania. Barack Obama won Pennsylvania with 52.7 percent of the two-party vote in 2012 and the state was closely divided in 2016, with Trump winning 50.4 percent of the two-party vote. Yet under a plan drawn by a Republican legislature, in 2012 Republicans won 13 U. S. House seats in Pennsylvania (72%), compared to only 5 won by Democrats (28%). In 2016, Republicans again won 13 U. S. House seats in Pennsylvania (72%), compared to only 5 won by Democrats (28%). An application of Dr. McDonald's voting rights standard to the partisan alignment in Pennsylvania would preclude a more equitable redistricting of House seats, because any such redistricting would require diluting the votes of Republicans in several of the current districts.

X. DR. MCDONALD'S REPORT CONTRADICTS HIS SCHOLARSHIP AND PRIOR TESTIMONY

Dr. McDonald purports to be assessing the intent of Maryland legislators "by examining how well the Sixth Congressional District followed traditional redistricting principles of minimizing county splits and compactness."[65] This, however, is not a meaningful standard. Dr. McDonald's own scholarship indicates that adherence to so-called "traditional redistricting principles" is not a "hedge" against gerrymandering:

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[64] McDonald Dep. at 57:22-25, 58:1-8, *Backus v. South Carolina*, No. 3:11-03120 (D.S.C. Feb. 27, 2012), ECF No. 158.

[65] McDonald Report at 4.

> "Some posit that traditional redistricting principles can act as a hedge against gerrymandering. One should be cautious, however, about putting one's faith in traditional redistricting principles to produce politically neutral outcomes. Chief Justice Brennan pessimistically noted that following traditional criteria, such as drawing pleasing shapes, is a not a gerrymandering cure, stating that, 'this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results' . . . And, as the next section describes, facially neutral criteria such as geographic compactness are likely to systematically favor one party."[66]

In this same article, Dr. McDonald further notes that there are many purported "traditional redistricting principles," beyond minimizing county splits and compactness: "population equality, contiguity, compactness, respect for existing political boundaries, respect for communities of interest, preservation of district cores, and nesting of districts."[67] In his *Backus* deposition Dr. McDonald states that, "All of these traditional redistricting principles could be or are indicators. They're not by themselves determinative."[68]

In addition, Dr. McDonald states that compactness is not a coherent standard by which to judge districts: "Compactness refers to the shape of a district, but is formally ill-defined. Scholars have proposed over fifty compactness measures, which have not resulted in clarity, since these measures conflict and can be manipulated."[69] Dr. McDonald also criticizes the use of compactness criteria because they have an inherent bias to favor Republicans: "Furthermore, computation-intensive analysis of process measures, enabled by computing advances, has identified potential biases–such as the tendency of compactness criteria to advantage the Republican party, because its support tends to be more evenly distributed geographically."[70] Similarly, Jowei Chen and Jonathan Rodden examined "automated districting simulations based on precinct-level 2000 presidential election results in several states."[71] They found that, "results illustrate a strong relationship between the geographic concentration of Democratic voters and electoral bias favoring Republicans."[72]

In his scholarship, Dr. McDonald stresses the importance of creating competitive districts. "There is also a greater issue of accountability. A legislature composed solely of uncompetitive districts is not accountable to the people. ... Without the fear of defeat, majority legislative parties are not responsive to the needs of the nation or their state; they are at best responsive to their base. Restoring accountability of incumbent members through competition within their districts will encourage accountability of national and state parties, and thus uphold the principles of voter choice that are necessary for a functioning democracy to work."[73]

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[66] Altman & McDonald "Redistricting Principles for the 21st Century," p. 1187.
[67] *Ibid.*, pp.1189-1190.
[68] McDonald Dep. at 38:22-25, *Backus v. South Carolina*, No. 3:11-03120 (D.S.C. Feb. 27, 2012), ECF No. 158.
[69] Altman and McDonald, "Redistricting Principles for the 21st Century," p. 1190.
[70] *Ibid.*, pp. 1195.
[71] Jowei Chen and Jonathan Rodden, "Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures," 8 *Quarterly Journal of Political Science* 239, 240 (2013).
[72] *Ibid.*
[73] Michael P. McDonald, "Redistricting and Competitive Districts," in *Electoral Competition and American Politics* 241 (Michael P. McDonald and John Samples, eds., 2006).

The three co-authors of a 2014 article in the Journal of Elections, concluded that "[c]ompetitive campaigns have been found to increase citizens' participation, engagement and learning."[74] These scholars found that "competitive elections have positive effects that endure for at least a year beyond the campaign season, reinforcing the idea that political competition plays a robust role in American representative democracy."[75]

However, Dr. McDonald fails to consider the competitiveness criteria in his evaluation of CD6 in Maryland, even though the Maryland legislature created CD6 as a competitive district. Legislators acknowledged the goal of a competitive CD6 at the time of the redistricting process. According to Democratic State Senator Rich Madaleno, "If you go with a competitive western Maryland district, the way that works is clearly that district comes further into Montgomery County, substantially into Montgomery County. Which historically that district did have. If you remember Congresswoman Byron, Beverly Byron, and her husband before her that district comprised roughly half of Montgomery County at one time. So, we are used to being associated with a western Maryland District."[76] State House Speaker Mike Busch said, "I think the numbers will show that it makes it [CD6] pretty competitive."[77]

The Cook Political Report in 2012 included Maryland's CD6 among its competitive U.S. House districts, rating it a narrow Democrat +2 percentage points. Cook calculates such ratings by comparing the district's average Democratic or Republican Party share of the two-party presidential vote in two presidential contests to the national average. Cook said that the district was "likely Democratic," and the *New York Times* evaluation rated it as "leans Democratic."[78] The average Republican vote across all statewide elections held in this district from 2012 to 2016 is 47 percent (Table 1), which places it within Dr. McDonald's "competitive" range of 45 to 55 percent.[79]

The district also emerges as competitive, although favoring Democrats, under Dr. McDonald's methodology of the "normalized presidential vote." He calculates this measure by subtracting from the two-party presidential vote in the district the two- party presidential vote nationwide. He says "I then add back 50 percent to conceptualize district competitiveness around 50 percent."[80] In 2012 Obama won 52.7 percent of the national vote and 55.4 percent of the District 6 vote for a normalized presidential vote of 52.7 percent, well within the competitive range. In 2016 Clinton won 51.7 percent of the national vote and 56.2 percent of the District 6 vote for a normalized presidential vote of 54.5 percent, also within the competitive range.[81] Table 1 above indicates that Republicans overwhelmingly won CD6 in the 2014 gubernatorial election and very

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[74] Heather Evans, Michael J. Ensley, and Edward G. Carmines, "The Enduring Effects of Competitive Elections," 24 Journal of Elections, Public Opinion, and Parties, 455 (2014).
[75] *Ibid.* at 455.
[76] Video at http://www.marylandjuice.com/2011/09/2012-redistricting-sen-rich-madaleno.html#more.
[77] Associated Press, "6th Congressional District Would Include More of Montgomery County," *Daily Record*, October 4, 2011, http://thedailyrecord.com/2011/10/04/6th-congressional-district-would-include-more-of-montgomery-county/.
[78] Cook Political Report, "2012 Competitive House Race Chart," http://cookpolitical.com/archive/chart/house/race-ratings/2012-07-26_14-08-01; Ballotpedia, "Maryland's Sixth Congressional District Elections, 2012," https://ballotped..a.org/Maryland%27s_6th_Congressional_District_elections,_2012.
[79] McDonald, "Redistricting and Competitive Districts" at 224.
[80] *Ibid.*
[81] *Id.* at 223.

narrowly in the 2014 election for Attorney General. In the 2014 congressional election, John Delany came with just 1,525 votes of losing CD 6 (fewer than 1 percent of votes cast), despite the advantages of incumbency.[82]

Consistent with Dr. McDonald's assessment of competitive districts, CD6 in 2012 elected the moderate Democrat John Delaney, rather than the outlier Republican Roscoe Bartlett. Delaney won the Democratic nomination by defeating the more liberal Garagiola, a sitting State Senator.[83] According to an analysis by GovTrack, Bartlett was among the 25 most conservative members of the U. S. House of Representatives in his last term. In contrast, GovTrack ranked Delaney in 2015 as only the 160th most liberal member of the House, making him the 34th most conservative Democrat out of 192 fellow Democrats.[84] As Dr. McDonald has concluded, in his scholarship, "District competition also affects other aspects of politics, such as the degree of political polarization in Congress, as 'more competitive districts tend to produce more moderate candidates.'"[85]

Dr. McDonald also fails to note that Delaney was not elected with the votes of Montgomery County only, but, as indicated in Table 13, he also won Washington County and the parts of Frederick County included in CD6. Table 13 also indicates that when combined, Delaney carried the four Maryland counties wholly or partially in CD6 under both maps. In addition, as indicated in Table 14, there was no diminution in congressional turnout in the three western Maryland counties included entirely within CD6, when the congressional election of 2012 is compared to the congressional election in the prior presidential year of 2008 under the 2001 congressional redistricting plan. Rather, turnout increased in each county.

[82] http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_00806.html

[83] John Fritze, "Democrats Fall in Behind Outsider Delaney," *Baltimore Sun*, April 4, 2012, http://www.baltimoresun.com/news/breaking/bs-md-sixth-battle-begins-20120404-story.html

[84] Govtrack, "Roscoe Bartlett," https://www.govtrack.us/congress/members/roscoe_bartlett/400017; "John Delaney, https://www.govtrack.us/congress/members/john_delaney/412544/report-card/2015.

[85] McDonald, "Redistricting and Competitive Districts," p. 233.

TABLE 13
COUNTY BREAKDOWN OF VOTE, 2012 GENERAL ELECTION FOR U.S. CONGRESS, WESTERN COUNTIES CD6

County	**John Delaney (D)**	**Roscoe Bartlett (R)**	**Percent Delaney**
Allegany	11,966	15,730	43.2%
Frederick	31,079	20,148	60.7%
Garrett	3,864	8,445	31.4%
Washington	29,381	28,565	50.7%
Total Western Maryland	**76,290**	**72,888**	**51.1%**
Source: Maryland State Board of Elections, http://www.elections.state.md.us/elections/2012/results/general/gen_detail_results_2012_4_BOT00806.html.			

TABLE 14
COUNTY BREAKDOWN OF CHANGES IN VOTER TURNOUT, 2008 AND 2012 GENERAL ELECTIONS COMPARED

County	Voters 2008	Voters 2012	Percent Change
Allegany	28,190	28,761	+2.0%
Garrett	12,364	12,700	+2.7%
Washington	58,915	60,761	+3.1%
Total	99,469	102,222	+2.8%
Statewide	2,661,905	2,734,176	+2.7%
Source: Maryland State Board of Elections, 2008 General Election and 2012 General Election, http://www.elections.state.md.us/elections/2008/turnout/general/2008_Presidential_General_Congressional_District_06.html; .			

Dr. McDonald correctly indicates that it was possible to create an alternative district more favorable to Republicans than the adopted 2011 CD6. He says that the district is purportedly more compact, although Dr. McDonald has criticized the use of compactness criteria, which he says is biased toward Republicans. Moreover, there are always a myriad of alternative districts that can be created in any plan that are "better" on some selected criteria than the districts in the adopted plan. Dr. McDonald has failed to demonstrate that the alternative district would serve other legitimate redistricting purposes of the plan. The creation of the alternative district would also change the adopted plan beyond CD6 and CD8, since moving counties and precincts out of adopted CD6 would ripple across the state in the adopted plan. Dr. McDonald gave no assurance that the proposed district would respect the legitimate redistricting goals of other areas of the state, such as respecting the non-retrogression mandate of § 2 of the Voting Rights Act in Districts 4 and 7; disallowing a crossing of the Chesapeake Bay; ensuring that District 2 continued to contain all major military installations in Maryland; ensuring all incumbents continued to reside in their district; and ensuring precise mathematical population equality.

XI. DR. MCDONALD'S METHODOLOGY CANNOT ESTABLISH INTENT

Dr. McDonald's methodology is inadequate to prove that the Maryland legislature intentionally discriminated against Republican-leaning voters in CD6 for their political expression. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the U.S. Supreme Court outlined several factors that it identified as relevant to ascertaining whether legislation was enacted with intentional discriminatory intent: (1) discriminatory impact; (2) historical background; (3) the sequence of events leading up to the decision; (4) procedural or substantive deviations from the normal decision-making process; and (5) contemporaneous viewpoints expressed by the decision-makers. This methodology is consistent with the approach followed by historians in evaluating intent.

Dr. McDonald does not examine the historical background to demonstrate a history of official discrimination in Maryland against Republican-leaning voters. He does not explore the sequence of events leading to the adoption of the 2011 Maryland congressional redistricting plan. He does not evaluate the procedures for adopting the plan, including the referendum on the plan in the November 2012 general election. He does not consider the testimony at public hearings or the presentation of the GRAC to the Maryland General Assembly. He does not cite a single contemporaneous statement by anyone involved in the adoption of the congressional redistricting plan. Dr. Morrison's report, although it does examine some contemporary statements, also fails to consider most of the *Arlington Heights* elements.

Neither Dr. McDonald nor Dr. Morrison considers several possible alternative explanations for the adoption of the plan and CD6, that are separate from any intent to retaliate against voters in CD6 for their political expression. These include, for example, the creation of a community of interest, the unpacking of prior CD8, the reflection of Maryland's domination by the Democratic Party, and the response to Republican gerrymandering in other states, and the assurance that CD1 will not cross the Chesapeake Bay. All these alternative considerations will be addressed below.[86]

[86] Democratic Party has won every statewide election for national office (president and US Senate) during the past three decades. As of the time of redistricting in 2011 the Democrats held a better than 2 to 1 registration advantage

XII. DR. MCDONALD MISUNDERSTANDS MARYLAND'S REPORTING OF ELECTION RESULTS

Dr. McDonald describes as follows his procedure for allocating statewide election results to CD6 from 2012 to 2016:

> "I did some estimation to construct statewide election results within the adopted Sixth Congressional District. Maryland reports complete election results by county *and election results for early voters only by precinct*. Election results are thus available for Allegany, Garrett, and Washington counties, which are entirely contained within the Sixth Congressional District. I estimated precinct-level Election Day candidate tallies for the parts of the Sixth Congressional District contained in Frederick and Montgomery counties. I apportioned the county total Election Day vote for the candidates by the proportion of the early vote a candidate received within a given precinct, relative to the county. I added the known early vote total and estimated Election Day vote total for each precinct, and sum the votes across Frederick and Montgomery counties' precincts assigned to the Sixth Congressional District. I then summed the votes for all counties to produce district-wide totals for the Sixth Congressional District."[87]

However, as indicated above and demonstrated by the precinct results excerpt for the 2012 general election, reproduced exactly from the Maryland State Board of Elections website without modification, Maryland does not report not early votes by precinct. Instead, Maryland reports by precinct only election night votes, that is, votes cast on Election Day. This excerpt clearly shows that the only results reported by the Board of Elections by precinct are for the election night votes and not as Dr. McDonald indicates for early votes. **Thus, Dr. McDonald's fails to accurately reflect** how Maryland reports election results and is estimating procedure is corresponding flawed by this error.

EXCERPT FROM MARYLAND STATE BOARD OF ELECTIONS PRECINCT RESULTS

2012 General Election,
http://www.elections.state.md.us/elections/2012/election_data/index.html,
All_By_Precinct_2012_General

"County","Election District","Election Precinct","Cong","Legs","Candidate Name","Party","Office Name","Office District","Winner","Write-In?","Election Night Votes","Election Night Votes Against"
"01","001","000","06","01C","Barack Obama","DEM","President - Vice Pres","","Y","","66",""
"01","001","000","06","01C","Mitt Romney","REP","President - Vice Pres","","","","351",""

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over Republicans and have maintained that edge through the elections of 2016. http://elections.state.md.us/elections/2010/turnout/general/2010_Congressional_District.html#Dem; http://elections.state.md.us/elections/2016/turnout/general/Official%20by%20Party%20and%20County.pdf

[87] McDonald Report at 9 (emphasis added).

XIII. ALTERNATIVE EXPLANATIONS FOR THE CONFIGURING OF CD6

Both the Morrison Report and the McDonald Report are incomplete. Plaintiffs' experts fail to consider several plausible and reasonable explanations for the new configuration of CD6 that have nothing to do with any intent to retaliate against voters for their political expression.

A. Unpacking Prior CD8

One of the ways in which a district plan disadvantages a political party is through the packing of its voters into a district well beyond what is needed for election of that party's candidates. The result of packing is large numbers of wasted voters to the detriment of the party that dominates the packed districts. Adam B. Cox in his article in the Supreme Court Review explains the impact of packing, using Democratic voters as his example: "Packing Democratic voters into a small number of districts where they constitute large supermajorities ensures Democratic victories in those districts but reduces the total number of seats Democrats capture by increasing the number of wasted Democratic votes-that is, votes cast for Democrats that are either unnecessary or insufficient to win a seat."[88]

By 2008, CD8 under the 2001 redistricting plan was an overwhelmingly packed district. Plaintiffs' expert Dr. McDonald defines for districts "two competitiveness ranges, 45–55 and 48–52 percent."[89] As indicated in Table 15, congressional election results in 2008 and 2010 for CD8 under the 2001 redistricting plan were some 23 to 25 percentage points beyond McDonald's outer range for competitive districts. These results clearly showed former CD8 to be a packed district to the disadvantage of Democrats. For these two elections, the number of wasted Democratic votes is an extraordinary 264,581 votes. I am not claiming here that Democrats deliberately packed CD8 in the prior redistricting, but, as noted above, packing can be a natural result of the distribution of voters and of demographic change over time.

CD8 under the 2001 plan bordered only CD4 and CD6. CD4, which is an African-American voting rights district, was already packed with Democrats and did not present an alternative for the unpacking of CD8. That left CD6 as the reasonable alternative for unpacking CD8 and the 2011 redistricting plan did precisely that. As indicated in Table 16, the 2011 plan succeeded in substantially unpacking CD 8. For the congressional elections of 2012 and 2014, (also, one presidential and one midterm year election), the Democratic percentage in CD8 dropped by some 12 to 14 percentage points. The number of wasted votes plummeted from 264,581 to 153,362, a decline of 111,219 wasted votes.

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[88] Adam B. Cox, "Gerrymandering and Disaggregated Districts," *Supreme Court Review*, 2004 429 (2004).

[89] Michael P. McDonald, "Redistricting and Competitive Districts," in *The Marketplace of Democracy: Electoral Competition and American Politics* 224 (McDonald and Samples, eds., 2006). Similarly, Barack Obama prevailed in the 2008 presidential election with 74.5 percent of the vote, not counting absentee and provisional ballots, which statewide were more favorable to Democrats. Maryland State Board of Elections, State Precinct Reference for 2008 Election, http://www.elections.state.md.us/elections/2008/election_data/index.html.

TABLE 15
PACKING IN CD8 UNDER MARYLAND'S 2001 REDISTRICTING PLAN AND WASTED VOTES
2

Election	Democratic Votes	Republican Votes	Democratic Percentage	Wasted Democratic Votes
2008	229,740	66,351	77.6%	163,389
2010	153,613	52,421	74.6%	101,192
Total	383,353	118,772	76.3%	264,581
Source, Maryland State Board of Elections, General Elections of 2008 and 2010, http://www.elections.state.md.us/elections/2008/results/general/gen_results_2008_4_00808.html; http://www.elections.state.md.us/elections/2010/results/General/gen_results_2010_2_00808.html.				

TABLE 16
UNPACKING OF CD8 UNDER MARYLAND'S 2011 REDISTRICTING PLAN AND WASTED VOTES

Election	Democratic Votes	Republican Votes	Democratic Percentage	Wasted Democratic Votes
2012	217,531	113,033	65.8%	104,499
2014	136,722	87,859	60.9%	48,863
Total	354,254	200,892	63.8%	153,362
Source: Maryland State Board of Elections, 2012 and 2014 General Elections, http://www.elections.state.md.us/elections/2012/results/general/gen_results_2012_4_00808.html; http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_00808.html.				

B. Realizing the Democratic Majority

Maryland is one of the most Democratic-dominated states in the nation. Yet Maryland Democrats' position, holding 75 percent of congressional seats after the 2010 elections, lagged behind the percentage of congressional seats held by the dominant party in most other states that were dominated by either political party. Table 17 reports the percentage of congressional seats held after 2010—the last election before redistricting--by relatively medium-sized states like Maryland (4 to 12 congressional districts) in which one party gained at least 60 percent of the vote in the 2008 vote for president. As indicated in Table 17, Maryland's percentage of the two-party presidential vote was about comparable to other states. Yet Maryland's percentage of congressional seats was *13 percentage points below* the average percentage of congressional seats won by the respective party that controlled the redistricting process in the 5 states.

An instructive comparison is provided by Massachusetts, which has just one more congressional seat than Maryland. Democrats about equally dominate the two states. However, all 9 congressional seats in Massachusetts were held by Democrats after 2010, compared to 6 of 8 seats in Maryland.

After the 2011 redistricting Maryland was in line with other party-dominated states. As indicated in Table 18, Maryland's percentage of the two-party presidential vote was about comparable to other states; so too was its percentage of seats held by the dominant party as compared to other states. Once again Democrats held all 9 congressional seats in the comparable state of Massachusetts.[90]

C. Responding to the Nationwide Context of Congressional Redistricting

Plaintiffs' experts fail to draw the important distinction between state legislative and congressional redistricting. Each state establishes a redistricting plan that is dispositive for the seats comprising its state legislature. But the composition of the U. S. Congress reflects the results of redistricting plans by all states with more than a single representative. Thus, the context for any one state's congressional redistricting decisions includes the redistricting processes taking place in other states. Adam B. Cox explains that, "Congressional political gerrymanders pose different analytic, normative, and constitutional questions than do state legislative gerrymanders. The latter implicate the composition of the whole legislative body, while the former affect only a part."[91]

The Maryland Constitution explicitly recognizes the distinction between state legislative and congressional redistricting. The Constitution stipulates specific requirements for legislative redistricting plans, but none for congressional redistricting plans. [92]

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[90] For uncontested elections, results are imputed from presidential election results.

[91] Adam B. Cox, "Partisan Gerrymandering and Disaggregated Redistricting," *Supreme Court Review* 2004 451 (2004).

[92] The Constitution of Maryland, Article III, Section 4 specifies that "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions. There is no requirement in the constitution for congressional districts. http://msa.maryland.gov/msa/mdmanual/43const/html/const.html.

TABLE 17
DOMINANT PARTY STATES: PERCENT VOTES CONGRESS AND PRESIDENT 2008, PERCENT CONGRESSIONAL SEATS WON*

State	Dominant Party	Vote For Dominant Party 2008 President	Congressional Seats Won by Dominant Party 2010	Congressional Seats Won by Second Party 2010
Alabama	Republican	60.9%	6 (86%)	1 (14%)
Connecticut	Democrat	61.3%	5 (100%)	0 (0%)
Arkansas	Republican	60.2%	3(75%)	1(25%)
Maryland	Democrat	62.9%	6 (75%)	2 (25%)
Massachusetts	Democrat	63.2%	9 (100%)	0 (0%)
Oklahoma	Republican	65.7%	4 (75%)	1(25%)
All States		**62.4%**	**33 (87%)**	**5 (13%)**
Difference MD All States		**+0.5%**	**-12%**	**+12%**

TABLE 18
DOMINANT PARTY STATES: PERCENT VOTES CONGRESS AND PRESIDENT 2012, PERCENT CONGRESSIONAL SEATS WON*

State	Dominant Party	Vote For Dominant Party 2012 President	Congressional Seats Won by Dominant Party 2012	Congressional Seats Won by Second Party 2012
Alabama	Republican	61.2%	6 (86%)	1 (14%)
Arkansas	Republican	62.2%	4 (100%)	0 (0%)
Kansas	Republican	61.1%	4 (100%)	0 (0%)
Kentucky	Republican	61.5%	5 (83%)	1 (17%)
Maryland	Democrat	63.3%	7 (88%)	1 (12%)
Massachusetts	Democrat	61.8%	9 (100%)	0 (0%)
Oklahoma	Republican	66.8%	5 (100%)	0 (0%)
Tennessee	Republican	60.4%	7 (78%)	2 (22%)
Utah	Republican	74.6%	3 (75%)	1 (25%)
All States		**63.7%**	**50 (91%)**	**6 (11%)**
Difference MD All States		**-0.4%**	**-1%**	**+1%**

In formulating its 2011 redistricting plan for its contribution to the U. S. Congress, **Maryland's legislators faced two critical contextual issues. First, Republicans, having gained** the advantage in more state governments than Democrats during the period of post-2000 redistricting had used partisan gerrymandering to boost their representation in Congress. Second, Republicans had gained control of additional states for the post-2010 redistricting and were poised for another round of gerrymandering that would further expand their edge in congressional elections.

Plaintiffs' expert Dr. McDonald, writing in 2011, clearly explicated this political context of the Republican-dominated gerrymandering of congressional seats.

> **"The defining characteristic of the 2010** midterm elections is likely the historic success of Republican candidates in federal and state races, following back- to-back decisive victories for Democrats. A fairly clear picture has now emerged as to who will control redistricting in each state. *Republicans appear well-poised to cash in on their electoral wins by creating redistricting plans that will tilt the electoral balance for the upcoming decade in their favor in large, battleground states where partisan gerrymandering is most potent.*"[92]

> **"Republicans control 16 states,** Democrats control **six states, and the remaining** 15 states have divided government. As several political commentators, including myself, **have noted, the Republicans'** prize states include Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Texas. Democrats were stripped of their largest prize- California- by the passage of a ballot initiative in 2010 that gave control of congressional redistricting to a state legislative commission established in 2008, and they only control one state where they can greatly alter the congressional **balance of power, Illinois.** ... *Republicans were also in a great position 10 years ago.* Now, they control only three more critical states- North Carolina, Ohio, and Tennessee- than they did 10 years ago (numerically, they control more states, but **these three are the most consequential).**"[93]

Similarly, **Gary Jacobson, arguably the nation's foremost scholar of congressional** elections, found that **"Republicans enjoyed two advantages in redistricting** after the 2000 Census. First, the states that gained seats after 2000 were more Republican in their voting habits that were **the states that lost seats ... Second, Republicans controlled the redistricting process in several** of the large states that were set to lose or gain seats, and they used that control effectively to boost **their House representation."**[94] In an article published in the *Yale Law and Policy Review*, J. Gerald Hebert, the former Acting Chief of the U. S. Justice Voting Rights Section, who contributed an amicus brief on behalf of plaintiffs in earlier stages of this litigation, cites three examples of invidious partisan gerrymandering following the 2000 U.S. Census, all in Republican controlled states. "The redistricting experiences in Florida, Michigan, and Texas following the 2000 U.S. census provide compelling examples of the danger of unfettered partisan redistricting."[95]

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[92] Michael P. McDonald, "The 2010 Midterm Elections: Signs and Portents for the Decennial Redistricting," 44 *PS: Political Science and Politics* 311, 312 (2011). (emphasis added).

[94] Gary Jacobson, *The Politics of Congressional Elections*, 7th ed., (New York: Pearson, 2009), p. 10.

[95] J. Gerald Hebert and Marina K. Jenkins, "The Need for State Redistricting Reform To Rein in Partisan Gerrymandering," 29 *Yale Law and Policy Review* 543, 552 (2011).

Legislatures do not blind themselves to these realities of congressional as opposed to state legislative redistricting. To offset the large Republican advantage in more heavily populated, and in many cases, competitive states, with significant consequences for representation in Congress, it was reasonable for the Maryland legislature to make CD6 into a more competitive district for Democrats.

District 6 Republican Representative Roscoe Bartlett himself recognized during his 2012 reelection campaign that the Maryland legislature's congressional plan was not intended to retaliate against himself or his supporters. Rather, it responded to Republican gerrymandering across the nation. "*'It's not personal' Bartlett said about the redistricting plan. 'They just needed another Democrat seat. The Democrats only control, I think, six states and the District [of Columbia]. Republicans control, I think, four times that. So they had to find pick-up opportunities anywhere they could.'*"[96]

Then-state Senator Jamie Raskin, an advocate of redistricting reform, explained that the Maryland legislature could not have been expected to "unilaterally disarm," given Republican legislatures' advancement of party goals in larger competitive states when those gains were of much greater consequence on the partisan composition of congress. He cites the examples of North Carolina and Ohio, which both created supermajority districts of each party, resulting in a loss of representation for Democrats.[97]

As indicated by the report of demographer Bill Cooper, the Maryland legislature could have adopted a plan which would have given Democrats an edge in all 8 congressional districts, creating the potential for Democrats to control all congressional seats as they did in Massachusetts. Table 20, taken from the Cooper Report indicates that the alternative map contains 8 majority-Democratic districts. The Table also indicates that the 8-0 map preserves two majority African American districts.

The map included in the Cooper report demonstrates that the plan creates reasonably compact districts, given Maryland's unique geography. This further shows that there is no particular correlation between so-called "traditional redistricting principles" and the partisan composition of a redistricting plan. Dr. Morrison quotes Mr. Hawkins to the effect that incumbent Democratic members of Congress opposed such a redistricting plan even if it was more favorable to Democrats.[98] However, although incumbent members have an important influence on congressional redistricting, they are not the final decision-makers, and if the goal of the legislature had been to retaliate against Republican inclined voters in Maryland they could have done so more aggressively through an alternative redistricting plan. The 8-0 map would also maintain the cross-Bay configuration that was present in the 2002 congressional map, a violation of traditional redistricting principles rejected by the 2011 congressional map drawers even at the expense of achieving a more effective Democratic map (see Section XII.4 below).

---

[96] Evan Serpick, "The Last Stand of Roscoe Bartlett," *Baltimore Magazine*, May 2012, http://www.baltimoremagazine.com/2012/5/5/the-last-stand-of-roscoe-bartlett (emphasis added).

[97] Jamin B. Raskin, "Nonrepresentational Line-Drawing and the Universal Representational Imperative: Why Judges Should Replace Gerrymandering with Proportional Representation," *Yale Law and Policy Review*, (Winter, 2012), http://ylpr.yale.edu/inter_alia/nonrepresentational-line-drawing-and-universal-representational-imperative-why-judges.

[98] Morrison Report at 15-16.

TABLE 19
ILLUSTRATIVE DEMOCRATIC REDISTRICTING PLAN WITH 8 DEMOCRATIC DISTRICTS

District	Population	% African American 18+	Democratic Percentage President 2008
1	722,429	19.6%	54.9%
2	720,465	22.4%	52.5%
3	720,600	25.1%	61.8%
4	721,571	55.8%	79.0%
5	721,786	30.1%	57.0%
6	721,529	11.3%	56.2%
7	721,892	52.2%	72.1%
8	721,959	11.3%	62.5%

Source: Report of Bill Cooper. The Democratic percentages are slightly understated because the Harvard Archive on which the report relies, does not include the absentee and provisional votes (9.1 percent of all votes), which are more Democratic (67.1%) than the election day votes (62.5%), Maryland State Board of Elections, 2012 General Election, President, http://www.elections.state.md.us/elections/2008/results/general/gen_results_2008_4_001-.html.

D. Responding to the Goal of Realigning Congressional District 1 So That it Did Not Cross the Chesapeake Bay

The state of Maryland explicitly indicated at the time of the redistricting process that one of the goals of the congressional plan was to conform to traditional redistricting principles by reconfiguring Congressional District 1 so that it no longer crossed the Chesapeake Bay. In its presentation to the General Assembly, GRAC expressly outlined the goal of devising a plan for Congressional District 1 that, unlike the previous plan, did not cross the Chesapeake Bay. In its presentation on CD1 GRAC noted that, **"9 Eastern Shore Counties are kept together. District** no longer crosses the Chesapeake Bay into more urban areas of Anne Arundel County and instead **runs into rural portions of Carroll County."**[99] State Democratic Delegate Kathleen Dumais, one of the legislative decision-makers, in defending the 2011 congressional plan prior to the November 2012 referendum also highlighted the realignment of CD1 so that it met the goal of not crossing the Bay. In an Op Ed published on October 29, 2012, Delegate Dumais reiterated the GRAC statement on the priority of not crossing the Bay in new CD1. She wrote, **"District 1 keeps the nine** Eastern Shore counties together and no longer crosses the Chesapeake Bay into more urban areas of Anne Arundel County. Instead, it runs into rural **portions of Carroll County."**[100]

To maintain the required population for the new CD1 that did not cross the Bay, it was necessary to add in not only the population from Carroll County, which had previously been in CD6, but also the parts of Harford County and Baltimore County that were also in the prior CD6. As indicated in Table 20, taken from the Report of Bill Cooper, the amount of Anne Arundel population removed from prior CD 1 almost exactly equals the amount of population added in from Carroll County, Harford County, and Baltimore County. To assure that the new CD6 conformed to the one-person, one-vote requirement, the legislature included additional population from Montgomery County, parts of which were already in CD6 under the 2002 congressional redistricting plan. As indicated in Table 20, the transfer in and out of CD1 had no effect on racial opportunities since the areas of exchange were overwhelmingly white with very small black and Hispanic voting age populations.

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[99] GRAC "Recommended Congressional Plan."

[100] Kathleen Dumais, "Md. Congressional Map is Fair, Legal," *Baltimore Sun*, October 29, 2012, http://www.baltimoresun.com/news/opinion/oped/bs-ed-redistricting-20121029-story.html.

TABLE 20
DEMOGRAPHIC STATISTICS POPULATION TRANSFERS 2011 CONGRESSIONAL PLAN CD1

CD1	Adj. Pop	Black %	Black 18+ %	Hispanic 18+ %	NH White
Removed From Anne Arundel	107,577	4.3%	4.2%	2.5%	89.9%
Added From CD6 in Harford, Baltimore & Carroll	106,562	2.0%	1.9%	1.4%	95.0%
Source: Report of Bill Cooper.					

CONCLUSION

In sum, the reports of plaintiffs' experts fail to establish any of the key elements of their claims. Moreover, the weight of the evidence and analysis contradicts these claims. Standard methods for assessing partisan gerrymandering, including the procedure used by Dr. McDonald in prior testimony, demonstrate that Maryland's 2011 congressional redistricting plan was not a partisan gerrymander. Dr. McDonald's effort to apply the standards used in voting rights analysis, moreover, does not withstand scrutiny. Similarly, application of methodology on jobs and commuting used by Dr. Morrison in a prior challenge to Maryland's 2011 congressional plan demonstrates that the new CD6 comprises a community of interest. Citizens testifying at public hearings and the Governor's Advisory Redistricting Committee stressed these aspects of the community of interest in new CD6.

Neither Dr. Morrison nor Dr. McDonald deploy a social science methodology sufficient to establish the intent of decision-makers for the 2011 congressional plan. The supposition that decision-makers intended to retaliate against Republican-leaning voters is refuted by the failure to create a partisan gerrymander, the statement of former Representative Roscoe Bartlett, the votes of the people of western Maryland themselves, and the fact that Democrats could have created a plan that gave Democrats an edge in all 8 Maryland districts. It is additionally refuted by four alternative explanations for the crafting of the 2011 congressional districts, all of them unexamined by plaintiffs' experts. These include:

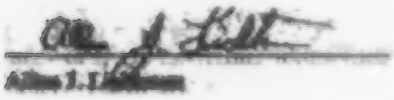
1. Unpacking Congressional District 8, with its large numbers of wasted Democratic votes.

2. Realizing the Democratic majority in Maryland in conformity with other states largely dominated by one party in national elections.

3. Responding to the nationwide context of congressional redistricting that the Maryland constitution treats differently from state legislative redistricting.

4. Meeting the criterion of not crossing the Chesapeake Bay in the drawing of new Congressional District 1.

Date: May 8, 2017



Allan J. Lichtman

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United States elections, 2014

From Wikipedia, the free encyclopedia

The **2014 United States elections** were held on Tuesday, November 4, 2014, in the middle of Democratic President Barack Obama's second term. During this midterm election year, all 435 seats in the United States House of Representatives and 36 of the 100 seats in the United States Senate were contested; along with 39 state and territorial governorships, 46 state legislatures (except Louisiana, Mississippi, New Jersey, and Virginia),[1] four territorial legislatures, and numerous state and local races. This midterm election became the most expensive in history, with total spending reaching $3.7 billion (including spending by outside entities[2]), while producing the lowest turnout since 1942.[3][4][5]

The elections saw sweeping gains by the Republican Party in the Senate, House, and in numerous gubernatorial, state, and local races. The Republicans gained control of the Senate for the first time since 2006, and increased their majority in the House.[6] The Republicans also gained two seats in governors' races.[7]

Overall, the elections resulted in the largest Republican majority in the entire country in nearly a century, with 54 seats in the Senate, 247 (56.78%) in the House, 31 governorships (62%), and 68 state legislative chambers. Moreover, Republicans gained their largest majority in the House since 1928, the largest majority in Congress overall since 1928, and the largest majority of state legislatures since 1928.[8][9][10]

Political scientist Gary C. Jacobson argues that the voters treated the election as a referendum on the economy and especially on Obama's presidency. The result was the most partisan, nationalized, and president-centered midterm election in at least 60 years.[11]

2014 United States elections

Midterm elections

Election day	November 4
Senate elections	
Seats contested	33 seats of Class II and 3 mid-term vacancies
Net change	Republican +9, Democratic −9

Map of the 2014 Senate races

Democratic hold Republican hold Republican gain

Line through state means both Senate seats were up for election

House elections	
Seats contested	All 435 seats to the 114th Congress
Net change	Republican +13, Democratic −13

Map of the 2014 House races

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Cook Partisan Voting Index

From Wikipedia, the free encyclopedia

The **Cook Partisan Voting Index**, also called **PVI**, is a measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole. *The Cook Political Report* introduced the PVI in August 1997 to better gauge the competitiveness of each district using the 1992 and 1996 presidential elections as a baseline.[1] The index is based on analysis by the Center for Voting and Democracy (now FairVote) for its July 1997 *Monopoly Politics* report.[2]

Map by state (After the 2016 election)

Map by 115th House district (After 2016 Election)

Contents

- 1 Calculation
- 2 Format
- 3 List of PVIs
  - 3.1 Extremes and trends
  - 3.2 By congressional district
  - 3.3 By state
- 4 See also
- 5 References
- 6 External links

Calculation

PVIs are calculated by comparing the district's average Democratic or Republican Party's share of the two-party presidential vote in the past two presidential elections to the nation's average share of the same. The national average for 2004 and 2008 was 51.2% Democratic to 48.8% Republican.[1] For example, in Alaska's at-large congressional district, the Republican candidate won 63% and 61% of the two-party share in the 2004 and 2008 presidential elections, respectively. Comparing the average of these two results (62%) against the average national share (49%), this district has voted 13 percentage points more Republican than the country as a whole, or R+13.

Prior to its April 2009 update, the PVI formula was calculated by comparing district-level results for the past two presidential elections to nationwide results for the most recent election. David Nir of the Swing State Project advocated a change to the new formula, and Charlie Cook agreed, wanting an "apples to apples" comparison.[3]

JOINT APPENDIX VOL 4

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

JOINT APPENDIX
VOLUME IV OF V (JA880 – JA1163)

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Appeal Docketed Dec. 6, 2018
Jurisdiction Postponed Jan. 4, 2019

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REDISTRICTING 2012 | By David Wasserman, October 11, 2012

Introducing the 2012 Cook Political Report Partisan Voter Index

The Cook Political Report is pleased to introduce our new 2012 Partisan Voter Index (PVI) for all 435 newly redrawn Congressional districts in the country, compiled especially for the *Report* by POLIDATA©. First introduced in 1997, the Cook PVI measures how each district performs at the presidential level compared to the nation as a whole. Up until this week, we had used preliminary PVI estimates to gauge the competitiveness of newly drawn seats. But this much more complete data set provides a powerful tool to compare today's array of districts with that of cycles past, view the partisan rank order of districts, and determine redistricting's winners and losers.

Unfortunately for Democrats, this year's index tells a dire story of what can happen when a party suffers an ugly election cycle right before redistricting. Democrats couldn't have picked a worse year to than 2010 to get clobbered: they lost not only 63 House seats but also more than 680 state legislative seats – empowering Republicans to draw ten-year maps in four times as many districts as Democrats. As a result, thanks to effective GOP cartography, **the number of "strong" Republican seats has jumped from 182 to 190 and the number of "strong" Democratic seats has fallen from 150 to 146. Meanwhile, the number of "swing" seats has fallen below 100 for the first time, from 104 to 99.**

If both parties hold all their "strong" districts, **Democrats would now need to win 73 percent of all "swing" districts to achieve a majority** – a very difficult feat even in a "wave" year, something 2012 does not appear to be. It also doesn't help Democrats that of the 99 "swing seats" (those between D+5 and R+5 in the PVI), 56 lean slightly to Republicans while just 43 lean slightly to Democrats. If every single seat elected a member consistent with its PVI score, there would be 246 Republicans and 189 Democrats, not far off from the current count in the House. **This suggests that in a "neutral" year, Democrats could win just as many popular votes for House as the GOP and still fall more than two dozen seats shy of a majority.**

Subscribers can view the full 2012 Partisan Voter Index in three different formats below:

2012 Partisan Voter Index by State and District »
2012 Partisan Voter Index by Member Name »
2012 Partisan Voter Index by Partisan Rank »

Before and After Redistricting: Partisan Distribution of the House

In many respects, observing House Democrats trying to take back their majority is like watching a soccer team play an evenly matched opponent when the field is slanted 15 degrees against them. Before redistricting, Republicans started out with 182 "strong" seats, 36 short of a majority. After GOP-dominated redistricting, there are 190 seats with a PVI score of R+5 or greater, requiring them to win merely 28 of 56 "moderately" or "barely" GOP seats to

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keep their majority.

A look at the partisan distribution of House seats before and after redistricting illustrates how effectively Republicans played "keep-away" in the states they controlled. Rather than drawing hyper-aggressive maps, they placed an emphasis on turning moderately Republican seats into strongly Republican seats. They also eliminated Democratic seats in states that lost seats – Michigan, Missouri, and Pennsylvania to name a few – and dropped the number of "strong" Democratic seats from 150 to 146.

Redistricting Before & After: Partisan Distribution of the House

Strongly Republican (R+5 or Greater)	182	190	+8
Moderately Republican (R+2 to R+5)	38	33	-5
Barely Republican (EVEN to R+2)	20	23	+3
	240	246	+6
Barely Democratic (EVEN to D+2)	17	12	-5
Moderately Democratic (D+2 to D+5)	28	31	+3
Strongly Democratic (D+5 or Greater)	150	146	-4
	195	189	-6

The Decline of the "Swing Seat"

The most striking House statistic in the last 15 years may be the decline of competitive districts, places where members have the most incentives to work on a bipartisan basis. In 1998, our Partisan Voter Index scored 164 districts between D+5 and R+5, more than a third of the House, and greater than both the number of strongly Democratic and strongly Republican seats. After 2012 redistricting, there are only 99 districts between D+5 and R+5 – less than a quarter of the House and a 40 percent decline since 1998.

Not all of the swing seat decline is attributable to redistricting. In many minimally altered districts, the local electorate has simply become much more homogenous. For example, the boundaries of West Virginia's 2nd CD haven't changed much since 1998, but its PVI score has shifted from EVEN to R+8 as voters have moved away from the national Democratic brand. Likewise, Albuquerque's migration to the left has bumped the PVI score of

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New Mexico's 1st CD from R+1 to D+5 in ten years.

But voter self-sorting has also enabled partisan gerrymanderers to more easily polarize districts wherever they wield power over the map. As Robert Draper astutely observed in *The Atlantic*, the goal of partisan mapmakers is often to "design wombs" for your team and "tombs for the other guys." But in the case of Northern Virginia's 11th CD, Republicans actually boosted Democratic Rep. Gerry Connolly's PVI from D+2 to D+7 in order to make neighboring districts more Republican.

One exception to this dramatic polarization of districts has been California, where a new nonpartisan, citizen-driven redistricting process boosted the number of seats between D+5 and R+5 from eight to 14 overnight. Another exception is New York, where a court-drawn map increased the count of such seats from 11 to 12. But in the remainder of the country, the number of swing seats fell 11 percent, from 82 to 73. The below chart illustrates the overall swing seat trend line between 1998 and 2012:

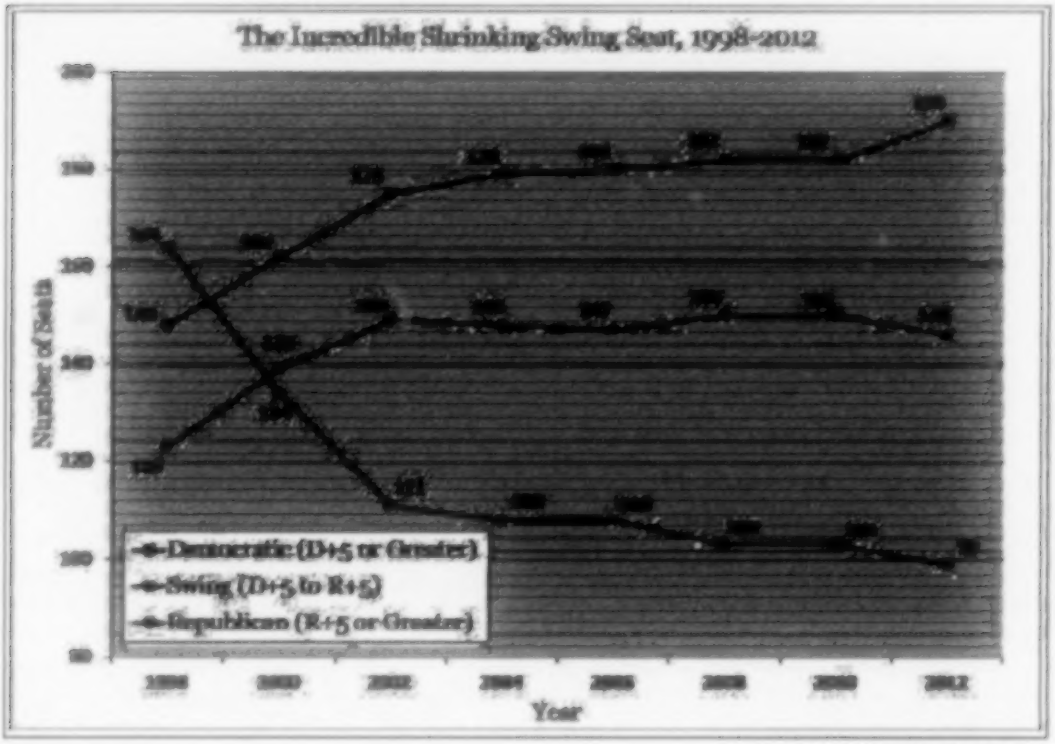

Chart Credit: 2012 Cook Political Report

This chart provides a more detailed look at the partisan breakdown of seats heading into the 2000 election versus where we are today:

Partisan Voter Index (PVI) Summary

1992/1996 Summary: Going Into the 2000 Election

D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
77	40	34	31	15	12	2

D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
4	2	9	37	38	60	74

D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
81	42	43	68	53	72	76
123					148	

2004/2008 Summary: Going Into the 2012 Election

D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
104	38	26	11	0	9	5

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D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
0	4	5	24	33	59	117

D+10.0 or Greater	D+5.0 to D+9.9	D+2.0 to D+4.9		R+2.0 to R+4.9	R+5.0 to R+9.9	R+10.0 or Greater
104	42	31	35	33	68	122

146 190

The "Median District" and PVI Rankings

Another way of gauging the impact of redistricting is the concept of the "median district." Because the Democratic vote tends to be more geographically concentrated in "safe" seats than the Republican vote, the median House district has always leaned slightly Republican since we introduced the Partisan Voter Index. In 1998, the median district was Washington's 8th CD, held by suburban Seattle GOP Rep. Jennifer Dunn, which was one point more Republican than the national average.

Over the last four years, the median district was Wisconsin's 1st CD, held by none other than Rep. Paul Ryan, with a PVI score of R+2. Today, the median district is that of Michigan GOP Rep. Tim Walberg, whose 7th CD has a PVI score of R+3. By comparison, the most Republican district in the country is now Amarillo's TX-13, with a score of R+29, while the most Democratic district is still the Bronx's NY-15, with a PVI score of D+41.

The "median district" has crept rightward by about two points since 1998. Not only has the Democratic vote become even more concentrated since the mid-1990s; Republicans have also used the redistricting process to "raise the bar" Democrats would need to clear to win a majority. Whereas the House used to be a more level playing field, Democrats could now win every single seat up to R+2 and still fall short of a House majority.

The Median & Most Partisan Districts, 1998-2012

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PVI Year	Most Democratic	Median Seat	Most Republican
1998	NY-15: Rangel (D+38)	WA-08: Dunn (R+1)	TX-19: Combest (R+26)
2000	NY-16: Serrano (D+42)	CA-23: Capps (R+1)	TX-19: Combest (R+29)
2002	NY-16: Serrano (D+44)	MI-11: McCotter (R+2)	TX-08: Brady (R+28)
2004	NY-16: Serrano (D+43)	TX-15: Hinojosa (R+2)	UT-03: Cannon (R+27)
2006	NY-16: Serrano (D+43)	AZ-08: Giffords (R+2)	UT-03: Cannon (R+27)
2008	NY-16: Serrano (D+41)	WI-01: Ryan (R+2)	AL-06: Bachus (R+29)
2010	NY-16: Serrano (D+41)	WI-01: Ryan (R+2)	AL-06: Bachus (R+29)
2012	NY-15: Serrano (D+41)	MI-07: Walberg (R+3)	TX-13: Thornberry (R+29)

Before and After Redistricting: Winners and Losers

The two charts below provide a look at which districts underwent the most dramatic alterations in redistricting. While the top 25 most dramatic swings *against* the incumbent party were fairly even between the two parties (14 Democratic and 11 Republican seats), Republicans were the clear beneficiaries where districts swung in favor of the incumbent party: 19 Republican seats experienced dramatic performance boosts compared to just six Democratic districts.

25 Biggest Redistricting Swings Favoring the Incumbent Party

19 Republican, 6 Democratic

Rank	District	Incumbent	PVI Before	PVI After	Swing	Current Cook Rating
1	TX-27	Blake Farenthold (R)	R+2	R+13	+10.65	Solid Republican
2	WA-09	Adam Smith (D)	D+5	D+15	+10.36	Solid Democratic
3	PA-17	Tim Holden (D)*	R+6	D+4	+10.35	Solid Democratic
4	PA-11	Lou Barletta (R)	D+4	R+6	+10.19	Solid Republican
5	AZ-04	Paul Gosar (R)	R+6	R+16	+9.93	Solid Republican

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6	NY-26	Brian Higgins (D)	D+6	D+13	+9.73	Solid Democratic
7	TN-08	Stephen Fincher (R)	R+6	R+15	+9.27	Solid Republican
8	OH-12	Pat Tiberi (R)	D+1	R+8	+9.14	Solid Republican
9	NC-02	Renee Ellmers (R)	R+2	R+11	+8.85	Solid Republican
10	LA-06	Bill Cassidy (R)	R+10	R+19	+8.75	Solid Republican
11	OH-15	Steve Stivers (R)	D+1	R+6	+7.21	Solid Republican
12	MI-12	Rush Holt (D)	D+5	D+12	+7.00	Solid Democratic
13	OH-01	Steve Chabot (R)	D+1	R+6	+6.95	Solid Republican
14	CO-04	Cory Gardner (R)	R+6	R+12	+6.60	Solid Republican
15	CA-42	Ken Calvert (R)	R+6	R+12	+6.33	Solid Republican
16	SC-02	Joe Wilson (R)	R+9	R+14	+5.08	Solid Republican
17	FI-17	Tom Rooney (R)	R+5	R+10	+5.03	Solid Republican
18	IL-06	Peter Roskam (R)	EVEN	R+5	+5.03	Solid Republican
19	VA-11	Gerry Connolly (D)	D+2	D+7	+4.99	Solid Democratic
20	WA-08	Dave Reichert (R)	D+3	R+2	+4.84	Solid Republican
21	PA-06	Jim Gerlach (R)	D+4	R+1	+4.82	Likely Republican
22	IL-14	Randy Hultgren (R)	R+1	R+10	+4.69	Solid Republican
23	GA-08	Austin Scott (R)	R+10	R+15	+4.64	Solid Republican
24	WA-02	Rick Larsen (D)	D+3	D+8	+4.27	Solid Democratic
25	FL-10	Dan Webster (R)	R+2	R+7	+4.13	Lean Republican

*Denotes incumbent not currently seeking reelection

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25 Biggest Redistricting Swings Against the Incumbent Party

14 Democratic, 11 Republican

Rank	District	Incumbent	PVI Before	PVI After	Swing	Current Cook Rating
1	MD-06	Roscoe Bartlett (R)	R+13	D+2	-15.72	Likely Democratic
2	NC-13	Brad Miller (D)*	D+5	R+9	-14.55	Likely Republican
3	CA-31	Gary Miller (R)	R+10	D+2	-11.65	Solid Republican
4	NY-25	Louise Slaughter (D)	D+15	D+5	-10.68	Likely Republican
5	GA-12	John Barrow (D)	D+1	R+9	-10.57	Lean Republican
6	CA-03	John Garamendi (D)	D+11	D+1	-10.29	Likely Democratic
7	TX-14	Ron Paul (R)*	R+18	R+8	-9.83	Likely Republican
8	NC-08	Larry Kissell (D)	R+2	R+12	-9.49	Lean Republican
9	CA-24	Lois Capps (D)	D+12	D+3	-8.60	Lean Democratic
10	IL-13	Tim Johnson (R)*	R+6	D+1	-7.40	Toss Up
11	MI-09	Sander Levin (D)	D+12	D+5	-7.13	Solid Democratic
12	CO-06	Mike Coffman (R)	R+8	R+1	-6.92	Toss Up
13	IL-11	Judy Biggert (R)	R+1	D+5	-6.55	Toss Up
14	IL-08	Joe Walsh (R)	R+1	D+6	-6.42	Likely Democratic
15	CA-26	Elton Gallegly (R)*	R+4	D+2	-6.10	Toss Up
16	WA-01	Jay Inslee (D)*	D+9	D+3	-5.89	Lean Democratic
17	NC-11	Heath Shuler (D)*	R+6	R+12	-5.72	Likely Republican
18	NC-07	Mike McIntyre (D)	R+5	R+11	-5.46	Toss Up

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19	IL-03	Dan Lipinski (D)	D+11	D+5	-5.36	Solid Democratic
20	IN-02	Joe Donnelly (D)*	R+2	R+7	-4.70	Likely Republican
21	IA-04	Steve King (R)	R+9	R+4	-4.64	Lean Republican
22	CA-52	Brian Bilbray (R)	R+3	D+1	-4.28	Toss Up
23	CA-10	Jeff Denham (R)	R+9	R+5	-4.05	Toss Up
24	MA-04	Barney Frank (D)*	D+14	D+11	-3.69	Solid Democratic
25	NY-17	Nita Lowey (D)	D+9	D+5	-3.42	Solid Democratic

*Denotes incumbent not currently seeking reelection

***The Cook Political Report* Partisan Voter Index (PVI) Explained**

In August of 1997, *The Cook Political Report* introduced the Partisan Voting Index (PVI) as a means of providing a more accurate picture of the competitiveness of each of the 435 congressional districts. Using the 1992 and 1996 major-party Presidential voting results, the PVI measured how each congressional district performed compared to the nation as a whole.

Using the results of the 2004 and 2008 elections for newly drawn Congressional boundaries taking effect in 2012, we have updated these PVI scores and have even more information to draw upon to understand the congressional level trends and tilts that will help to define the elections in 2012 and beyond. We will update PVI scores again in 2013 to reflect the results of the 2012 presidential election.

Developed for *The Cook Political Report* by Polidata, the index is an attempt to find an objective measurement of each congressional district that allows comparisons between states and districts, thereby making it relevant in both mid-term and presidential election years.

While other data such as the results of senatorial, gubernatorial, congressional and other local races can help fine tune the exact partisan tilt of a particular district, those kinds of results don't allow a comparison of districts across state lines. Only presidential results allow for total comparability.

A Partisan Voting Index score of D+2, for example, means that in the 2004 and 2008 presidential elections, that district performed an average of two points more Democratic than the nation did as a whole, while an R+4 means the district performed four points more Republican than the national average. If a district performed within half a point of the national average in either direction, we assign it a score of EVEN.

To determine the national average for these latest ratings, we have taken the average Democratic share of the two-party presidential vote for 2004 and 2008, which is roughly 51.2 percent, and that of Republicans, which is roughly

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48.8 percent. So, if John Kerry captured 55 percent of the vote in a district and Barack Obama carried 57 percent in the district four years later, the district would have a PVI score of roughly D+5.

In addition to the charts above, we have listed the PVI score for every district on the House Race At-A-Glance chart and on each individual race page. It is important to remember that redistricting in 2012 made some significant changes to the congressional map that make it hard to compare current districts with their predecessors.

Notes About PVI Data & Methodology

Following each election and round of redistricting, presidential results are compiled to generate PVI scores for each congressional district. In a few states, these results are aggregated by district by state and/or local election authorities. However, in others they are not, and the reported election results do not account for some votes that are reported centrally and not redirected back to the voter's registration precinct.

Clark Benson of Polidata has offered both a detailed explanation of Polidata's methodology for allocating these votes and cautionary notes on the districts for which 2004 and 2008 raw vote totals are still under review. Recalculating presidential results by district following redistricting involves many judgment calls, and while this dataset reflects Polidata's best efforts, raw vote data are preliminary and subject to change upon further post-election review.

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McDonald Rebuttal Report

I have been asked by Plaintiffs in this action to address the expert reports authored by Dr. Allan Lichtman and Mr. William Cooper. I focus primarily on Dr. Lichtman's report, and have a few comments regarding Mr. Cooper's report.

At the outset of my initial report (McDonald p. 3), I stated that I have been asked by Plaintiffs to this action to address three questions. The three questions Plaintiffs asked me to address are:

1) Whether Maryland's 2011 Congressional Plan resulted in vote dilution that was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters?
2) Whether the Maryland General Assembly or its mapmakers specifically intended to burden the representational rights of certain citizens because of how they voted in the past and the political party with which they had affiliated?
3) Whether the lines of the Sixth Congressional District would have been drawn as they were but for the map drawer's and General Assembly's consideration of partisan goals to the detriment of traditional redistricting principles?

For the most part, Dr. Lichtman does not criticize my analyses and conclusions I draw in responding to these three questions. In this reply report, I address Dr. Lichtman's critiques that with respect to these questions, and I show they do not undermine my conclusions.

Instead of responding directly to the three questions I answer, Dr. Lichtman appears to object to the questions themselves, which has an effect of distracting from a real debate regarding the questions I have been asked to evaluate. Plaintiffs have represented to me that their legal theory involves a First Amendment claim as to whether or not Maryland intentionally targeted Republicans residing in the Sixth Congressional District, as it was configured prior to the post-2010 redistricting, due to the political beliefs that they held at the time of the redistricting. I have not been tasked to judge the merits of this legal argument, nor is it my understanding that my role of expert witnesses is to draw legal conclusions in litigation. However, my education and professional experience allow me to draw conclusions that are relevant to these legal questions.

Dr. Lichtman reframes my analysis of the adverse effects the 2011 Maryland congressional redistricting plan on Republicans residing in the Sixth Congressional District to be in terms similar to partisan gerrymandering claims under the Equal Protection and Due Process Clauses. Specifically, he argues that the partisan effects of a redistricting plan as a whole must be analyzed. Doing so, he purports to show "…Maryland Democrats are generally at a statewide *disadvantage* in converting their votes to congressional house seats…" (Lichtman p. 6, original emphasis). On its face, this claim is highly suspect. Democratic 2012 congressional candidates won a combined 62.9% of Maryland's vote, and won seven of eight house seats, or 87.5%. Maryland Democrats thus won 24.6 percentage points more seats than might have been expected if seats had been awarded proportional to the vote; this outcome clearly advantages the Democrats. I show Dr. Lichtman's faulty conclusion is a consequence of his erroneous math and

incomplete analyses. When I apply the proper math to complete analyses, the adopted Maryland congressional redistricting plan is clearly a Democratic gerrymander.

When I correct for errors in Dr. Lichtman's partisan gerrymandering analyses of the congressional redistricting plan as a whole, his analyses of support my conclusion that Maryland Democrats intended to adversely affect Republicans residing in the prior Sixth Congressional District. Dr. Lichtman states that "CD6 [w]as the reasonable alternative" to improving Democrats' performance in the plan as a whole. (Lichtman p. 42). Dr. Lichtman's corrected partisan gerrymandering analyses show that Republicans are disadvantaged in the Maryland congressional plan as a whole. Maryland Democrats thus realized their partisan advantage in the plan as a whole by specifically targeting Republicans in the Sixth Congressional District since this was the only "reasonable alternative" for Democrats to seek such advantage.

I proceed to address Dr. Lichtman's criticisms of my analysis to these three question in turn, with the addition of clarifying points to some of his conclusions.

Question One: Did Vote Dilution of Republicans Occur?

Dr. Lichtman and I Agree Vote Dilution Occurred

Dr. Lichtman and I agree with respect to the first question that Maryland's 2011 Congressional Plan resulted in vote dilution that was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters.

Dr. Lichtman states his first opinion in his report (Lichtman p. 2):

> I conclude that these reports establish only what is already the obvious: that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan.

Similarly, my first opinion on p. 3 of my initial report states:

> …the evidence is incontrovertible that Maryland's adopted Sixth Congressional District was drawn in a manner that has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district.

The only difference between our opinions is a choice of words. Dr. Lichtman frames his opinion in terms of "improved Democratic prospects," while I frame it in terms of "diminishing the ability of registered Republican voters to elect candidates of their choice." Because these are inverse ways of saying the same thing, Dr. Lichtman and I are in agreement with respect to the obvious effect that Maryland's Sixth Congressional District was drawn in such a way to favor Democrats at the expense of Republicans.

My Vote Dilution Analysis

In my initial report, I establish that "I am thus highly confident within prevailing professional standards that registered Democrats in the Sixth Congressional District prefer Democratic candidates and registered Republicans prefer Republican candidates" (McDonald p. 9).

Dr. Lichtman criticizes my analysis, thusly (Lichtman p. 32):

> Unlike racial groups, there is no reliable way to identify partisan groups. Party registration or identification is a highly imperfect form of identification because party registration does not assure voting for the party in any given election.

In my voting rights experience, it is also true that racial and ethnic groups may not reliably vote for a particular candidate of choice. Indeed, in litigation involving New York's state Senate districts, I found Hispanics did not reliably cohesively vote with African-Americans to elect the African-American candidate of choice.[1] The exercise of conducting racial bloc voting analyses is to determine the degree of group cohesion in voting. The levels of a group voting "only 69 percent" (Lichtman p. 32) for a candidate are more than sufficient to establish bloc voting. Indeed, Dr. Lichtman agrees with me that fifty percent of the vote serves as a bright line when determining racial bloc voting when he draws conclusions from the fact that "Bartlett lost Washington County with 49.3% of the two-party vote" in the 2012 election (Lichtman p. 32).

Dr. Lichtman attempts to undermine my conclusion from my racial bloc voting analysis essentially rest on the assertion that Republicans can remedy the burdens that changes to the Sixth Congressional District's boundaries places upon them by "…chang[ing] their party affiliation" (Lichtman p. 32). I have two responses. First, Dr. Lichtman's partisan gerrymandering analyses (Lichtman pp. 5-11) assume stability of partisan voting. Dr. Lichtman's argument that Republicans or Democrats can simply change their party affiliations if district lines are drawn to adversely affect them arrives at the nonsensical conclusion that partisan gerrymandering never occurs. Second, Dr. Lichtman's rebuttal evidence on changing voting behavior of partisans consists primarily of an analysis of the change in the total votes from 2008 to 2012 within one county: Washington County. This selective evidence is woefully inadequate to establish how partisans voted within this one county or within Maryland's Sixth Congressional District as a whole, as I establish in my report by examining all the available evidence (McDonald pp. 7-9).

Dr. Lichtman's analysis of Washington County is drawn from Table 13 of his report (Lichtman p. 38), which reports 2012 election results for four Western Counties. He uses this evidence to assert that "…Delaney [the Democrat] was not elected with the votes of Montgomery County only, but, as indicated in Table 13, he also won Washington County and the parts of Frederick County included in CD6" (Lichtman p. 37). As vividly illustrated in my Figure Six (McDonald p. 23), Frederick County is clearly split along partisan lines. To use election results in a county clearly split along partisan lines as evidence of a lack of partisan gerrymandering is odd.

[1] *Rodriguez v. Pataki* 308 F. Supp. 2d 346 (S.D.N.Y 2004).

Although not clear, I believe Dr. Lichtman is responding to my summary conclusion that (McDonald p.17):

> Maryland's adopted Sixth Congressional District's geography and political composition are a clear result of a classic partisan gerrymandering strategy known as cracking. A district that was predominantly rural and Republican in character was transformed into a district where the political strength of Democratic suburbs of the Washington, D.C. suburbs outweighs the Republican rural areas, predominantly in the panhandle.

I am happy to clarify, which is clear from my discussion of the changes to the Sixth Congressional District (McDonald pp. 11-12), that the Sixth Congressional District retained Democratic pockets in Maryland's panhandle that also contributed to the "…major transformation from a predominantly Republican district to a predominantly Democratic district" (McDonald p. 11).

Dr. Lichtman's Attempt to Reframe Question One: His Partisan Gerrymandering Analyses

Dr. Lichtman's asserts the "…possible existence of a partisan gerrymander must be assessed by examining the plan as a whole" (Lichtman p. 3). To be clear, I was not asked by Plaintiffs to this action to evaluate partisan gerrymandering of the entire adopted Maryland congressional redistricting plan. I understand that the Plaintiffs' focus on the Sixth District alone is a function of their legal theory, the merits of which I am not in a position to judge (nor is Dr. Lichtman). My purpose in this section is to establish glaring deficiencies in Dr. Lichtman's computations and methodology that when analyzed properly reverse his opinion that "Maryland's 2011 Congressional Plan is Not a Partisan Gerrymander" (Lichtman p. 5).

Dr. Lichtman makes two mistakes in his partisan gerrymandering analyses. He misapplies a methodology I used in *Perez* v. *Perry*, a case regarding Texas congressional and legislative districts, and he miscalculates a newly proposed method to measure the degree of partisan gerrymandering known as the efficiency gap which he states is "relatively simple to compute" (Lichtman p. 9).

Correctly applying Dr. Lichtman's two tests for partisan gerrymandering of the entire plan, I conclude the entire adopted Maryland congressional plan is a Democratic gerrymander that disfavors Republicans.

Partisan Gerrymandering Analysis: *Perez* v. *Perry*

With respect to my methodology in *Perez* v. *Perry*, Dr. Lichtman correctly notes on page 5 of my report that my proposed methodology involves the following steps:

1) Calculate statewide election returns within districts. This requires the reaggregation of statewide results into each of the individual districts of a plan.
2) Calculate the average share of "two-party" vote across districts.

3) Compare the relationship between seats to votes at various average votes for the two major parties across the districts.

Dr. Lichtman omits that I evaluate the performance of the Texas redistricting plans at a specific average vote: the vote share the parties can expect to receive in a *typical election*.

It is important to consider how votes are translated into seats in a typical election if perfectly competitive elections of equal 50% vote shares for each of the two major parties rarely occur, if ever. Partisan bias measures constructed around 50% of the vote – which is Dr. Lichtman's approach – may fail to capture another important element in partisan gerrymandering: what is known as responsiveness, or the rate of change in votes a party receives compared to the rate of change in seats a party wins. When the opposition party rarely expects to win fifty percent of the vote, the gerrymandering party can engineer a large amount of responsiveness to garner an even a larger seat advantage over what they may enjoy by merely engineering partisan bias at 50% of the vote. Indeed, the gerrymandering party may trade off partisan bias favoring them at 50% for a high degree of responsiveness that is more than compensated at the expected vote share of a typical election.

To illustrate how the tradeoff between partisan bias and responsiveness works, consider a redistricting plan than has a partisan bias of 5% disfavoring the gerrymandering party at the hypothetical 50%/50% election. This plan also has a high degree of responsiveness, such that each percentage point change in the vote share yields two percent more seats for the gerrymandering party. If the typical election occurs with a 60%/40% vote share split favoring the gerrymandering party, the party can expect to win:

- -5% (for the partisan bias against them at 50%).
- +20% (for the 2% of seats expected in each 1% change in the vote).
- A total of -5% + 20% = +15% seat share in the typical election.

Maryland Democrats appear to have implemented a partisan gerrymandering strategy that relies primarily on a high degree of responsiveness, thereby favoring them in the typical election. I have previously encountered this strategy of using responsiveness to gerrymander in a state legislative plan proposed by Alaskan Republicans.[2] Thus, it is important to examine "various average votes" (Lichtman p. 5) including the typical election that takes place within a state or locality, and not just those at 50%/50%.

Dr. Lichtman's incomplete analysis involves two hypothetical atypical Maryland elections. In one hypothetical election he states: "If Republicans were to achieve a bare majority of 51 percent of the vote, according to Dr. McDonald's methodology they would win 63 percent of the seats" (Lichtman p. 6). In another the other hypothetical election he states "At 54 percent of the vote, under Maryland's 2011 congressional redistricting plan, Republicans win all six of the districts that are not majority-African American voting rights districts (CD4 and CD7)" (Lichtman p. 6).

[2] *In Re 2001 Redistricting Cases* (Case No. S-10504).

Dr. Lichtman then compares his statistics to those that I generated in Texas for *Perez* v. *Perry* in Table 2 of his report (Lichtman p. 8) for an atypical hypothetical 50%/50% Texas election. Texas Republicans engineered both favorable partisan bias and a high degree of responsiveness, so this is a false comparison.

Dr. Lichtman performs no analysis of the typical Maryland election that would fully inform his opinion if he had fully followed my methodology. Somehow Dr. Lichtman obtained statistics regarding atypical Texas elections from my report, while ignoring my analysis of typical elections.

Fortunately, Dr. Lichtman provides nearly all the information necessary to conduct a complete analysis of my *Perez* v. *Perry* methodology with respect to Maryland. In Table 1 on p. 7 of his report, he provides election results for seven statewide elections reported in the adopted congressional districts. The typical election in Maryland is provided by the average in the rightmost column of Table 1. The typical vote share Maryland Republicans can expect is 39.1%, not 51% or 54%. Indeed, the typical vote shares presented in Table 1 may be actually lower since these statistics exclude "absentee and provisional votes (fewer than 10 percent of votes cast)" (Lichtman p. 6, footnote 11); these votes tend to break in a Democratic direction in Maryland.[3] In a typical Maryland election, Dr. Lichtman's data show Republicans receive a majority of the vote in only the First Congressional District. Therefore Republicans can expect to win one of eight congressional districts, or 12.5% of the seats, in a typical Maryland election. Since this is less than 39.1% by 26.6 percentage points, I conclude that Maryland's 2011 congressional redistricting plan is a partisan gerrymander.

Contrary to Dr. Lichtman's assertion that "Democrats are generally at a statewide disadvantage in converting their votes to congressional house seats" (Lichtman p. 6), I conclude that by applying my entire *Perez* v. *Perry* methodology it is Republicans who are disadvantaged in typical Maryland elections, not through the partisan bias that Dr. Lichtman investigates only, but through a high degree of responsiveness.

Partisan Gerrymandering: Efficiency Gap

With respect to Dr. Lichtman's efficiency gap analysis, he clearly makes calculation errors that result in his erroneous conclusion that the adopted Maryland congressional plan "translates into *an efficiency gap of 8.0 percent disfavoring Democrats*" (p. 10, original emphasis).

Dr. Lichtman did not provide the underlying computations for his work, so I will address each step leading to the final computation of the efficiency gap for Maryland's 2012 House elections. To also be clear, I do not endorse the efficiency gap, as I believe there are several flaws to it. Still, the correct efficiency gap computation reveals the adopted congressional plan favors the Democrats, not the Republicans.

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[3] For example, in the 2012 presidential election, Mitt Romney received 971,869 of the statewide vote out of 2,649,713 of the combined Democratic and Republican "two-party" vote. This yields a statewide Republican two-party vote share of 36.7%, but Dr. Lichtman reports Romney received a higher 37.0% of the vote in the first column of Table 1 in his report (p. 7). This discrepancy is consistent with the excluded absentee and provision ballots breaking in a Democratic direction.

Name	Party	Total Vote	Percentage
CD 1			
Wendy Rosen	Democratic	92,812	27.5%
Andy Harris	Republican	214,204	63.4%
Muir Wayne Boda	Libertarian	12,857	3.8%
John LaFerla (Write-In)	Democratic	14,858	4.4%
Michael Calpino (Write-In)	Unaffiliated	71	0.0%
Douglas Dryden Rae (Write-In)	Unaffiliated	26	0.0%
Other Write-Ins	N/A	2,932	0.9%
Total		337,760	
CD 2			
C. A. Dutch Ruppersberger	Democratic	194,088	65.6%
Nancy C. Jacobs	Republican	92,071	31.1%
Leo Wayne Dymowski	Libertarian	9,344	3.2%
Ray Bly (Write-In)	Republican	22	0.0%
Other Write-Ins	N/A	415	0.1%
Total		295,940	
CD 3			
John Sarbanes	Democratic	213,747	66.8%
Eric Delano Knowles	Republican	94,549	29.6%
Paul W. Drgos, Jr.	Libertarian	11,028	3.4%
Other Write-Ins	N/A	535	0.2%
Total		319,859	
CD 4			
Donna F. Edwards	Democratic	240,385	77.2%
Faith M. Loudon	Republican	64,560	20.7%
Scott Soffen	Libertarian	6,204	2.0%
Other Write-Ins	N/A	363	0.1%
Total		311,512	
CD 5			
Steny H. Hoyer	Democratic	238,618	69.4%
Tony O'Donnell	Republican	95,271	27.7%
Arvin Vohra	Libertarian	4,503	1.3%
Bob Auerbach	Green	5,040	1.5%
Other Write-Ins	N/A	388	0.1%
Total		343,820	
CD 6			
John Delaney	Democratic	181,921	58.8%
Roscoe G. Bartlett	Republican	117,313	37.9%
Nickolaus Mueller	Libertarian	9,916	3.2%
Other Write-Ins	N/A	399	0.1%
Total		309,549	

Name	Party	Total Vote	Percentage
CD 7			
Elijah Cummings	Democratic	247,770	76.5%
Frank C. Mirabile	Republican	67,405	20.8%
Ronald M. Owens-Bey	Libertarian	8,211	2.5%
Ty Glen Busch (Write-In)	Democratic	10	0.0%
Charles U. Smith (Write-In)	Democratic	28	0.0%
Other Write-Ins	N/A	394	0.1%
Total		323,818	
CD 8			
Chris Van Hollen	Democratic	217,531	63.4%
Ken Timmerman	Republican	113,033	32.9%
Mark Grannis	Libertarian	7,235	2.1%
George Gluck	Green	5,064	1.5%
Other Write-Ins	N/A	393	0.1%
Total		343,256	
All			
	Democratic	1,626,872	62.9%
	Republican	858,406	33.2%
	All	2,585,514	

Table 1. 2012 Maryland Congressional Results

I start with the 2012 election results from the Maryland State Board of Elections, reported in Table 1, that Dr. Lichtman identifies as his data source.[4]

Dr. Lichtman describes his steps to compute the efficiency gap as follows (Lichtman p. 9):

1) Sum for each party the number of votes cast for losing candidates in each district.
2) Sum for each party the number of votes cast for winning candidates in excess of 50%.
3) Add together these two sums to obtain the total number of wasted votes for each party.
4) Subtract the total number of wasted votes for the party controlling the redistricting from the total number of wasted votes for the second party.
5) A positive result indicates that the plan disadvantages the second party, e.g., that it has more wasted votes. A negative result indicates that the plan disadvantages the redistricting party, i.e., that it has more wasted votes.
6) Divide the result by the total number of votes cast to obtain the net percentage of wasted votes for the disadvantaged party.

[4] http://www.elections.state.md.us/elections/2012/results/general/gen_results_2012_4_008X.html.

7) This final percentage measure represents the efficiency gap.

I am confronted by two undocumented choices which Dr. Lichtman uses to choose candidates to include in his analysis.

First, in some districts partisan write-in candidates ran in the election, who received a combined total of 14,918 votes. Dr. Lichtman does not describe how he treated these candidates. Strictly following Dr. Lichtman's described procedure, I include these candidates in the vote totals for a party within each district and allocate them accordingly if the party won or lost the district. I also report statistics excluding these candidates.

Second, Dr. Lichtman does not describe how he treats Libertarian, Green and non-party affiliated write-in candidates. I follow Stephanopoulos and McGhee who exclude these candidates to compute what is commonly known as the "two-party" vote between Democratic and Republican candidates.

Following these rules, I compute a total of 2,500,196 votes for Democratic and Republican candidates. This is 17,509 more than the 2,482,687 total candidate votes Dr. Lichtman reports in Table of his report (Lichtman p. 11). This difference is close to the partisan write-in candidates combined total of 14,918 votes, but not exact.

Before I compute the efficiency gap computations, it is instructive to note that Maryland Republicans candidates received a combined 33.2% of all Democratic and Republican votes in the 2012 Maryland congressional elections, but won only one seat, or 12.5% of the seats (see candidate totals in Table 1). Dr. Lichtman's opinion that Democrats are disadvantaged by these election results should strike even a casual observer as implausible.

I calculate the efficiency gap in Table 2, presenting all intermediary steps.

In the first column of Table 2 I compute the minimum votes needed to win. For example, in the First Congressional District, there were 321,874 votes for all candidates, after excluding minor party and unaffiliated write-in candidates. The minimum votes needed to win is (321,874 / 2) + 1 = 160,938. (One vote is added since otherwise there would be a tie.)

In column two is the total votes of all Democratic candidates if a Democrat won the district. In column three is the difference between column three and column two. This represents the wasted votes for the Democrats in excess of what they needed to barely win the district (Dr. Lichtman's Step 2). In the Second District this value is 194,088 – 143,091 = 50,997. In column four the votes for all Democratic candidates if a Republican won the district (Dr. Lichtman's Step 1). These computations are repeated for the Republicans in columns five, six, and seven, respectively.

The grayed areas represent the sum of the wasted votes for each party (Dr. Lichtman's Step 3). For Democrats, this is the sum of the votes reported in columns three and four, and for Republicans the sum in columns six and seven. I compute the total wasted votes for the Democrats – the party controlling the redistricting - is 552,602 and the total wasted votes for the Republicans – the second party - is 697,490.

	Min. Votes Needed to Win	Dem. Votes (If Win)	Excess Votes of Needed to Win	Dem. Votes (If Loss)	Rep. Votes (If Win)	Excess Votes of Needed to Win	Rep. Votes (If Loss)
CD 1	160,938		[redacted]		214,204	[redacted]	
CD 2	143,091	194,088					
CD 3	154,149	213,747					
CD 4	152,473	240,385					
CD 5	166,946	238,618					
CD 6	149,618	181,921					
CD 7	157,607	247,808					
CD 8	165,283	217,531					
Total Wasted Votes							
Differential Wasted Votes							144,888
Efficiency Gap							5.8%

Table 2. Efficiency Gap Computations

Subtracting the wasted votes from the party that controls the redistricting from the second party yields 697,490 – 552,602 – 144,888 (Dr. Lichtman's Step 4). Since this is a positive number, the Republicans – as the second party – have more wasted votes than the Democrats (Dr. Lichtman's Step 5). Dividing this by the total number of votes of 2,500,196, I calculate the efficiency gap as 5.8%. (Note, if I exclude the partisan write-in candidates, the efficacy gap is a larger 6.7% disfavoring the Republicans.)

Dr. Lichtman computes the total wasted votes for the Democrats is 985,261 and for the Republicans is 763,002, for a total difference of 222,259 disfavoring the Democrats (Lichtman Table 3, p. 11). The discrepancy with my calculations apparently arises in Dr. Lichtman's computation of the wasted votes for the winning candidate (Dr. Lichtman's Step 2). If instead of subtracting the winning candidate's vote total from the minimum needed to win the district, as the efficiency gap formula requires, I subtract the winning party candidate(s) from the second place party candidate(s), I arrive at 997,544 wasted votes for the Democrats and 750,758 wasted votes for the Republicans. If I exclude the major party write-in candidates, I compute 982,670 wasted Democratic votes and 765,594 wasted Republican votes.

Although I cannot precisely reproduce Dr. Lichtman's numbers because he did not provide the full information to do so, I am confident through my forensics work that Dr. Lichtman made a fatal error in a computation of the efficiency gap that he describes as "relatively simple to compute" (Lichtman p. 9). Most likely this error lies in the improper computation of the wasted votes for the party that won a district. Where he computes "*…an efficiency gap of 8.0 percent*

disfavoring Democrats" (Lichtman p. 10, original emphasis), I compute either a 5.8% or 6.7% efficiency gap disfavoring the Republicans.

Summary of Dr. Lichtman's Partisan Gerrymandering Analyses

Dr. Lichtman employs two methods to assess if the Maryland congressional redistricting plan is a partisan gerrymander. Neither method supports Dr. Lichtman's conclusion that "…Maryland's 2011 congressional redistricting plan was not a partisan gerrymander" (Lichtman p. 52). Indeed, correct computation and interpretation of both methods reveal that the Maryland 2011 congressional redistricting plan is a Democratic gerrymander (though, again, this was not a question I was initially asked to answer).

1) With respect to the method I used in *Perez* v. *Perry*, Dr. Lichtman fails to evaluate the effect of the redistricting plan for the typical Maryland election, instead focusing on atypical elections where Republican congressional candidates receive 50% or 54% of the vote. Dr. Lichtman provides no evidence that Republicans could typically expect such favorable results. When evaluated at the typical election, 39.1% Republican vote, Republican candidates win only one of eight districts, or 12.5% of the seats. Since 12.5% is 26.6 points less than 39.1%, I conclude, as a recognized expert in the evaluation of partisan gerrymandering claims, that the 2011 Maryland congressional plan is a Democratic gerrymander.
2) With respect to Dr. Lichtman's efficiency gap analysis, my forensics analysis indicates that Dr. Lichtman made an incorrect calculation for the wasted votes of the winning candidate by subtracting the second place candidate from the winning candidate. This error led him to compute an efficiency gap of 8.0 percentage points disfavoring the Democrats. When I make the correct calculation by subtracting the minimum necessary to win the election from the winning candidate's vote share, I arrive at an efficiency gap of 5.8 points disfavoring the Republicans (or 6.7 if I exclude partisan write-in candidates).

Question Two: Did Maryland Specifically Intended to Burden Republicans' Rights?

The second question Plaintiff's to this action asked me to address is whether the Maryland General Assembly or its mapmakers specifically intended to burden the representational rights of certain citizens because of how they voted in the past and the political party with which they had affiliated? Through an analysis of the changes to the Sixth Congressional District and its only neighbor, the Eight Congressional District (McDonald pp. 11-16), I conclude "…that politics, not good government goals, was a major motivating factor behind the creation of the adopted Sixth Congressional District" (McDonald p. 17).

Dr. Lichtman States Maryland Democrats Did Gerrymander

Dr. Lichtman contradicts his faulty analysis that Maryland Democrats created a Republican gerrymander elsewhere in his report.

As noted at the outset of my rebuttal, Dr. Lichtman's first opinion in his report is that "…I conclude that these reports establish only what is already the obvious: that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan" (Lichtman p. 2).

Dr. Lichtman reaffirms this opinion that a goal of Maryland's Democrats was to execute a gerrymander of equal efficacy as similarly situated party-controlled states (Lichtman p. 44):

> After the 2011 redistricting Maryland was in line with other party-dominated states. As indicated in Table 18, Maryland's percentage of the two-party presidential vote was about comparable to other states; so too was its percentage of seats held by the dominant party as compared to other states.

Dr. Lichtman then excuses Maryland Democrats for partisan gerrymandering because the Republicans did it elsewhere (Lichtman p. 48):

> To offset the large Republican advantage in more heavily populated, and in many cases, competitive states, with significant consequences for representation in Congress, it was reasonable for the Maryland legislature to make CD6 into a more competitive district for Democrats.

Dr. Lichtman thus admits that, despite his faulty partisan gerrymandering analyses, Maryland Democrats intended to burden the rights of Republicans residing in the Sixth Congressional District, since according to Dr. Lichtman, Democrats views "CD6 as the reasonable alternative" (Lichtman p. 42) to improving their performance in the plan as a whole.

District Competitiveness

There is a logical inconsistency in Dr. Lichtman's two prior quotes. In the first quote, Dr. Lichtman implies that it was the goal of Maryland Democrats to elect an additional Democrat to the House of Representatives to bring the partisan composition of Maryland's congressional delegation in line with other similar party-dominated states. In the second quote, he opines that the goal was merely to make "a more competitive district for Democrats" (Lichtman p.48).

As Dr. Lichtman notes, I have written extensively on district competition. I further served as a consultant to the Arizona Independent Redistricting Commission to analyze compliance of the commission with the Arizona constitutional mandate for competitive districts. I have never heard a competitive district described as being *for* a political party. Competitive districts are those where either major party has an equal chance of electing their candidate.

Dr. Lichtman's apparent confusion regarding whether or not the Sixth Congressional District was designed to elect a Democrat or "emerges as competitive" (Lichtman p. 36) lies in faulty analysis.

To begin, Dr. Lichtman alleges that I endorse a "'competitive' range of 45 to 55 percent" to define a competitive district (Lichtman p.36). Since Dr. Lichtman does not provide a quote to this citation, I will do so:

> …a normalized presidential vote within two competitiveness ranges, 45-55 and 48-52 percent, are presented in figure 10-1…[t]he wider 45-55 range is presented since it is commonly used to describe competitive congressional elections; *however, my analysis of the relationship between competitive districts and competitive elections suggests that the tighter range is a more valid definition of a competitive district* (emphasis added).[5]

In the footnote to this paragraph, I note that my methodology is based on my work for the 2001 Arizona Independent Redistricting Commission, and I have written extensively about this methodology elsewhere.[6] It is clear from my quote that I am presenting a 45-55 range as a matter of convenience for an audience familiar with this range, when in truth I endorse a tighter 48-52 range to identify when a district is competitive informed by my practical work as a redistricting consultant and my academic scholarship.

A short digression on terminology is needed, as it is can be confusing. *Competitive district* refers to the underlying partisanship of the district, as is typically evaluated as the level of partisanship through statewide election results aggregated within a district, similar to his Table 1 (Lichtman p. 7) and my Table Three (McDonald p. 10). *Competitive election* refers to the realized election for a district. A statistical analysis is needed to determine the level of partisanship needed for a district to be competitive, such that it will produce a competitive election. These two concepts may not necessarily be the same since statewide offices can have different voting patterns than district elections.

Dr. Lichtman has not performed a statistical analysis to determine the underlying level of partisanship needed within District Six to reliably produce competitive elections, as I employed in my Arizona work or recommend in my academic writing. If I apply the tighter 48-52 range that I generally believe is more valid, absent such a statistical analysis, to the 47.1% average Republican vote share for District Six that Dr. Lichtman presents in Table 1, I conclude that District Six is not competitive. Thus, Dr. Lichtman's following assertion is incorrect (Lichtman p. 36):

> The average Republican vote across all statewide elections held in this district from 2012 to 2016 is 47 percent (Table 1), which places it within Dr. McDonald's "competitive" range of 45 to 55 percent.

Dr. Lichtman also cites the 2012 Cook Political Report, which rates the Sixth District as +2 Democratic, which would place it on the cusp of what I consider to be a competitive district. Following the 2016 election, the Cook Political Report rates the Sixth Congressional District as

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[5] Michael P. McDonald. 2006. "Redistricting and Competitive Districts" in *The Marketplace of Democracy: Electoral Competition and American Politics*, Michael P. McDonald and John Samples, eds. Washington, DC: Brookings Press, p. 224.

[6] Michael P. McDonald. 2006. "Drawing the Line on District Competition." *PS: Political Science and Politics* 39(1): 91-94.

+4 Democratic.[7] The most recent Cook Political Report rating does not support Dr. Lichtman's conclusion that the Sixth Congressional District is competitive.

Dr. Lichtman further engages in a "normalization" of vote shares. This is a technique academics use to consider what would happen in a hypothetical 50%/50% election. This computation is used by academics to make presidential elections – which tend to be highly competitive nationally – comparable when they are comparing statistics computed from different presidential elections. However, this computation suffers the same issues that I noted previously with respect to the *Perez* v. *Perry* partisan gerrymander methodology in that it does not consider what happens in a typical election. In subsequent state-specific publications to my 2006 book chapter cited by Dr. Lichtman, I do not normalize vote shares to compute the competitiveness of districts.[8] Still, even using normalized vote shares, Dr. Lichtman computes a 2012 normalized presidential vote of 52.7% and a 2016 normalized presidential vote of 54.5% (Lichtman p. 36), neither of which fall within the 48-52 range.

Dr. Lichtman's opinion that the Sixth Congressional District is competitive thus rests on three elections: the 2014 Governor election, the 2014 Attorney General election, and the 2014 U.S. House election. However, Dr. Lichtman ignores all the data available to him. In seven of ten elections within the district, the Democratic candidate won decisively. The average seven statewide election results within a district – which is the preferred measure of the partisan character of a district – Dr. Lichtman computes that the Republican candidate received 47.1% of the vote within the Sixth Congressional District. This is outside the 48-52 range I deem most appropriate to identify a competitive district.

It is therefore my opinion, applying methodology consistent with my prior work, that the Sixth Congressional District is not a competitive district. My opinion is most consistent with Dr. Lichtman's assertion that Maryland's Democrats intended to bring the partisan balance of Maryland's congressional delegation "…in line with other party-dominated states" (Lichtman p. 44).

Reducing Democratic Wasted Votes

Dr. Lichtman proposes that another alternative explanation for the reconfiguring of the Sixth Congressional District was to "unpack[] CD8" (Lichtman p. 42). This is just another way of stating that Maryland Democrats wished to adversely affect Republicans in the Sixth District.

Dr. Lichtman states notes that "CD8 under the 2001 redistricting plan was an overwhelmingly packed district" (Lichtman p. 42) and that "…CD6 [w]as the reasonable alternative for unpacking CD8 and the 2011 redistricting plan did precisely that" (Lichtman p. 42).

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[7] http://cookpolitical.com/file/2013-04-49.pdf.

[8] Micah Altman and Michael P. McDonald. 2013. "A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights and Participation." *University of Richmond Law Review* 47: 771-831; Micah Altman and Michael P. McDonald. 2015. "Paradoxes of Political Reform: Congressional Redistricting in Florida" in *Jigsaw Puzzle Politics in the Sunshine State*, Seth C. McKee, ed. Gainesville, FL: University of Florida Press; Micah Altman and Michael P. McDonald. Forthcoming. "Redistricting by Formula: The Case of Ohio." *American Politics Research*.

If there are trades to be made between two districts, one Democratic in character and one Republican, then the only way to reduce Democratic wasted votes is for Democrats to win both districts. Merely trading Democrats from one district to another without changing the election outcome in the target district is insufficient, since the overall same number of Democratic votes are wasted if the election outcome does not change.

To illustrate, suppose there are 80,000 wasted Democratic voters over what was needed to win the district in the Eight Congressional District and Democrats are 60,000 voters in the Sixth District, which these voters cannot elect their preferred candidate. This yields a total of 140,000 wasted votes. If 20,000 Democratic voters are shifted from the Eighth District to the Sixth District, then there are now 60,000 wasted Democratic voters in the Eighth District and, assuming Democrats continue to be unable to elect their preferred candidate, there are 80,000 wasted votes in the Sixth District, yielding the same 140,000 wasted votes. It is only in the case that the Democrats' preferred candidate wins the Sixth District that their wasted votes decreases. (As a corollary, the Republican wasted votes would increase significantly in the case that their preferred candidate wins neither district, where before their candidate won one.)

It is not surprising that Dr. Lichtman does not understand this dynamic since his failure to compute correctly the efficiency gap appears to have a similar logical error, as noted above.

Question Three: Does the Sixth Congressional District Respect Traditional Redistricting Principles?

Dr. Lichtman Falsely Claims I Examined the Sixth District in Isolation

Dr. Lichtman criticizes me for examining "only one of eight congressional districts" (Lichtman p. 3) while failing to examine the congressional redistricting plan as a whole. To reinforce this critique Dr. Lichtman references a statement by myself, adding his emphasis to it, that "…you really can't look at one district in isolation…" (Lichtman p. 3).

I did not examine the Sixth Congressional District in isolation. Maryland's Sixth Congressional District has an unusual feature in that it is entirely bordered by the Eight Congressional District. As a consequence, it is possible to examine the Sixth and Eighth Congressional Districts together, but otherwise in isolation from the remainder of the redistricting plan. Dr. Lichtman is thus incorrect in stating "The creation of the alternative district would also change the adopted plan beyond CD6 and CD8, since moving counties and precincts out of adopted CD6 would ripple across the state in the adopted plan" (Lichtman p. 40). Indeed, I propose and analyze an alternative congressional redistricting plan that makes changes to only the Sixth and Eighth congressional districts (McDonald pp. 14-16).

These subsequent concerns about my alternative plan that Dr. Lichtman lists therefore do not apply to my analysis (Lichtman p. 40):

> Dr. McDonald gave no assurance that the proposed district would respect the legitimate redistricting goals of other areas of the state, such as respecting the non-retrogression mandate of § 2 of the Voting Rights Act in Districts 4 and 7;

> disallowing a crossing of the Chesapeake Bay; ensuring that District 2 continued to contain all major military installations in Maryland; ensuring all incumbents continued to reside in their district; and ensuring precise mathematical population equality.

While these concerns do not apply to the alternative map presented in my report, Dr. Lichtman's concerns do apply to Mr. Cooper's "Hypothetical 8-0 Plan" since this plan is a complete reconfiguration of the entire Maryland plan. Mr. Cooper nowhere in his report addresses these concerns, except to note that he "did not take the step to zero out the districts (from .23% overall deviation) in order to achieve perfect population equality" (Cooper p. 5).

Indeed, I have a further concern regarding Mr. Cooper's work. In my work of drawing an alternative map, I discovered that the Ansolabehere and Rodden election data used by Mr. Cooper (Cooper p. 4) fabricates Montgomery County election results. The issue appears to be, as far as I can determine, that Montgomery County split precincts between the time these scholars obtained the election results and when Maryland transmitted precinct boundaries to the Census Bureau for inclusion in the 2010 census geography. This caused some precincts to have no associated election results. To resolve this issue, these scholars appear to have simply cut and pasted the same election results into both portions of the split precincts, effectively doubling the votes. For all of the Montgomery precincts I list (McDonald p. 27), there are identical election results for an adjacent precinct. I cannot know from the information provided to me how deeply this issue affects Mr. Cooper's work. I also do not know the degree to which this issue is present in other Maryland counties outside those containing the Sixth District in part.

Compactness

Dr. Lichtman wishes to undermine my assessment that my proposed alternative redistricting plan for the Sixth and Eight congressional districts improves upon the adopted district in terms of compactness. He notes that I have "…criticized the use of compactness criteria…" (Lichtman p. 40), and that I have noted there are over fifty "compactness measures, which have not resulted in clarity, since these measures conflict and can be manipulated" (Lichtman p. 35). If Dr. Lichtman believes that I have manipulated my compactness analyses by cherry-picking measures I choose to present, it is incumbent upon him to present such evidence. However, Prof. Lichtman presents no evidence or analysis regarding the compactness any district.

Arlington Heights

Dr. Lichtman (p. 40) faults me for not following the legal standard in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Plaintiffs to this action did not ask me to examine these *Arlington Heights* factors. Instead, they asked me to provide analysis pertinent to the three questions set forth in my Initial Report and this report. I offer no opinion as to whether or not they apply to the matters in this case.

Exposition Error in My Report

Dr. Lichtman points out that I misstated that the Maryland State Board of Elections only releases publicly in-person early votes at the precinct level. In fact, the Board of Elections only

publicly releases Election Day votes. However, this error in exposition does not affect any of my computations. Indeed, the statistics reported for the Sixth Congressional District in Table 3 of my initial report (McDonald p. 10) and his statistics in Table 1 of his report (Lichtman p. 7) are substantially similar. There are two differences that do not substantially affect our conclusions:

1) Dr. Lichtman's statistics include a special tabulation of the in-person early vote from the State Board of Elections (Lichtman footnote 11, p. 6), while I do so by tabulating the total county votes for counties entirely contained in a district and by apportioning these votes from the country data in counties split by more than one district.
2) Dr. Lichtman does not include absentee or provisional votes, which constitute "fewer than ten percent of votes cast" (Lichtman footnote 11, p. 6), while I do include these votes. I do so by tabulating the total county votes for counties entirely contained in a district (something Dr. Lichtman could have also done to check his implied claim of minimal effect from excluding these votes) and by apportioning these votes from the country data in counties split by more than one district.

Summary

In my initial report, I focused on three questions that Plaintiffs tasked me with answering:

1) Whether Maryland's 2011 Congressional Plan resulted in vote dilution that was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters?
2) Whether the Maryland General Assembly or its mapmakers specifically intended to burden the representational rights of certain citizens because of how they voted in the past and the political party with which they had affiliated?
3) Whether the lines of the Sixth Congressional District would have been drawn as they were but for the map drawer's and General Assembly's consideration of partisan goals to the detriment of traditional redistricting principles?

Most of Dr. Lichtman's criticisms do not relate to the analysis and conclusions that I draw regarding these three questions. Instead, he criticizes me for confining my analysis to these questions.

Beyond these three questions, Dr. Lichtman makes three errors in analyses of election results that undermine his conclusions:

1) In an analysis of partisan gerrymandering following a method I used in *Perez* v. *Perry*, Dr. Lichtman fails to consider the effect of Maryland's redistricting plan for typical elections in the state. When I do so, I conclude that Maryland Democrats executed a Democratic gerrymander.
2) In an analysis of partisan gerrymandering using a method known as the efficiency gap, Dr. Lichtman makes a critical math error that leads him to falsely conclude that the adopted congressional plan favors the Republicans when it favors the Democrats.
3) In an analysis of competitive districts, Dr. Lichtman uses the wrong range of what I believe constitutes a competitive district, leading him to falsely conclude the Sixth

Congressional District has an equal chance of electing a Democrat or a Republican candidate.

Together, correction of these errors leads me to concur with Dr. Lichtman that "2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan" (Lichtman p. 2). I further concur with him that a goal of Maryland Democrats was to execute a gerrymander of equal efficacy "…in line with other party-dominated states" (Lichtman p. 44).

After reviewing Dr. Lichtman's report and correcting his analyses, it remains my opinion that the adopted Sixth Congressional District has a concrete and adverse effect on Republicans residing in the district, that Maryland Democrats intended this outcome, and that this partisan goal superseded respect of traditional redistricting principles in the creation of the adopted Sixth Congressional District.

Date: May 22, 2017

Prof. Michael P. McDonald, PhD

Subject: Re:
From: jason.gleason03@gmail.com
Date: 10/3/2011 2:59 PM
To: "Brian Romick" <brianromick@gmail.com>

I hope so. I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it.
------Original Message------
From: Brian Romick
To: Jason Gleason
Subject: Re:
Sent: Oct 3, 2011 2:57 PM

Jeanne is good on the politicel message

On 10/3/11, jason.gleason03@gmail.com <jason.gleason03@gmail.com> wrote:
> This is painful to watch. I'm not sure what purpose this presentation is serving.
> Sent from my Verizon Wireless BlackBerry

Sent from my Verizon Wireless BlackBerry

IN THE UNITED STATES DISTRICT COURT FOR THE UNITED STATES DISTRICT COURT FOR MARYLAND

O. JOHN BENISEK, et al., Plaintiffs, v. LINDA H. LAMONE, et al.,, Defendants.	Civil Case No.: 13-3233

DECLARATION OF WILLIAM S. COOPER

WILLIAM S. COOPER, acting in accordance with 28 U.S.C. § 1746, Federal Rules of Civil Procedure 26(a)(2)(B) and 26(e), and Federal Rules of Evidence 702 and 703, does hereby declare and say:

1. My name is William S. Cooper. I have a B.A. in Economics from Davidson College. As a private consultant, I serve as a demographic and redistricting expert for the Plaintiffs. I am compensated at a rate of $150 per hour.

I. Redistricting Experience

2. I have testified at trial as an expert witness on redistricting and demographics in federal courts in over 35 voting rights cases since the late 1980s. Approximately 30 of the cases led to changes in local or state election district plans.

3. Since the release of the 2010 Census, I have developed several statewide legislative plans (Alabama, Georgia, Kentucky, Florida, South Carolina, Texas, and Virginia) and over 150 local redistricting plans (including about 10 in Maryland) – primarily for groups working to protect minority voting rights.

4. Four plans that I developed for local government clients in Virginia and Mississippi were adopted in the early 2010s. I also served as a redistricting consultant in 2011 to the Miami-Dade County Commission and Board of Education. I currently serve as a redistricting consultant to the City of Wenatchee, Washington.

5. For additional historical information on my testimony as an expert witness and experience preparing and assessing proposed redistricting maps for Section 2 litigation and other efforts to promote compliance with the Voting Rights Act, see a summary of my redistricting work attached as **Exhibit A**.

II. Purpose of Declaration

6. The attorneys for the Defendants in this case asked me to complete two tasks: (1) Develop a hypothetical Congressional plan for Maryland so that all eight districts have a Democratic majority (without changing current CD 6), using information that was available in 2011. (2) Analyze population shifts involving current CD 1 – specifically relating to Anne Arundel County and the CD 6 portion of Harford, Baltimore, and Carroll Counties under the 2002 Plan.

III. Methodology and Sources

7. For my analysis, I used a geographic information system (GIS) software package called *Maptitude for Redistricting*, developed by the Caliper Corporation. This software is deployed by many local and state governing bodies across the country for redistricting and other types of demographic analysis.

8. I used the *2010 Adjusted Block Level Data* file for Maryland legislative redistricting pursuant to the *No Representation Without Population Act*.[1] This special dataset was prepared by the State to adjust the population count in order to take into account the home addresses of the incarcerated resident Maryland population. The block file is available for download at: http://www.mdp.state.md.us/redistricting/2010/dataDownload.shtml

9. I obtained the block equivalency file for the 2011 Plan from the above website. For the 2002 Plan boundaries in effect until 2011, I created a block equivalency file from the 2010 *Maryland PL 94-171* file published by the U.S. Census Bureau.[2]

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[1] See: http://www.mdp.state.md.us/redistricting/2010/newLaw.shtml

[2] The PL 94-171 data file is released in electronic format and is the complete count population file designed by the Census Bureau for use in legislative redistricting. The block level dataset is available for download at: http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/Maryland/

10. I imported the block equivalency files for the 2002 and 2011 plans into a block-level geographic database and created Congressional district boundaries for both plans using *Maptitude for Redistricting*.

11. To determine the percentage of the Democratic and Republican vote in the 2008 Presidential contest by Congressional district, I used a file with precinct-level election data prepared by researchers associated with the Harvard Election Data Archive.[3] The file with Maryland election results is available for download at: http://projects.iq.harvard.edu/eda/data

12. In order to account for split precincts, I imported the Harvard election dataset into *Maptitude for Redistricting* and disaggregated the 2008 precinct-level election results to the block level (based on 2010 voting age population).

13. I also used a GIS shapefile depicting the 2011 home addresses of the eight incumbent members of the Maryland Congressional delegation, prepared by the State of Maryland.

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[3] Source: Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", http://hdl.handle.net/1902.1/15549 V3 [Version]

IV. Hypothetical 8-0 Congressional Plan

14. As requested by the attorneys for the Defendants, I developed a hypothetical Congressional plan ("8-0 Plan") with eight Democratic districts. No incumbents are paired in this plan. **Exhibits B-1, B-2,** and **B-3** provide maps and a statistical summary depicting the 8-0 Plan.

15. Under the 8-0 Plan, hypothetical District 6 is identical to CD 6 under the 2011 Plan. In the 2008 Presidential contest, the eight districts range from a low of 52.5% Democratic in District 2 to a high of 79% Democratic in District 4.

16. Finally, because the 8-0 Plan is hypothetical, I did not take the step to zero out the districts (from .23% overall deviation) in order to achieve perfect population equality. This process would involve splitting a few precincts and would have no meaningful impact on the preceding analysis.

V. Population Shifted Into CD 6 and Out of CD 1 Under the 2011 Plan

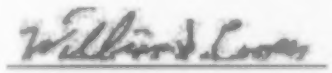
17. **Exhibit C** is a map of the 2002 Plan. As can be seen from the map, under the 2002 Plan, CD 1 extended across the Chesapeake Bay from the Eastern Shore to encompass part of Anne Arundel County. CD 6 extended across the northern tier all the way from Garrett County to the Harford-Cecil county line – a distance of about 175 miles along the Pennsylvania border, as the crow flies.

18. The 2011 Plan removed Anne Arundel County from CD 1, shifting 107,757 persons out of CD 1 as drawn under the 2002 Plan. To compensate for this population loss, 106,562 persons in Harford, Baltimore, and Carroll Counties were shifted from CD 6 under the 2002 Plan into CD 1 under the 2011 Plan.

19. **Exhibit D-1** is a map showing the CD 1 areas shifted (depicted with thick Black lines). **Exhibit D-2** shows summary statistics for the population shifted.

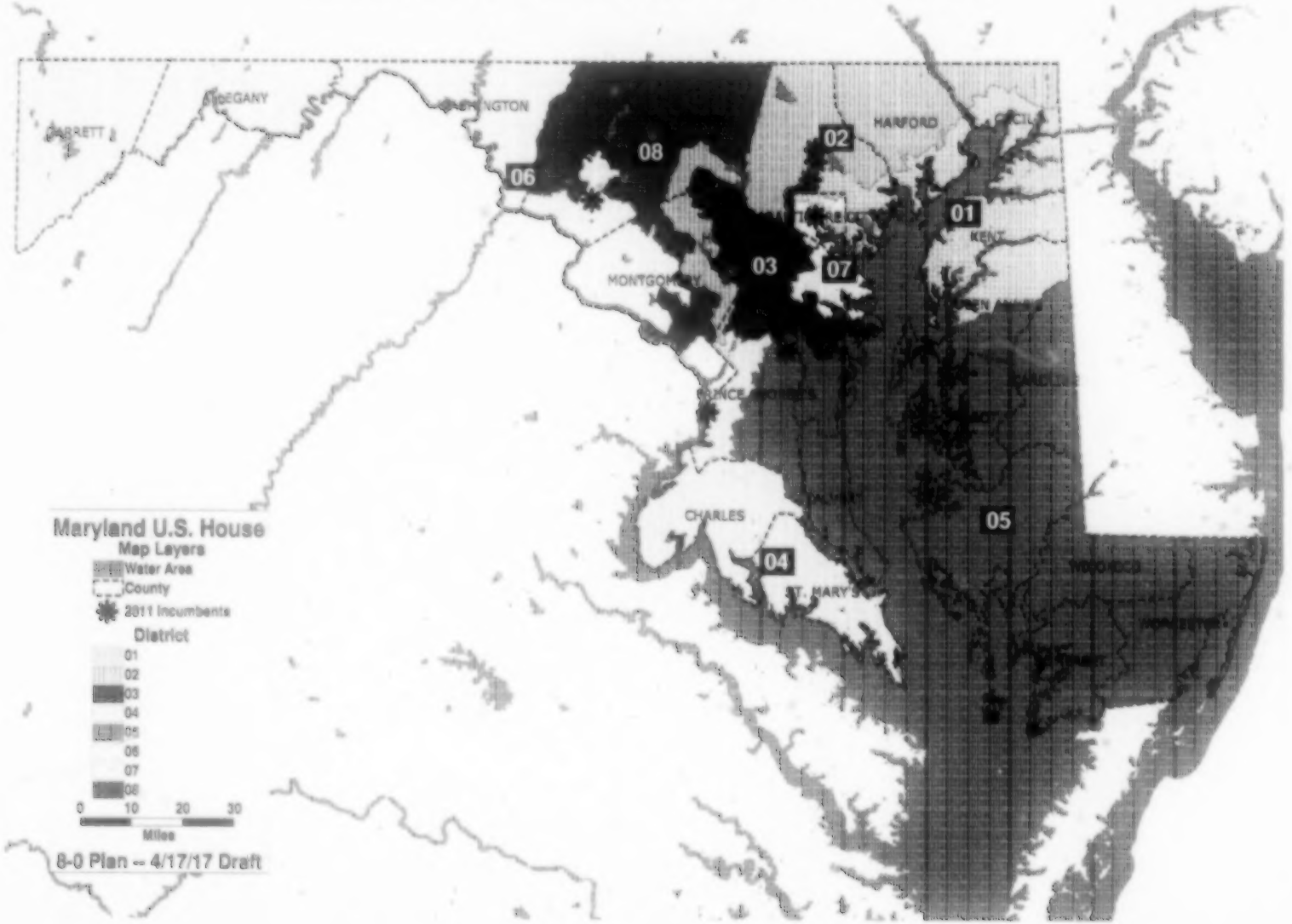
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: May 6, 2017



WILLIAM S. COOPER

Exhibit B-1



GARRETT
ALLEGANY
WASHINGTON
HARFORD
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KENT
MONTGOMERY
PRINCE GEORGE'S
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WORCESTER
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Maryland U.S. House
Map Layers
Water Area
County
2011 Incumbents
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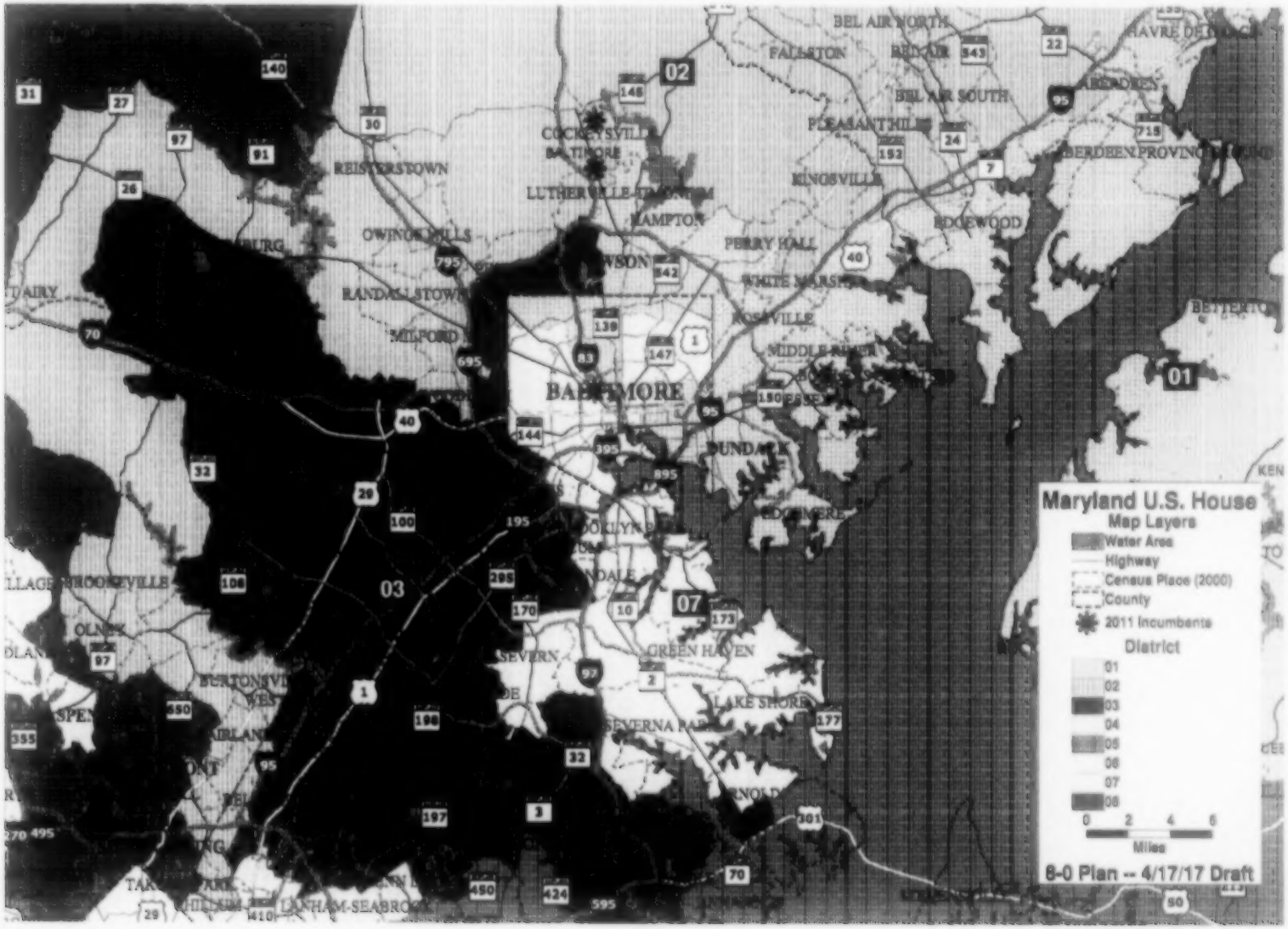
Miles
8-0 Plan -- 4/17/17 Draft

Exhibit B-2


Maryland U.S. House
Map Layers
Water Area
Highway
Census Place (2000)
County
2011 Incumbents
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Miles
8-0 Plan -- 4/17/17 Draft
BALTIMORE
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Exhibit B-3 (Amended)

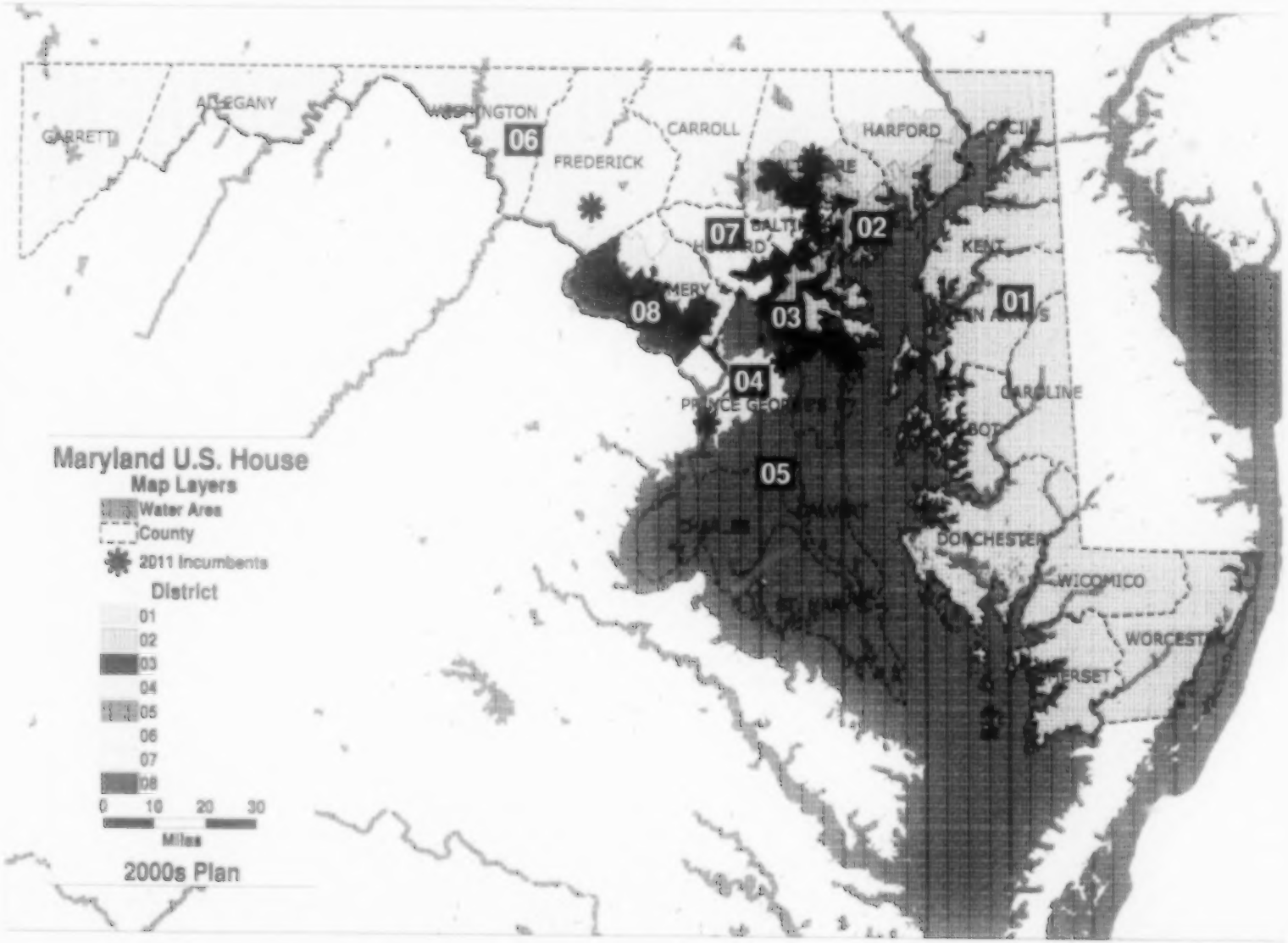
Population Summary Report

Maryland U.S. House, 8-0 Plan – April 17, 2017 Draft

District	Adjusted Population	Deviation	% Deviation	Adjusted Single-Race Black	% Adjusted Single-Race Black	Adjusted 18+ Population	Adjusted 18+ Black	% Adjusted 18+ Black	% Unadjusted 18+ Hispanic	% Unadjusted NH White	2008 Presidential (Democratic percentage)
01	722429	900	0.12%	153699	21.28%	570998	111727	19.6%	4.7%	70.6%	54.9%
02	720465	-1064	-0.15%	166755	23.15%	547303	122444	22.4%	6.7%	62.1%	52.5%
03	720600	-929	-0.13%	167803	26.06%	547065	137462	25.1%	6.2%	57.3%	61.8%
04	721571	42	0.01%	407040	56.41%	542777	302995	55.8%	9.7%	29.9%	79.0%
05	721786	257	0.04%	225609	31.28%	557567	167997	30.1%	4.0%	62.6%	57.0%
06	721529	0	0.00%	87435	12.12%	545070	61486	11.3%	10.1%	66.4%	56.2%
07	721692	363	0.05%	386808	53.86%	553031	286527	52.2%	3.3%	41.2%	72.1%
08	721959	430	0.06%	62210	11.39%	555468	62475	11.3%	11.9%	66.6%	62.5%
Total	8772231		0.22%	1666359	29.44%	4418267	1256113	28.40%	7.3%	57.22%	

Note: 2008 vote by precinct reported by Harvard Election Data Archive
Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", hdl:1902.1/15549 V3 [Version]

Exhibit C


GARRETT
ALLEGANY
WASHINGTON
FREDERICK
CARROLL
HARFORD
CECIL
KENT
QUEEN ANNE'S
CAROLINE
DORCHESTER
WICOMICO
WORCESTER
SOMERSET
CALVERT
PRINCE GEORGE'S
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Maryland U.S. House
Map Layers
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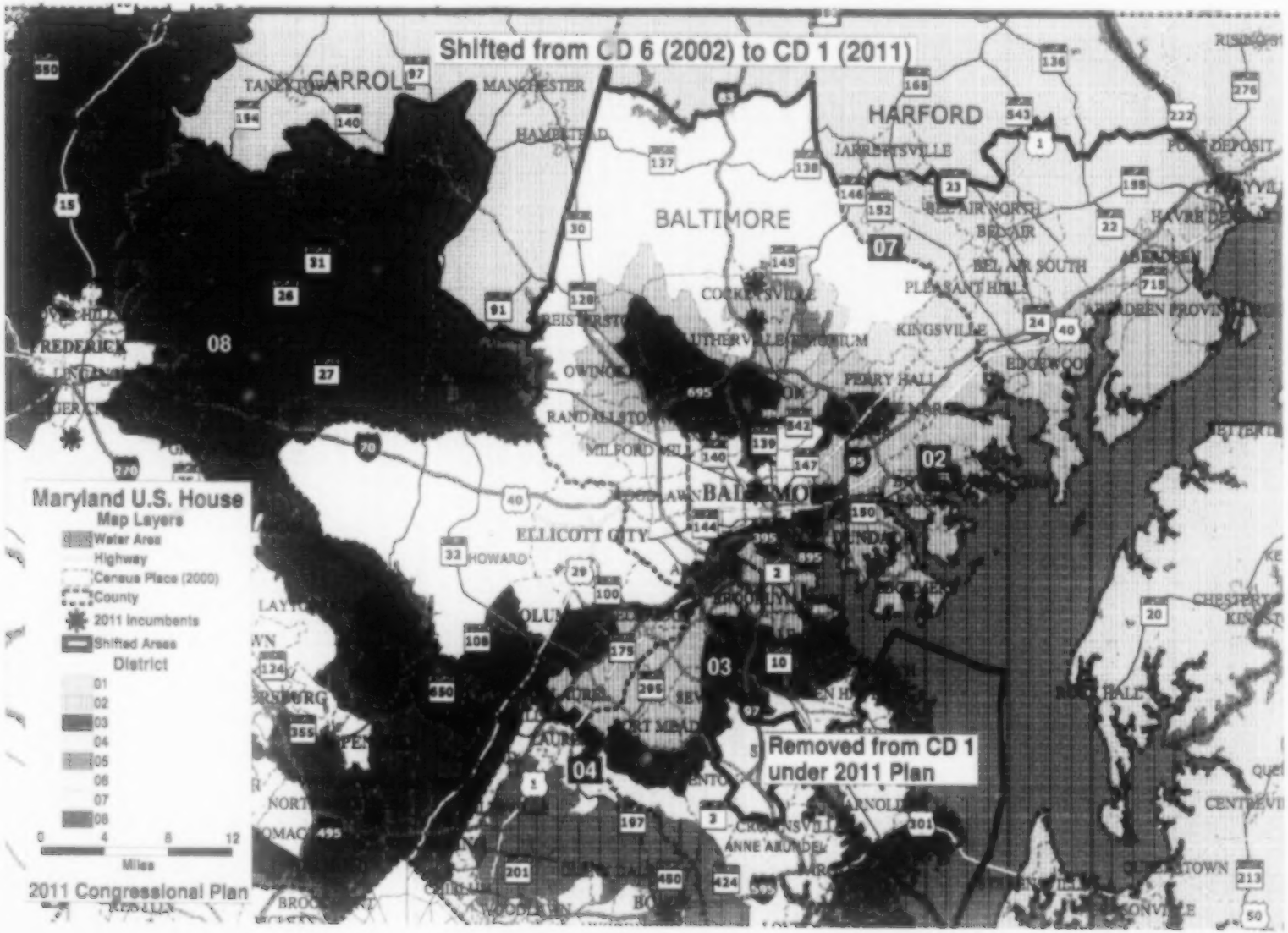
Miles
2000s Plan

Exhibit D-1


Shifted from CD 6 (2002) to CD 1 (2011)
Removed from CD 1 under 2011 Plan
Maryland U.S. House
Map Layers
Water Area
Highway
Census Place (2000)
County
2011 Incumbents
Shifted Areas
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Miles
2011 Congressional Plan
CARROLL
HARFORD
BALTIMORE
FREDERICK
ELLICOTT CITY
HOWARD
ANNE ARUNDEL
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Exhibit D-2

Population Summary Report

Maryland U.S. House, CD 1 -- 2011 Adopted Plan -- Anne Arundel to Harford, Baltimore, and Carroll shift

District	Adjusted Population	Adjusted Single-Race Black	% Adjusted Single-Race Black	Adjusted 18+ Population	Adjusted 18+ Black	% Adjusted 18+ Black	% Unadjusted 18+ Hispanic	% Unadjusted NH White
01	721529	82401	11.42%	667047	81308	11.0%	2.8%	69.3%
Removed from Anne Arundel	107677	4572	4.25%	60754	3361	4.2%	2.5%	69.9%
Added from CD 8 in Harford, Baltimore, and Carroll	[illegible]	2129	2.00%	81012	1501	1.9%	1.4%	95.0%

Note: 2008 vote by precinct reported by Harvard Election Data Archive

Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", hdl:1902.1/15546 V3 [Version]

IN THE UNITED STATES DISTRICT COURT FOR THE UNITED STATES DISTRICT COURT FOR MARYLAND

O. JOHN BENISEK, et al., Plaintiffs, v. LINDA H. LAMONE, et al.,, Defendants.	Civil Case No.: 13-3233

SUPPLEMENTAL DECLARATION OF WILLIAM S. COOPER

WILLIAM S. COOPER, acting in accordance with 28 U.S.C. § 1746, Federal Rules of Civil Procedure 26(a)(2)(B) and 26(e), and Federal Rules of Evidence 702 and 703, does hereby declare and say:

1. My name is William S. Cooper. As a private consultant, I serve as a demographic and redistricting expert for the Defendants. I previously submitted a declaration for the Defendants in this case dated May 6, 2017. I was deposed by the attorneys for the Plaintiffs on May 23, 2017.

2. I submit this supplemental declaration in response to two concerns raised by the Defendants' attorneys at my May 23 deposition: (1) the hypothetical 8-0 Plan described in my May 6 Declaration is not a zero deviation plan and (2) the

hypothetical 8-0 Plan does not account for duplicate vote counts found in the dataset I relied upon from the Harvard Election Data Archive.

3. With respect to the zero deviation concern, I explained in my May 6 Declaration and at my May 23 deposition that given the hypothetical nature of the 8-0 Plan there is no point in zeroing out the district deviations. This is because the necessary population changes are so small that there would be no meaningful partisan effect.[1]

4. With respect to the precinct-level 2008 Presidential vote count discrepancy found in the Harvard Election dataset, I was unaware of the issue until I received the reply report filed on the evening of May 22 by Dr. Michael McDonald. Because I was en route to my May 23 deposition, I did not have an opportunity to make adjustments to correct the errors prior to the deposition.

5. The attached Zero Deviation 8-0 Plan removes duplicate vote counts in 11 consolidated Montgomery County precincts. (See maps in Exhibits A-1, A-2, and summary district statistics in Exhibit A-3.) These corrections are identical to the precincts identified by Dr. McDonald in his April 7 report[2] – except that consolidated Montgomery Precinct 5-009 merges 5-022 and 5-009. Precinct 5-005, which Dr. McDonald consolidates with 5-022, does not change – according to the

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[1] See Cooper May 6 Declaration, ¶16.

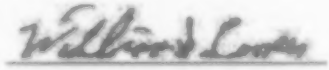
[2] See McDonald, April 7, 2017 Report – p. 27.

official Maryland 2010 precinct boundary file I used. [3]

6. The corrections I made to account for the duplicate vote count in the 11 consolidated precincts have a very minor downward impact on the 2008 Democratic vote percentages in CD 6 (-0.7%) and hypothetical Districts 2 (-0.2%) and District 8 (-.04%) of the Zero Deviation 8-0 Plan.[4]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: June 1, 2017



WILLIAM S. COOPER

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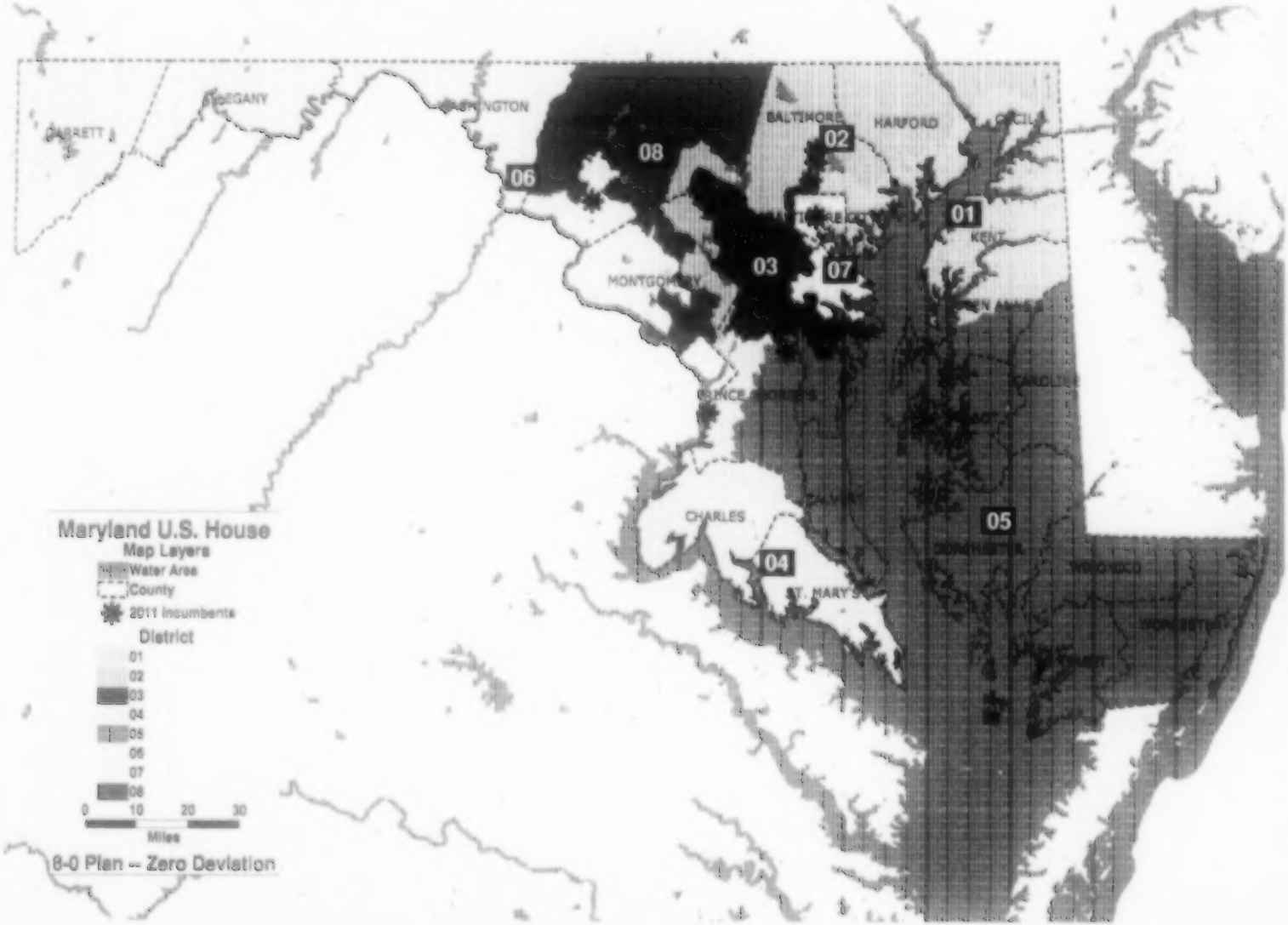
[3] The 2010 Maryland precinct shapefile, which I used as an overlay in preparing the 8-0 Plan, is available for download at:

http://planning.maryland.gov/redistricting/2010/precinct.shtml

[4] Compare attached Exhibit A-3 with Cooper May 6, 2017 Declaration, Exhibit B-3.

Exhibit A-1


Maryland U.S. House
Map Layers
Water Area
County
2011 Incumbents
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8-0 Plan -- Zero Deviation
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BALTIMORE
HARFORD
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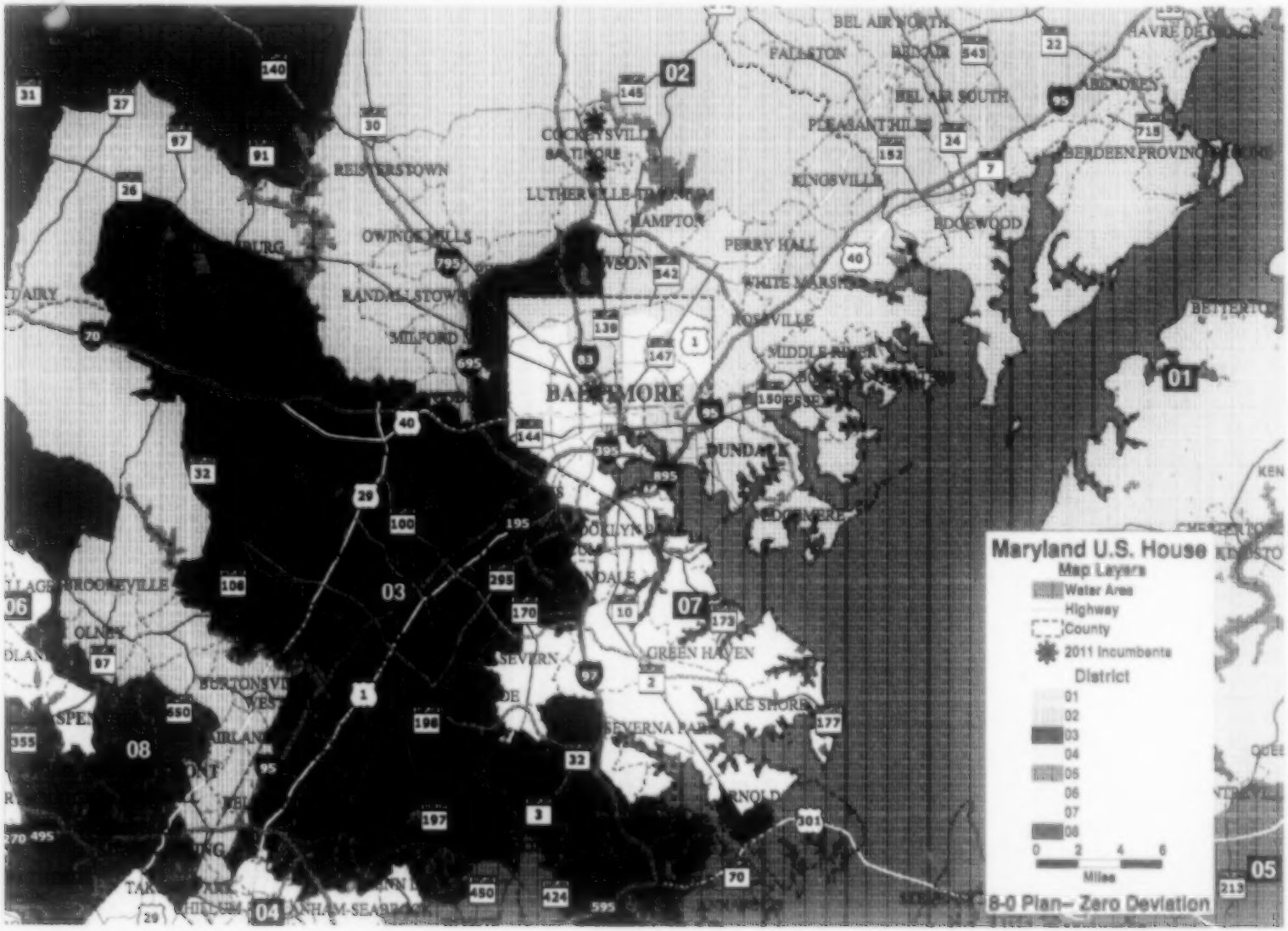
CHARLES
ST. MARY'S
WORCESTER

Exhibit A-2


Maryland U.S. House
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8-0 Plan– Zero Deviation
BALTIMORE
DUNDALK
GREEN HAVEN
LAKE SHORE
SEVERNA PARK
SEVERN
REISTERSTOWN
OWINGS MILLS
RANDALLSTOWN
MILFORD
COCKEYSVILLE
LUTHERVILLE-TIMONIUM
HAMPTON
PERRY HALL
WHITE MARSH
ROSSVILLE
MIDDLE RIVER
KINGSVILLE
EDGEWOOD
PLEASANT HILLS
BEL AIR SOUTH
BEL AIR NORTH
FALLSTON
ABERDEEN
HAVRE DE GRACE
BETTERTON
OLNEY
BROOKEVILLE
BURTONSVILLE
ANNAPOLIS
ARNOLD
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Exhibit A-3

Population Summary Report

Maryland U.S. House, 8-0 Plan -- April 17, 2017 Zero Deviation

District	Adjusted Population	Deviation	% Deviation	Adjusted Single-Race Black	% Adjusted Single-Race Black	Adjusted 18+ Population	Adjusted 18+ Black	% Adjusted 18+ Black	% Unadjusted 18+ Hispanic	% Unadjusted 18+ NH White	2008 Presidential (Democratic percentage)
01	721529	0	0.00%	153564	21.28%	570281	111727	19.6%	4.7%	70.6%	84.9%
02	721529	0	0.00%	166841	23.12%	546144	122444	22.4%	8.8%	62.2%	82.3%
03	721529	0	0.00%	187993	26.06%	547820	137462	25.1%	6.2%	57.3%	61.7%
04	721529	0	0.00%	406602	56.36%	542763	302995	55.8%	9.7%	29.9%	79.0%
05	721529	0	0.00%	226295	31.36%	567370	167997	30.1%	4.0%	62.5%	57.1%
06	721529	0	0.00%	87435	12.12%	545070	61486	11.3%	10.1%	69.4%	55.5%
07	721529	-1	0.00%	386601	53.86%	552738	286527	52.2%	3.3%	41.2%	72.1%
08	721529	0	0.00%	82036	11.37%	565131	62475	11.3%	11.9%	66.7%	62.1%
Total	5772231		0.00%	1696369	29.44%	4418367	1288113	29.40%	7.3%	57.22%	

Note: 2008 vote by precinct reported by Harvard Election Data Archive

Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", hdl:1902.1/15549 VS [Version]

Duplicate vote counts in 11 Montgomery County consolidated precincts have been removed from the Harvard dataset

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v. Case No. 13-cv-3233

LINDA H. LAMONE., *et al.*,

Defendants.

DECLARATION OF YAAKOV WEISSMANN

I, Yaakov Weissmann, under penalty of perjury, declare and state:

1. I, Yaakov "Jake" Weissmann, am over the age of eighteen and competent to testify on the matters stated below.

2. I have served as a staff member to Senate President Thomas V. Mike Miller, Jr. since July 2009. When I began my service I was a junior member of the staff and Patrick Murray was Deputy Chief of Staff. Victoria Gruber served, and still serves as Chief of Staff. In 2011, Senate President Miller assigned the general topic of redistricting to Mr. Murray's portfolio of matters and Mr. Murray asked me to assist him.

3. My first work on redistricting began in January 2011 when I met with the Department of Legislative Services with Mr. Murray, Jeremy Baker, who was a staff member to House Speaker Michael Busch, and staff from the Department of Legislative Services to be trained to use the Maptitude redistricting software. We also learned and discussed what data would be available from the Census, later in the spring.

4. To the best of my recollection, in or around January or February, 2011, Mr. Murray and I were provided with a laptop that had been prepared by the Department of Legislative Services with the 2010 Census data, as adjusted for Maryland's No Representation Without Population Act. The laptop also included party registration data and voter turnout data. At some later time we received two data files that contained Democratic Performance Index information at the precinct level—the first file contained

unreliable data, but the second appeared to be reliable. I cann t recall who provided the data we ultimately used. None of the data sets we had available gave data at an address level and we did not examine information at an address level.

5. Occasionally, we examined census blocks. The only data available at a census block level, other than 2010 Census data, was registration and turnout data. The Democratic Performance Index data was available at the precinct level only (although the mapping software will display a number for the Census Block, I cannot ever recall looking at that number and, because the Democratic Performance Index is calculated using election returns, it is not meaningful at lower than a precinct level). Election results data from the State Board of Elections was not integrated into the mapping software, although it is possible that we consulted those results from time to time. I have no specific recollection of doing so with respect to congressional redistricting. When drawing district lines, the software program did not permit us to split census blocks.

6. Because I was more technologically proficient, and, as a junior staffer, had more time in my schedule, I became the person primarily charged with using the Maptitude software to create draft plans.

7. I began working with staff members from the Governor's office in or around July, 2011 to assist them with drawing the Governor's Redistricting Advisory Committee 2011 Congressional map. These staff included Joseph Bryce, Secretary of State John McDonough. Pat Murray and Jeremy Baker were also part of this group. As part of that work I attended several of the GRAC's public hearings. From time to time, Jeanne Hitchcock, chair of the Governor's Redistricting Advisory Committee and Richard Hall, Secretary of Planning would join our workgroup to provide feedback, including feedback from the public hearings and other stakeholders. We also looked at and considered a variety of third-party plans including the plan submitted to the Governor's Redistricting Advisory Committee by the Maryland Republican Party.

8. Sometime in the middle of August, 2011, our group received a draft map that was provided by a member of the Governor's staff, although I cannot remember who provided it. I understood this draft map to be a map that the Maryland United States Congressional Delegation had presented to the Governor. A printout of the map is attached as Exhibit A to this affidavit. I have examined Exhibit B to this affidavit and believe it to be the same or a substantially similar map.

9. The map depicted as Exhibit A was not acceptable. The group of staff tasked with developing a plan therefore sought to create a plan that would be acceptable to the Commission. We made a series of major changes that included keeping 1) Washington

County intact; 2) Frederick City intact;[1] 3) Hagerstown intact; 4) Westminster intact; 5) the number of districts in Prince George's County to just two by drawing the Third and the Eighth Districts so that they did not include population from Prince George's County; 6) the number of districts in Montgomery County to three by drawing the Fourth District so that it did not include population from Montgomery County; and 7) the I-270 corridor as a major feature of the Sixth district, connecting Frederick with Montgomery County. We also made other changes to improve the visual compactness of the districts throughout the map as compared to the draft map provided by the Congressional delegation.

10. When we were preparing the plan for the GRAC's approval we also understood that an option should be presented that eliminated the Chesapeake Bay crossing the First District by removing the Anne Arundel County District One population. Because of GRAC's other goals, including reducing the number of congressional districts in Prince George's County, maintaining majority-minority districts, and incumbent protection, development of this map required the Sixth District to expand southward into Montgomery County. For example, keeping the addresses of all incumbents in their districts was not simple in the north-east sector of the map, where three incumbent congressional representatives lived in close proximity to each other.

11. When drawing the Sixth and Eighth Districts, the staff intended to place the entirety of Frederick City into the Sixth District and the entirety of Rockville, Maryland into the Eighth District. In the process of preparing this affidavit I examined maps prepared by the Department of Planning and attached as Exhibit A to the declaration of Shelly Aprill and the map files produced in this case, and realize that there was a trivial split of each city. In Frederick City, I do not know how this split occurred, because I recollect selecting the boundaries of the municipality in Maptitude for inclusion in the Sixth District when drawing the district lines in that area. In Rockville, it appears that the boundaries of precinct 04-020 were followed rather than the municipal boundary in one instance. I cannot recall if this was done purposefully to avoid a precinct split or whether I selected Rockville's municipal boundaries in Maptitude like I did for Frederick City, but I do recall that Rockville in its entirety was intended to be placed in the Eighth District. Examining the map file from which the text of Senate Bill 1 was prepared, it appears that there are 0 residents in the area of Frederick City contained in the Eighth and that there are 4 residents in the area of Rockville contained in the Sixth District.

12. At one point, our group considered a map that would have created the possibility that eight Democratic and zero Republican congressional representatives could be elected, but this map was not seriously considered for adoption.

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[1] As explained below, it was our intent to keep Frederick City intact.

13. As staff, we developed at least three plans, but it may have been four, to discuss and share with the GRAC. These plans were presented to GRAC who voted on a plan that was announced, and that plan was presented to the Governor. After the GRAC's announcement and presentment, the Governor made slight additional changes. This map was ultimately provided to the Department of Legislative Services to be translated into the text of Senate Bill 1.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

6/29/17
Date

Yaakov Weissmann

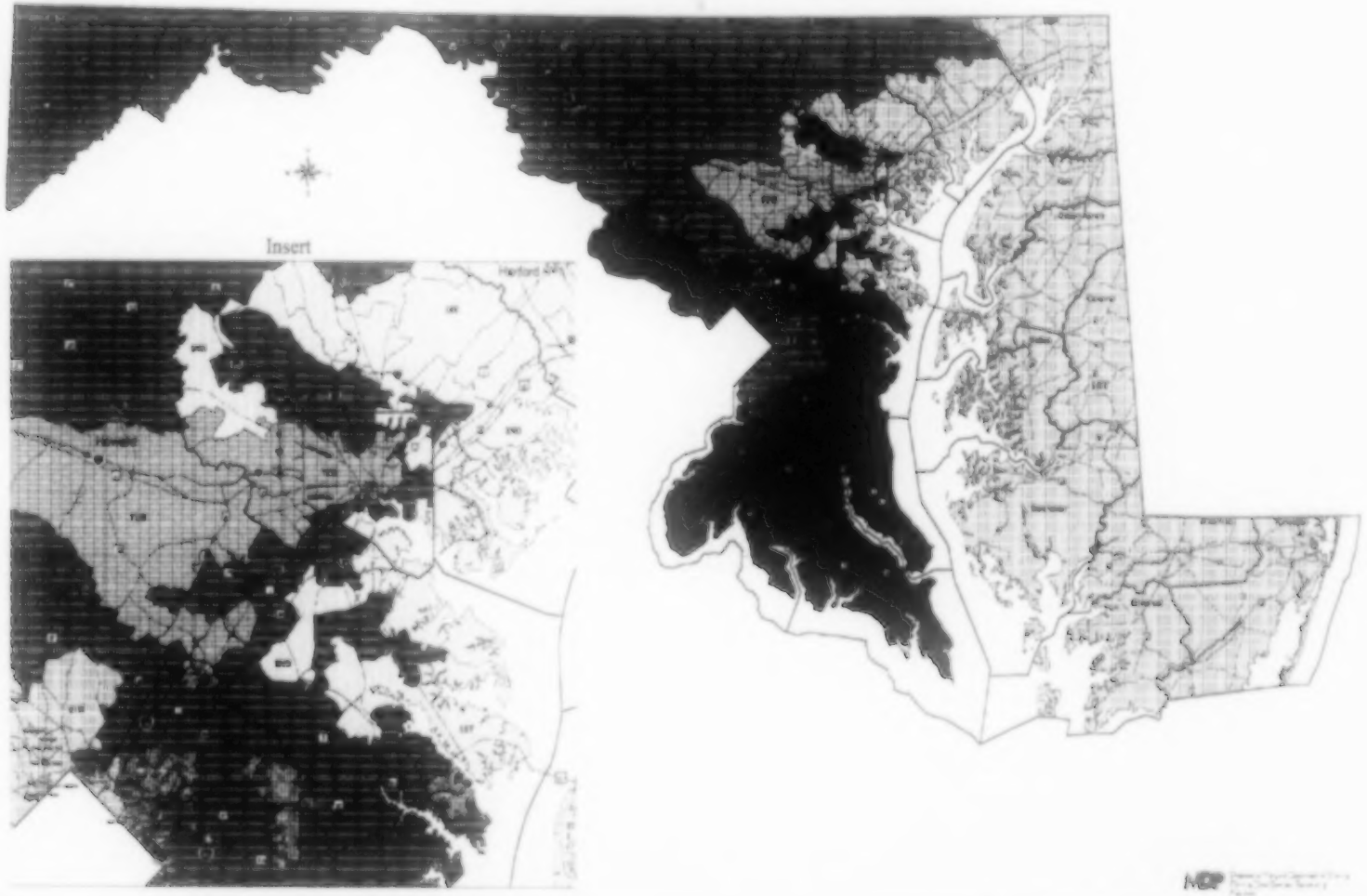
Exhibit A

Exhibit B

Delegation Proposal

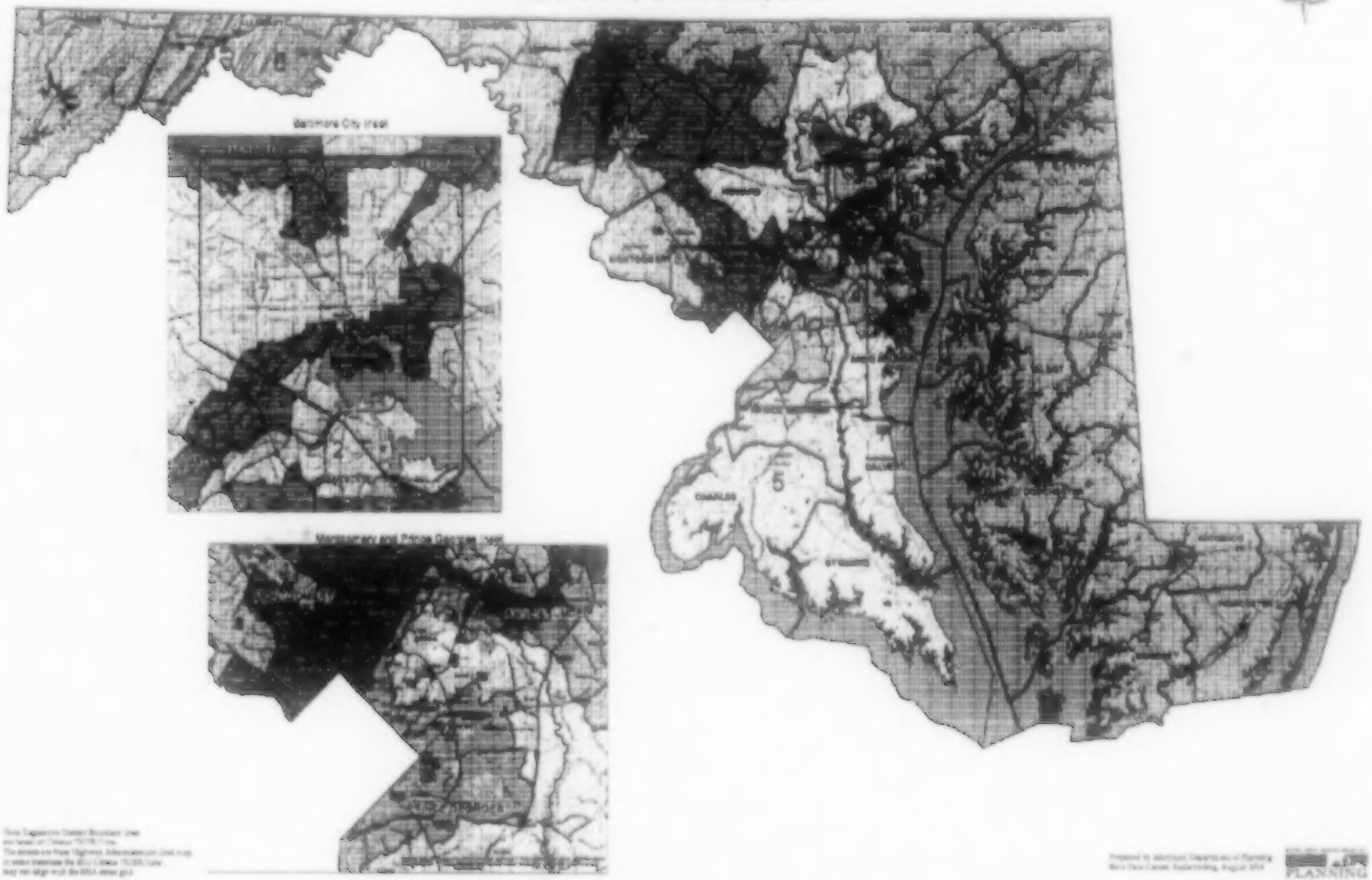
2002 CONGRESSIONAL DISTRICTING PLAN

Senate Bill 805 May 6th, 2002



Maryland 2011 Congressional Districts

Senate Bill 1, October 20, 2011



Appendix A - 5

POPULATION CHANGE and VARIANCE from IDEAL - ADJUSTED 2010 CENSUS POPULATION COUNTS by EXISTING 2002 CONGRESSIONAL DISTRICT

Senate Bill 605, May 6, 2002

Note: This report is based on Census 2010 P.L. 94-171 Redistricting Data (Maryland) and is ADJUSTED for the use of Maryland Redistricting pursuant to the "No Representation Without Population" Act (SB 400\HB 496) passed into Maryland law in 2010. Maryland census data must be ADJUSTED for the purposes of creating congressional, state legislative, and local districting plans. Generally, the law requires that the census data must be adjusted to reassign Maryland residents in State & Federal correctional institutions to their last known address, and to exclude out-of-state residents in correctional institutions from redistricting.

Variance from Ideal District Population
Ideal Congressional District Population 2000: 662,061
Ideal Congressional District UnAdjusted Population 2010: 721,694
Ideal Congressional District AdJustedPopulation 2010: 721,529

2002 Congressional District	Total Census Population 2000	2000 Ideal Congressional District Population	UnAdjusted Total Census Population 2010	Adjusted Total Census Population 2010	2010 AdJusted Ideal Congressional District Population	Net Change	Net Pct Change	Adjusted Variance from Ideal Popn. Deviation	Percent
Maryland	5,296,486	662,061	5,773,552	5,772,231	721,529	-1,321	0.0%		
01	662,082	662,061	744,275	743,067	721,529	-1,208	-0.2%	21,538	3.0%
02	662,060	662,061	700,893	703,824	721,529	2,931	0.4%	-17,705	-2.5%
03	662,082	662,061	719,856	716,808	721,529	-3,048	-0.4%	-4,721	-0.7%
04	662,082	662,061	714,319	715,674	721,529	1,355	0.2%	-5,855	-0.8%
05	662,080	662,061	767,369	768,464	721,529	1,095	0.1%	46,935	6.5%
06	662,080	662,061	738,940	731,715	721,529	-7,225	-1.0%	10,186	1.4%
07	662,080	662,061	659,776	664,091	721,529	4,315	0.7%	-57,438	-8.0%
08	662,080	662,061	728,124	728,588	721,529	464	0.1%	7,059	1.0%

Definition: The "ideal" district population is equal to the total state population divided by the total number of districts."Absolute deviation" is the degree by which a single district's population varies from the "ideal" population.
The difference is expressed as a plus or minus number, meaning that the district's population exceeds or falls short of the "ideal" by that number of people.
The percent deviation is the percent, plus or minus, that the district's actual population deviates from the "ideal" population.

Note: The district totals include minor corrections in the assignment of census tabulation blocks to voting districts/precincts. The corrections to the P.L.94-171 U.S. Bureau of the Census file were made by Maryland Department of Planning and Department of Legislative Services.
The 2010 Population for Congressional and Legislative Districts are derived and based on the assignment of voting districts/precincts to districts as provided by Local Board of Elections and adjusted by the Maryland Departments of Planning, Legislative Services and Public Safety and Correctional Services pursuant to the "No Representation Without Population" Act.

Report prepared by the Maryland Department of Planning, Clearinghouse, Redistricting, May 2011

U.S. Election Assistance Commission invited me to be a panelist on poll worker recruitment, training and retention at its public meeting on May 25, 2006. Invited participant in a planning session sponsored by the PEW Charitable Trusts as part of their "Make Voting Work" initiative.

In 2011, I was retained to assist the Baltimore City Council in its redistricting process for the drawing of city council district lines. This task involved attending numerous public hearings and meetings as well as drafting proposals of council district boundary lines for consideration by the Baltimore City Council. I also provided analysis of the city council redistricting plans proposed by the Mayor of Baltimore City, council members and the public. I prepared a lengthy report with maps as part of my work. In addition to advising and consulting with the Baltimore City Council on its redistricting process, I chaired the 2010 Citizens Committee for Baltimore City at the request of the Mayor. Again, my responsibility was to coordinate with the U.S. Census Bureau and work with advocacy groups, businesses, city agencies, community, and neighborhood groups to secure the maximum participation of Baltimore City residents in the 2010 Census.

Publications

- Herbert C. Smith & John T. Willis, "Maryland Politics and Government: Democratic Dominance" (2012)
- John T. Willis, "Presidential Elections in Maryland" (1984)
- John T. Willis, "Carroll County," in Western Maryland: A Profile 105 (Thomas H. Hattery, ed., 1980)
- *Election Administration Reports* (John T. Willis, ed., 2008-present)

IV. The Evolution of the Sixth Congressional District

A. Origin of the Sixth Congressional District's Five Counties

The five counties in Maryland's Sixth Congressional District (Allegany, Frederick, Garrett, Montgomery and Washington) share a common origin and heritage as well as have extensive agricultural, economic, geographic, political, religious and social connections. All of the counties

were part of the land designated as Frederick County by an Act of the Maryland Proprietary Assembly on June 10, 1748.[1]

By resolution of the Maryland Constitutional Convention of 1776, passed on September 6, 1776, Montgomery County was created from the lower district of Frederick County and Washington County was created from the upper district of Frederick County.[2] All three counties received recognition under the 1776 Constitution of Maryland and were granted representation in the House of Delegates.[3] The state's first constitution was adopted on November 8, 1776.[4]

Allegany County was created by the Maryland General Assembly on December 25, 1789, from the western portion of Washington County,[5] after the ratification of the U.S Constitution and after the first federal elections were held in Maryland on January 7-10, 1789.[6] Garrett Count was the last county created in Maryland on December 5, 1872, from the western portion of Allegany

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[1] "An Act to divide Prince George's County and to erect a new one by the Name of Frederick County." 15 Md. Laws 1748, reported in *Assembly Proceedings May* 10-*June* 11, 1748 142; *available at* http://aomol.msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000046/pdf/am46--142.pdf.

[2] 78 Proceedings of the Conventions of the Province of Maryland, held at the City of Annapolis in 1774, 1775 & 1776 242, 242-46 (Baltimore: James Lucas & E.K. Deaver and Annapolis: Jonas Green 1836); available at http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/am78--242.html.

[3] "A Declaration of Rights, and the Constitution and Form of Government, Agreed to by the Delegates of Maryland, in free and full Convention assembled." 40-41 (Annapolis: Frederick Green 1776), available at: http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/convention1776.html

[4] "Maryland At A Glance: Historical Chronology", Maryland Manual On-Line, available at http://msa.maryland.gov/msa/mdmanual/01glance/chron/html/chron17.html (last visited May 8, 2017).

[5] Chapter 29, Acts of 1789.

[6] John T. Willis, "Presidential Elections in Maryland" 13 (1984).

County.[7] Garrett County, named after John W. Garrett, the president of the Baltimore and Ohio Railroad Company from 1851-1884,[8] first had votes recorded in a federal election in 1874.[9]

The common origin and historical development of the five counties contained in the Sixth Congressional District are aptly described in a chapter entitled "The Green Walls–Western Maryland" in The Old Line State: A History of Maryland, edited by the State Archivist and Commissioner of Land Patents, Dr. Morris L. Radoff, and published by the Maryland Hall of Records Commission. The author of this chapter was Charles McC Mathias, Jr., who became the congressman representing the Sixth Congressional District (1961-1969) and a Maryland U.S. Senator (1969-1987).[10] The early settlement and development of the counties in the current Sixth Congressional District is set forth in great detail in the classic two volume work entitled, History of Western Maryland. Being a History of Frederick Montgomery, Carroll, Washington, Allegany and Garrett Counties from the Earliest Period to the Present Day, compiled and written by J. Thomas Scharf and first published in 1882.

B. History of the Sixth Congressional District

To explain and illustrate the historical development of Maryland's congressional district boundary lines, I have prepared, in conjunction with the Maryland Department of Planning, a set of maps depicting the boundary lines for the state's congressional districts from the first federal election held January 7-10, 1789, to the current congressional district boundary lines approved on October 20, 2011. *See* Appendix A, Maps 1 through 16.

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[7] Chapter 212, Acts of 1872

[8] J. Thomas Scharf, "History of Western Maryland: Being a History of Frederick, Montgomery, Carroll, washington, Allegany and Garrett Counties From the Earliest Period to the Present Day", Vol.II 1511 (Regional Publishing Co. 1968).

[9] *See id.* at 1518 (Garrett County was considered part of the Sixth District in the elections of 1874).

[10] Morris Radoff, ed., The Old Line State, Hall of Records Commission (1971).

On December 22, 1788, the Maryland General Assembly passed the first statute creating congressional district boundary lines in Maryland.[11] The Sixth Congressional District was designated as consisting of Frederick, Washington and Montgomery counties.[12] That 1789 Sixth Congressional District encompasses all of the land contained in the current Sixth Congressional District. *See* Appendix A, Compare Map 1 with Map 16.

The number of members of the U.S. House of Representatives allocated to the state of Maryland pursuant to federal laws implementing apportionment after the decennial U.S. Census, has ranged from five members to nine members. Table 1 sets forth the number of members of the House of Representatives apportioned to Maryland under the United States Constitution after each decennial census since 1789 and the congressional district designations from 1789 through 2016 for each of the counties relevant to this litigation. Table 2 lists the state laws passed by the Maryland General Assembly establishing the congressional district boundary lines within the state.

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[11] Chapter 10, Acts of 1788, Second Session, available at http://aomol.msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000204/html/am204--317.html.

[12] *Ibid.*

TABLE 1
MARYLAND ELECTION HISTORY
CONGRESSIONAL DISTRICTS of RELEVANT COUNTIES
1789-2020

Years	# Md Rep.	Allegany	Carroll	Frederick	Garrett	Montgomery	Washington
1789-91	6	not formed	not formed	6	not formed	6	6
1792-1800	8	6	not formed	3 and 4	not formed	3	6
1802-1830	9	6	not formed	3 and 4	not formed	3	6
1812-1820	9	6	not formed	3 and 4	not formed	6	6
1822-1830	9	6	not formed	3 and 4	not formed	6	6
1832-1840	8	7	nf; 3 and 6	6 and 7	not formed	6	7
1842-1950	6	2	3	2	not formed	1	2
1852-1960	6	2	3	2	not formed	1	2
1862-1870	5	4	4	4	not formed	5	4
1872-1880	6	6	2	6	6	6	6
1882-1890	6	6	2	6	6	6	6
1892-1900	6	6	2	6	6	6	6
1902-1910	6	6	2	6	6	6	6
1912-1920	6	6	2	6	6	6	6
1922-1930	6	6	2	6	6	6	6
1932-1940	6	6	2	6	6	6	6
1942-1950	6	6	2	6	6	6	6
1952-1960	7	6	2	6	6	6	6
1962-1964	8	6	2	6	6	6	6
1966-1970	8	6	6	6	6	8	6
1972-1980	8	6	6	6	6	6 and 8	6
1982-1990	8	6	6	6	6	6 and 8	6
1992-2000	8	6	6	6	6	4 and 8	6
2002-2010	8	6	6	6	6	4 and 8	6
2012-2020	8	6	1 and 8	6 and 8	6	3, 6 and 8	6

Prepared by J.T. Willis from official election returns and a work in progress, **Maryland Election History** (copy. 04/07/17).

TABLE 2
MARYLAND ELECTION HISTORY
Acts of Maryland General Assembly
Creating Congressional Districts
(1788-2011)[13]

1. Acts of 1788 (Reg. Sess.), Chapter X (created six congressional districts (CDs))
2. Acts of 1791 (Reg. Sess.), Chapter LXII (provided for 8 or 9 CDs depending upon census results)
3. Acts of 1832 (Reg. Sess.), Chapter 275 (created eight CDs)
4. Acts of 1843 (Reg. Sess.), Chapter 16 (created six CDs)
5. Acts of 1862 (Reg. Sess.), Chapter 228 (created five CDs)
6. Acts of 1872 (Reg. Sess.), Chapter 418 (created six CDs)
7. Acts of 1902 (Reg. Sess.), Chapter 136 (recreated six CDs)
8. Acts of 1951 (Reg. Sess.), Chapter 143 (created seven CDs)
9. Acts of 1961 (Reg. Sess.), Chapter 206 (created eight CDs)[14]
10. Acts of 1963 (Reg. Sess.), Chapter 380 (created eight CDs)[15]
11. Acts of 1971 (Special Sess.), Chapter 353 (created eight CDs)
12. Acts of 1982 (Reg. Sess.), Chapter 106 (created eight CDs)
13. Acts of 1991 (2nd Special Sess.), Chapter 4 (created eight CDs)
14. Acts of 2002 (Reg. Sess.), Chapter 340 (created eight CDs)
15. Acts of 2011 (Special Sess.), Chapter 1 (created eight CDs)[16]

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[13] Prepared by J.T. Willis from official election returns and a work in progress, **Maryland Election History** (copy. 04/07/17)

[14] The boundary lines drawn by the General Assembly were petitioned to referendum and rejected at the general election on November 6, 1962.

[15] The boundary lines drawn by the Maryland General Assembly were petitioned to referendum but federal district court stayed the conduct of the election pending judicial challenges. The 1966-70 congressional district boundary lines were court-ordered on May 3, 1966, in *Maryland Citizens Committee for Fair Congressional Redistricting, Inv. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966).

[16] The boundary lines drawn by the Maryland General Assembly were petitioned to referendum and approved by the voters at the general election on November 6, 2012.

An examination of these Maryland congressional district maps and tables reveals a long-standing connection between Montgomery County and the rest of the western counties in the Sixth Congressional District. As previously stated, Montgomery County along with Frederick County and Washington County comprised the initial Sixth Congressional District for the first federal congressional election in 1789. *See* Appendix A, Map 1. For the forty-seven (47) regular congressional elections held from 1872 through 1964 spanning ninety-four years, the entirety of Montgomery County was part of the Sixth Congressional District along with Allegany, Frederick, Garrett and Washington counties. *See* Appendix A, Maps 7 through 10. The entirety of Montgomery County has been a part of the sixth congressional district for forty-nine out of the 115 regular congressional elections since 1789. *See* Appendix A, Maps 1, 7 through 10. A portion of Montgomery was included in the Sixth Congressional District in another eighteen (18) congressional elections covering twenty-six years (1972-1980, 1982-1990, 1992-2000, 2012-2016). *See* Appendix A, Maps 12, 13, 15, 16.

After the state of Maryland was allocated eight members of the U. S. House of Representatives subsequent to the first federal census taken in 1790, Montgomery County was joined with the eastern part of Frederick County by the Maryland General Assembly in a Third Congressional District for the five congressional elections held from 1792 to 1800. *See* Appendix A, Map 2. After the state of Maryland was allocated nine members of the U.S. House of Representatives pursuant to the 1800 Census, Montgomery County remained joined with Frederick County in a Third Congressional District for another fifteen congressional elections, covering thirty years from 1802 through 1832. *See* Appendix A, Map 3. For the ten congressional elections from 1833 to 1840 when the state's members of the U.S. House of Representatives was reduced to eight following the 1830 Census, Montgomery County was joined with Frederick County (and

in 1838 and 1840 with a portion of Carroll County), in the Sixth Congressional District. *See* Appendix A, Map 4.

The congressional district history of Montgomery County stands in contrast to Carroll County, which was created in 1837 out of an eastern portion of Frederick County and a northwestern portion of Baltimore County. Pursuant to Chapter 294 of the Acts of 1836, the western portion of Carroll County was placed in the Third Congressional District with an eastern portion of Frederick County and the entirety of Montgomery County. *See* Appendix A, Map 4. The eastern portion of Carroll County was assigned to the Sixth Congressional District along with Baltimore County, Harford County, and parts of Baltimore City. *Id.* After the 1840 census, Maryland's number of members in the U.S. House of Representatives was reduced from eight to six and Carroll County was placed in the Third Congressional District along with Baltimore County, Howard County, and Baltimore City for the next twenty years from 1842 to 1860. *See* Appendix A, Map 5. When Maryland's congressional delegation was reduced to only five members after the 1860 Census, the General Assembly placed Carroll County in a Fourth Congressional District along with the western Maryland counties for ten years from 1862 to 1870. *See* Appendix A, Map 6. However, when Maryland's representation was increased to six members after the 1870 Census, Carroll County was placed in the Second Congressional District along with Baltimore County, a portion of Baltimore City, Cecil County, and Harford County for thirty years. *See* Appendix A, Map 7. After the 1900 Census, Carroll County again was assigned to the Second Congressional District together with Baltimore County, a portion of Baltimore City, and Harford County for the next fifty-four years until the 1966 congressional elections. *See* Appendix A, Maps 8 through 10.

On May 3, 1966, a federal district court panel ordered a redistricting plan for the 1966 to 1970 congressional elections, as a result of lawsuits challenging attempts of the Maryland General Assembly to draw eight congressional districts.[17] The court's redistricting plan, depicted in Appendix A, Map 11, placed Carroll County into a Sixth Congressional District with Allegany, Frederick, Garrett, and Washington Counties, and a part of Howard County as the court endeavored to achieve congressional districts of substantially equal population.[18] This judicial action placed Carroll County in a district with other counties with which it had not been joined since the state of Maryland was reduced to only five members in the House of Representatives after the 1860 Census.

In summary, the political connection of Montgomery County to Frederick County and the other Maryland counties in the Sixth Congressional District is consistent with the historical redistricting decisions of the Maryland General Assembly for 229 years that have reflected cultural, demographic, economic, geographic, transportation, and political factors. In forty-nine congressional elections covering ninety-eight years, the entirety of all of the counties were together in a single congressional district. In another eighteen regular congressional elections covering thirty-six years, a portion of Montgomery County has been included in the Sixth Congressional District with the western Maryland counties. In addition, the entirety of Montgomery County was included, with a portion of Frederick County, in a common congressional district for another twenty regular congressional elections spanning 40 years.

Further, the inclusion of a portion of Carroll County in the First Congressional District with the northern portions of Baltimore County and Harford County as well as Cecil County represents

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[17] *Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966).
[18] *Id.* at 736-37.

a return to historical congressional district alignments that had existed for ninety-four years from 1872-1964 and is not a significant break with Maryland's political history. In addition, the inclusion of a portion of Carroll County in the Eight Congressional District with a portion of Montgomery County is a reconnection of boundary lines that existed at the time of the formation of Carroll County. Portions of Montgomery County also shared the Sixth Congressional District with Carroll County for fifteen congressional elections spanning 30 years from 1972-1980, 1982-1990, and 2002-2010.

V. The Principal Factors in Creating Maryland's Congressional Boundaries

The delineation of congressional district boundary lines by the Maryland General Assembly after the report of the decennial U.S. Census requires a careful consideration and balancing of multiple factors and is subject to a variety of influences, the most significant being population changes and geography.

In Maryland, congressional district boundaries are confined by, limited by, and constrained by, the state's unique shape, relatively small geographic size and widely disparate population densities that have fluctuated dramatically in the 220 years between the 1790 Census and the 2010 Census.

Marylanders, and their political leadership, have always been aware of, and sensitive to, the state's diverse geography, the state's distinct regions, and changing population patterns.

A. Population Migration and Demographic Changes

Population changes in the State of Maryland are presented in another set of Exhibit Maps reflecting the state's population from the 1800 Census to the 2000 Census. The red and blue areas of each Census Map of Maryland represent fifty percent of the state's population. This set of maps vividly shows the pressure generated by population shifts on the process and decision-making

involved in the shaping of congressional district boundary lines. Notably, the sixty-year general trend of increasing population in the western side of Maryland is continuing and will influence future redistricting plans.

These population shifts have generated changes in legislative and congressional district boundary lines throughout the history of Maryland. The adoption of each of Maryland's four state constitutions was accompanied by changes in the apportionment of the Maryland General Assembly as was the addition of four counties in 1789, 1837, 1851, 1867, and 1872. Congressional district boundary lines were changed to roughly reflect population shifts when the size of the state's delegation to the House of Representatives has changed as a result of the federal apportionment process.

Subsequent to the reapportionment court decisions of the 1960s, Maryland's congressional districts have had to be altered in an effort to achieve population equality because congressional districts do not have the same population gains and losses during the ten-year periods between the controlling U.S. Census. The population contained within congressional district boundary lines at the time the congressional district boundary lines were approved often varies significantly with the population within their respective boundary lines as found by the ensuing federal census. Accordingly, based on census data, congressional district boundary lines must change every ten years. It is also manifest that if one congressional district boundary line is changed that change will have an effect on the boundaries of other congressional districts. With regard to the current Sixth Congressional District, an analysis cannot simply start with a preferred boundary line for that district alone. Indeed, based on my own experience as well as academic research, constructing a congressional district map is a web with changes to one boundary line tugging and pulling on other boundary lines and rippling through the remainder of the congressional districts in the state.

B. Geography and Topography

Central to Maryland's culture, as well as its economic and political development, is the relationship of the land to navigable bodies of water. The Chesapeake Bay divides the land mass of the state into an Eastern Shore and a Western Shore that prompted the consideration of geography in the 18th and 19th century allocation of elective offices and operation of government. The rivers and tributaries that flow into the Bay often form the boundary lines between counties and political districts and were often the basis for political boundary lines as well as instrumentalities of commerce and sources of water for agriculture, power, and life for nearby communities.

The Potomac River that is the southern boundary line of the Sixth Congressional District separating Maryland from the Commonwealth of Virginia is a prominent example of the importance of a waterway. The Charter of the Province of Maryland granted to the Calvert family by King Charles of England in 1632 described the dividing line between the Commonwealth of Virginia and the Province of Maryland from its western point, "the first Fountain of the River of Pattowmack [Potomac], thence verging toward the South, unto the further Bank of the said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the Mouth of the said River, where it disembogues into the aforesaid Bay of Chesapeake."[19]

The approximately 405 mile length of the Potomac River was, and remains, significant to the development and vitality of Western Maryland and binds the counties of the Sixth Congressional District to a common heritage and concerns. The counties of the Sixth Congressional District share this lengthy, meandering, aquatic boundary line for hundreds of miles from Maryland's most westerly point to slightly above Great Falls located in Montgomery County

[19] Charter of Maryland art. III (1632).

only a few miles from the District of Columbia. In the quest to expand westward and exploit the natural resources of the region, the Potomac River was an important transportation route for water conveyance and a guiding path for railroad and surface road routes necessary to support population growth and economic development.

In the early development of Maryland, the construction of state roads facilitated the linkage between agriculture products and natural resources and the urban, commercial centers emerging around the Port of Baltimore and the District of Columbia. Much of the political and economic activity in Maryland revolved around the competition between The Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad in their respective efforts to reach Western Maryland and beyond to the Ohio Valley.[20] This competition redounded to the benefit of the counties in the Sixth Congressional District, just as the interstate highway system and improved state roads link the district to important centers of population and markets. As described by the National Park Service, the beginning of the C&O Canal was "as a dream of passage to Western wealth. Operating for nearly 100 years the canal was a lifeline for communities along the Potomac River as coal, lumber and agricultural products floated down the waterway to market."[21]

VI. Demographic, Economic and Transportation Factors Supporting the Sixth Congressional District

The historical, economic, cultural, social and political connections between Montgomery County and the other counties in the Sixth Congressional District, especially Frederick County is unmistakable and undeniable. Data from the U.S. Census Bureau, the Maryland Department of Planning, the Maryland Department of Labor, Licensing and Regulation, the Maryland

[20] *See generally* Robert J. Brugger, Maryland A Middle Temperament 1634-1980, at 202-06 (The Johns Hopkins Univ. Press 1988).
[21] National Park Service, https://www.nps.gov/choh/index.htm (last visited May 8, 2017).

Department of Transportation and other state agencies along with information compiled by county and municipal offices of planning show the depth of these connections.

A. Migration Patterns

The westward movement of population is not only the story of the historical development of people in Maryland but also similar migration patterns continue in the 21st century. A substantial number of individuals previously living in Montgomery County have moved into Frederick County as well as the Western Maryland counties over recent decades.

The U.S Census Bureau reported that preceding the 2002 Maryland congressional redistricting act, 11,165 individuals moved into Frederick County from Montgomery County from 1995 to 2000.[22] This number represented the largest source of in-migration into Frederick County from any jurisdiction and 27.4% of all in-migration and 51.95 % of all intra-state migration.[23] Continuing the trend, in the five years preceding the 2011 redistricting act, the American Community Survey conducted by the U.S. Census Bureau again found that 45.4% of the intra-state migration and 25.8% of all migration into Frederick County was from individuals previously residing in Montgomery County.[24]

B. Commuting Patterns

The 2008 Frederick County Trends report shows that 23.3% of commuters in Frederick County traveled to Montgomery County every day based on the U.S. Census Journey To Work

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[22] Maryland Department of Planning, Planning Data Services, "Frederick County, 1995 to 2000 Census Based Migration Flows" (August 2003), available at https://planning.maryland.gov/msdc/census/cen2000/Migration/county_to_county/fred_migr9500.pdf.

[23] *Ibid.*

[24] Maryland Department of Planning, "Frederick, Migration Flows From 2006 to 2010 American Community Survey," available at http://www.mdp.state.md.us/MSDC/American_Community_Survey/2006-2010/migration/Flow/fred.pdf.

2000 report.[25] The Maryland Department of Transportation Maryland Traffic Maps show a current annual average daily traffic of over 85,000 vehicles on Interstate 270 between Frederick County and Montgomery County.[26] A review of the department's interactive map vividly demonstrates the commuting connection between the counties as well as its topographic and land use relationships. These commuting relationships have existed for the past two decades.

C. Economic Connections

The substantial economic connection of Montgomery County to Frederick County and the Western Maryland counties is anchored by the activities of the federal government and the Interstate 270 (I-270) Technology Corridor. The research centers of the National Institute of Health in Montgomery County and Fort Detrick in Frederick County are examples of employment opportunities that draw people in both directions through the I-270 and Interstate 70 corridors.

The Maryland Department of Labor, Licensing and Regulation Office of Workforce Information and Performance reports that 26,729 residents of Frederick County (23.7% of the total workforce) were employed in Montgomery County in April 2016, over 22,500 more than work in Washington County to the west, the next highest destination.[27]

The University of Maryland System spans the Sixth Congressional District with Frostburg State University in Frostburg, a campus of the University of Maryland in Hagerstown and the

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[25] Frederick County, "Trends and Issues" 30 (April 2008), available at https://frederickcountymd.gov/DocumentCenter/View/280201.

[26] The Maryland Department of Transportation's Maryland Annual Average Daily Traffic (AADT) Locator interactive map is available at http://maryland.maps.arcgis.com/apps/webappviewer/index.html?id=223148a698214294a7b43cd612a4c67d.

[27] "Commuting Patterns: Frederick Workforce Region" (April 2016), available at https://mwejobs.maryland.gov/admin/gsipub/htmlarea/uploads/Frederick_WorkforceRegion_Commuting_Patterns.pdf (last accessed May 8, 2017).

Universities at Shady Grove campus in Montgomery County.[28] Strong community colleges in every county in the Sixth Congressional District enhance the opportunities for the residents of the district.[29]

D. Agricultural Heritage and Preservation

Montgomery County shares the rich soils of the Piedmont Plateau with other counties in the Sixth Congressional District and was a major producer of agricultural products throughout its history.[30] Even today, notwithstanding its status as the most populous Maryland jurisdiction, Montgomery County retains its agricultural heritage. Montgomery County has the highest percentage of farmland under agricultural land preservation easements in the nation.[31] The county has met its goal of over 70,000 acres of farmland preserved and has more acreage devoted to agricultural preservation programs than any county in the country.[32] While there is high-density development in the southern portion of the county and along most of its transportation corridors, the portion of Montgomery County in the Sixth Congressional District has significant agriculture areas. The attached map entitled "Montgomery County: Agriculture Preservation" prepared by the Montgomery County Office of Agriculture depicts the various preservation programs and shows that the protected farmland is located primarily in the northern portions of the county. Appendix 3. The large northwestern area where land is protected from development under a variety of preservation programs is entirely within the Sixth Congressional District.

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[28] University System of Maryland, "Institutions," http://www.usmd.edu/institutions/, last accessed May 8, 2017.

[29] Maryland Manual On-Line, "Maryland At A Glance: Community Colleges," http://msa.maryland.gov/msa/mdmanual/01glance/html/colcom.html (last accessed May 8, 2017).

[30] *E.g.* Scharf, Vol. I at 644-45.

[31] The Office of Land Preservation, Montgomery County, "Agricultural Preservation" (November 21, 2016), https://www.montgomerycountymd.gov/agservices/agpreservation.html (last accessed May 8, 2017).

[32] *Ibid.*

E. Culture and Tourism

Acquired in 1938, the C&O Canal became a National Historic Park in 1971.[33] This 184.5-mile national treasure provides educational and recreational opportunities for the public. A park service map, which can be accessed at *www.nps.gov/choh*, illustrates the location of the major features of this important park. Five of the six visitor centers are located in the Sixth Congressional District with the sixth located only a few miles south of the district.

VII. Conclusions

- There was a rational and logical basis for the configuration of the Sixth Congressional District in the congressional redistricting plan passed by the Maryland General Assembly on October 18, 2011, and approved by the Governor of Maryland on October 20, 2011.
- The current Sixth Congressional District is consistent with congressional district boundary lines established by the Maryland General Assembly since the first federal election was conducted in 1789.
- The current Sixth Congressional District, following the bends, turns and flow of the Potomac River from the state's furthest southwest corner to just above the Great Falls in Montgomery County, is a natural linkage of geography, culture, economy and the state's history.
- The inclusion of a portion of Carroll County in the First Congressional District with the northern portions of Baltimore County and Harford County as well as Cecil County, represents a return to historical congressional district boundary configurations that existed

[33] John G. Parsons, Chesapeake & Ohio National Historical Park, "General Plan" 4 (January 30, 1976); available at https://www.nps.gov/choh/learn/management/upload/C-O-Canal-NHP-General-Plan-1976.pdf (last accessed May 8, 2017).

for ninety-four years from 1872-1964 and is not a significant break with Maryland's political history.

- The inclusion of a portion of Carroll County in the Eight Congressional District with Montgomery County represents a return to the congressional district boundary lines that existed at the time Carroll County was formed and also other congressional district configurations shared by both counties.

Date: May 6, 2017

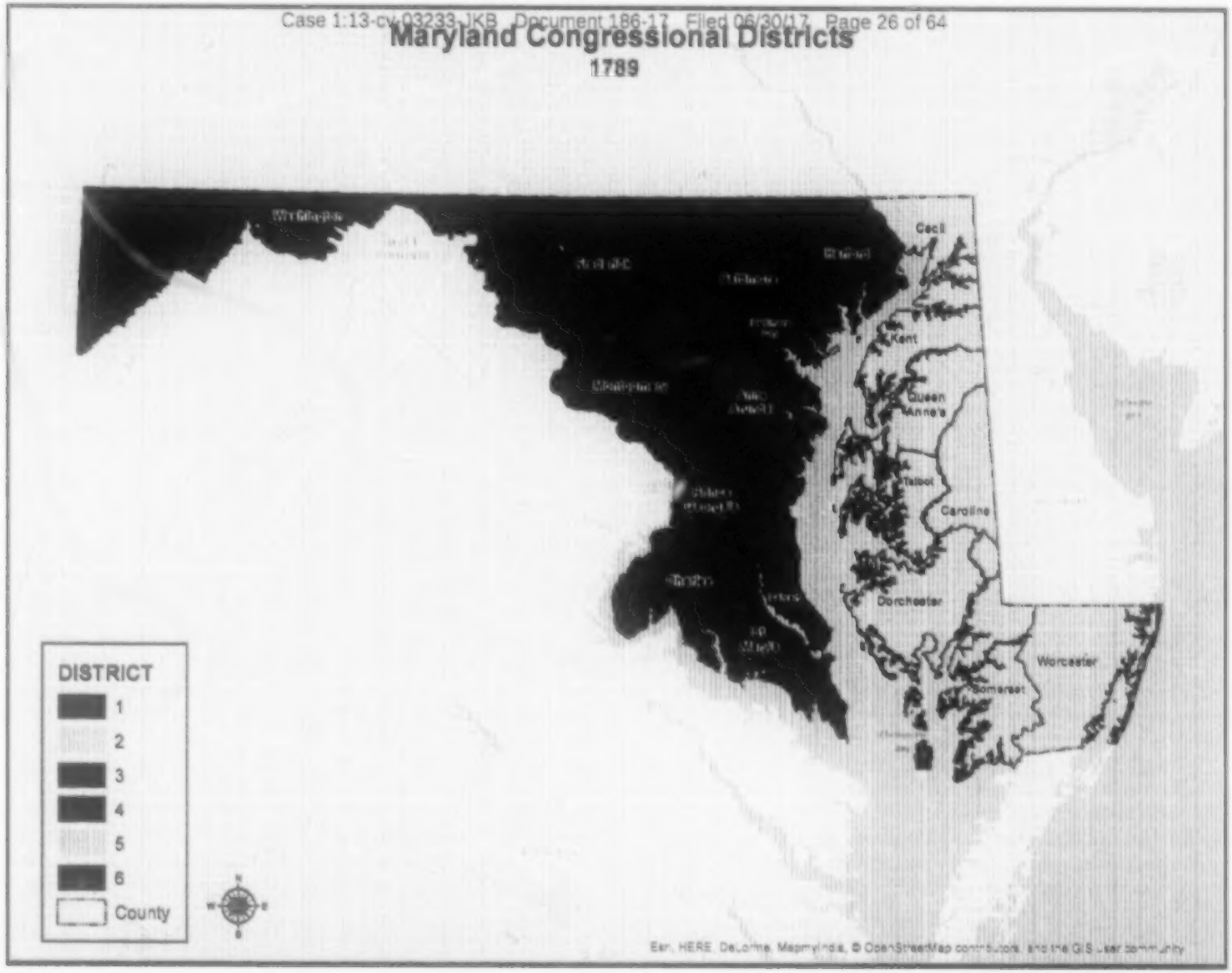
John T. Willis

APPENDIX 1

MAP 1

Maryland Congressional Districts

1789

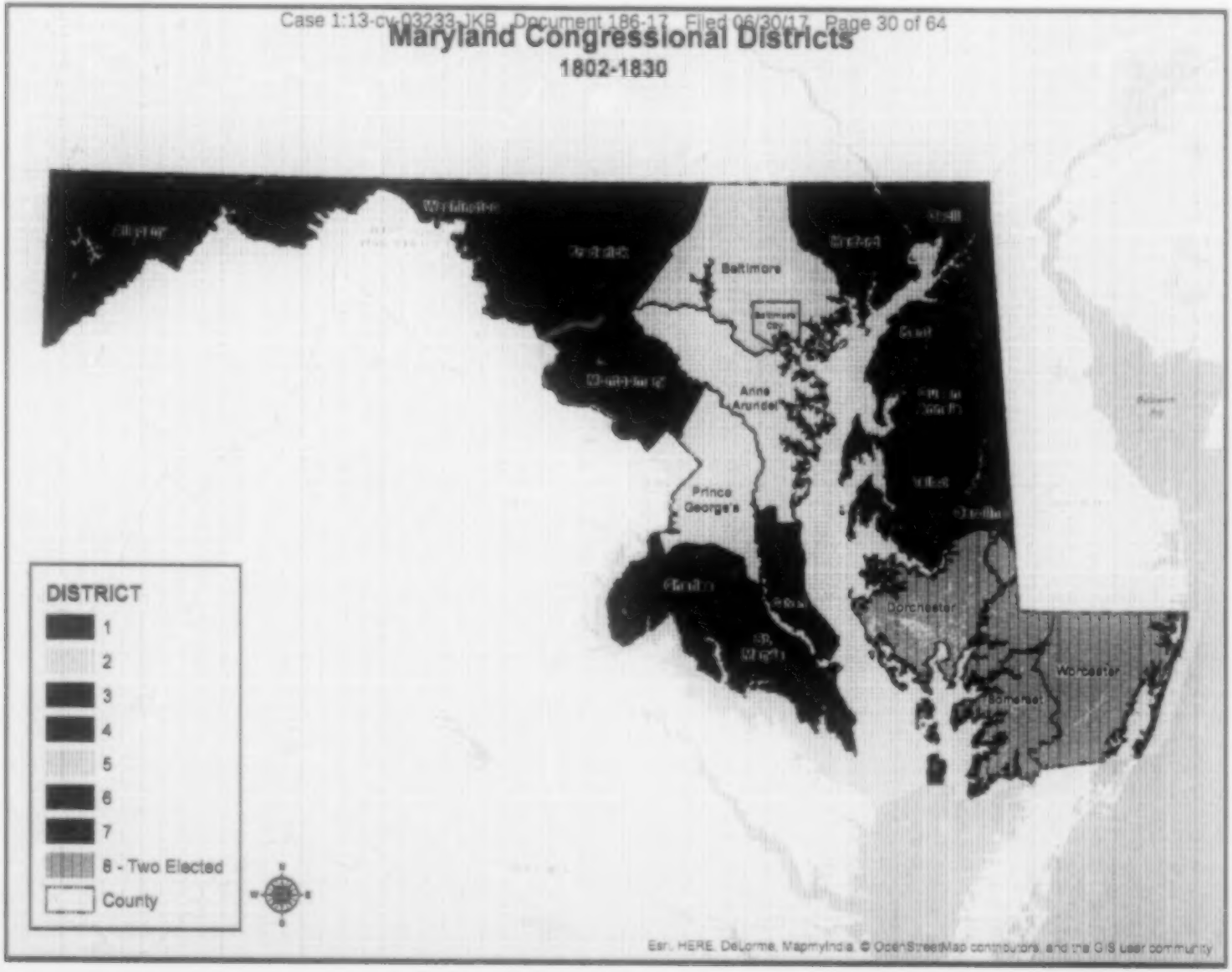


MAP 2

Maryland Congressional Districts
1792-1800

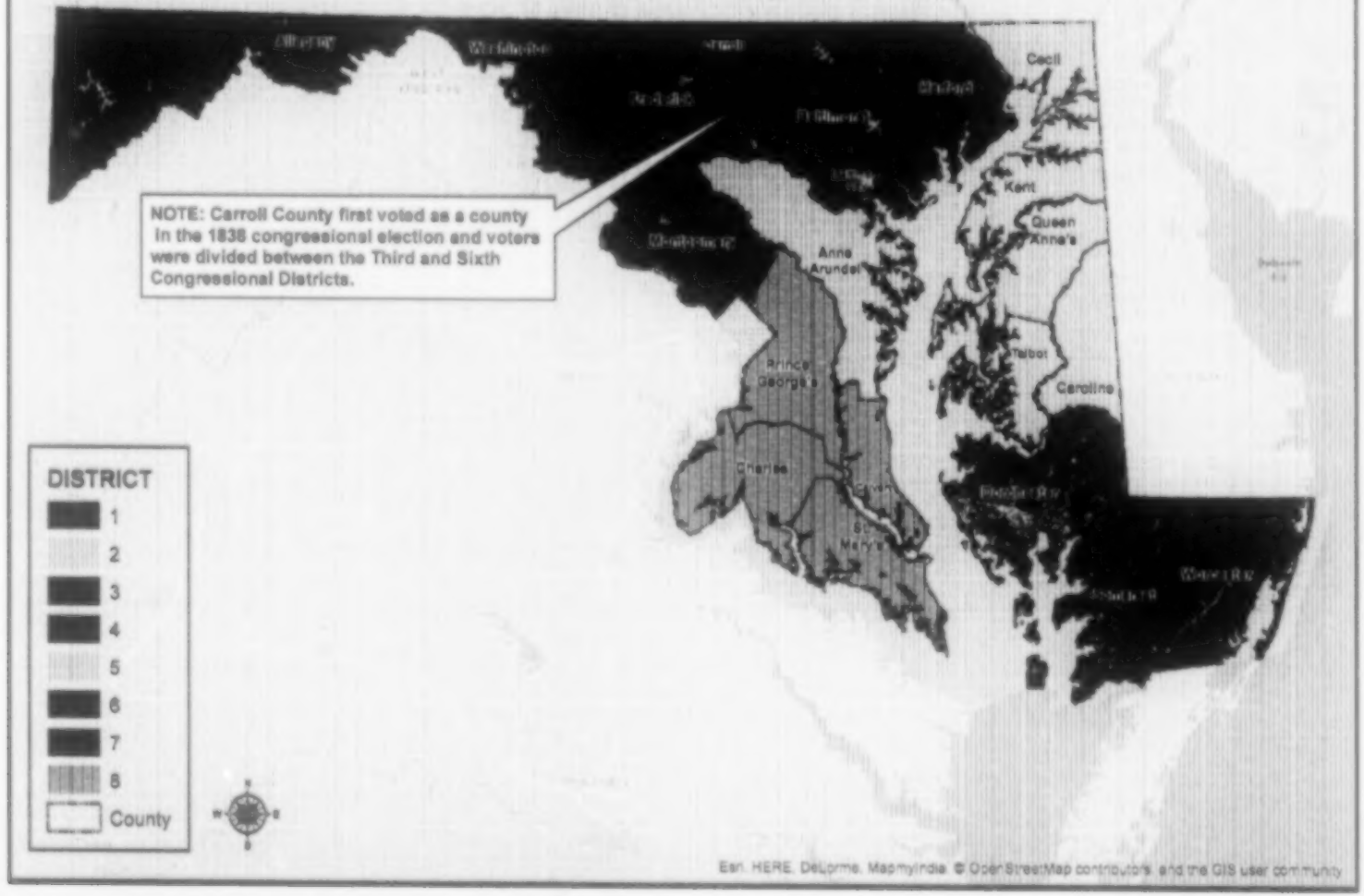
MAP 3

Maryland Congressional Districts
1802-1830



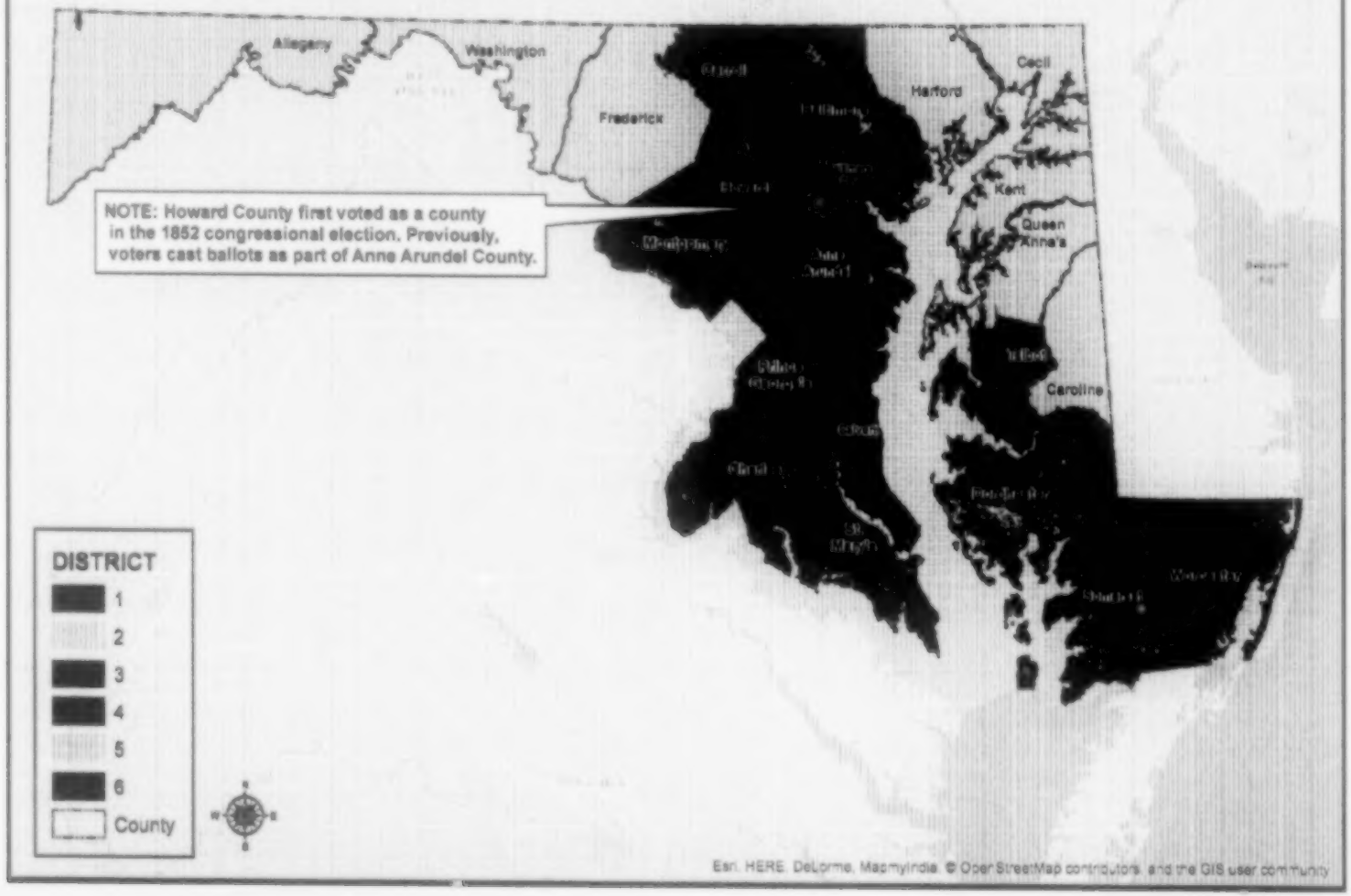
MAP 4

Maryland Congressional Districts
1832-1840



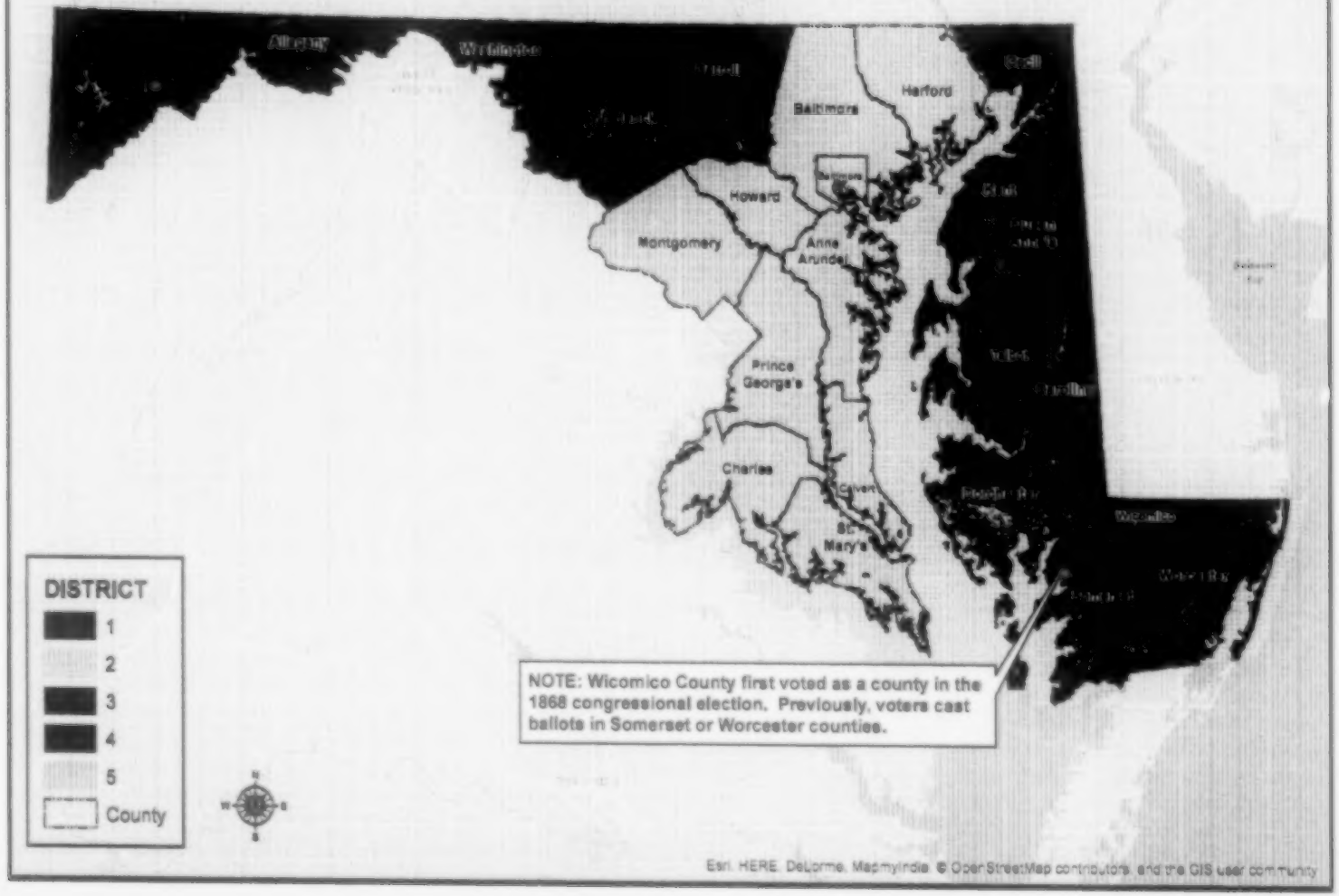
MAP 5

Maryland Congressional Districts
1842-1860



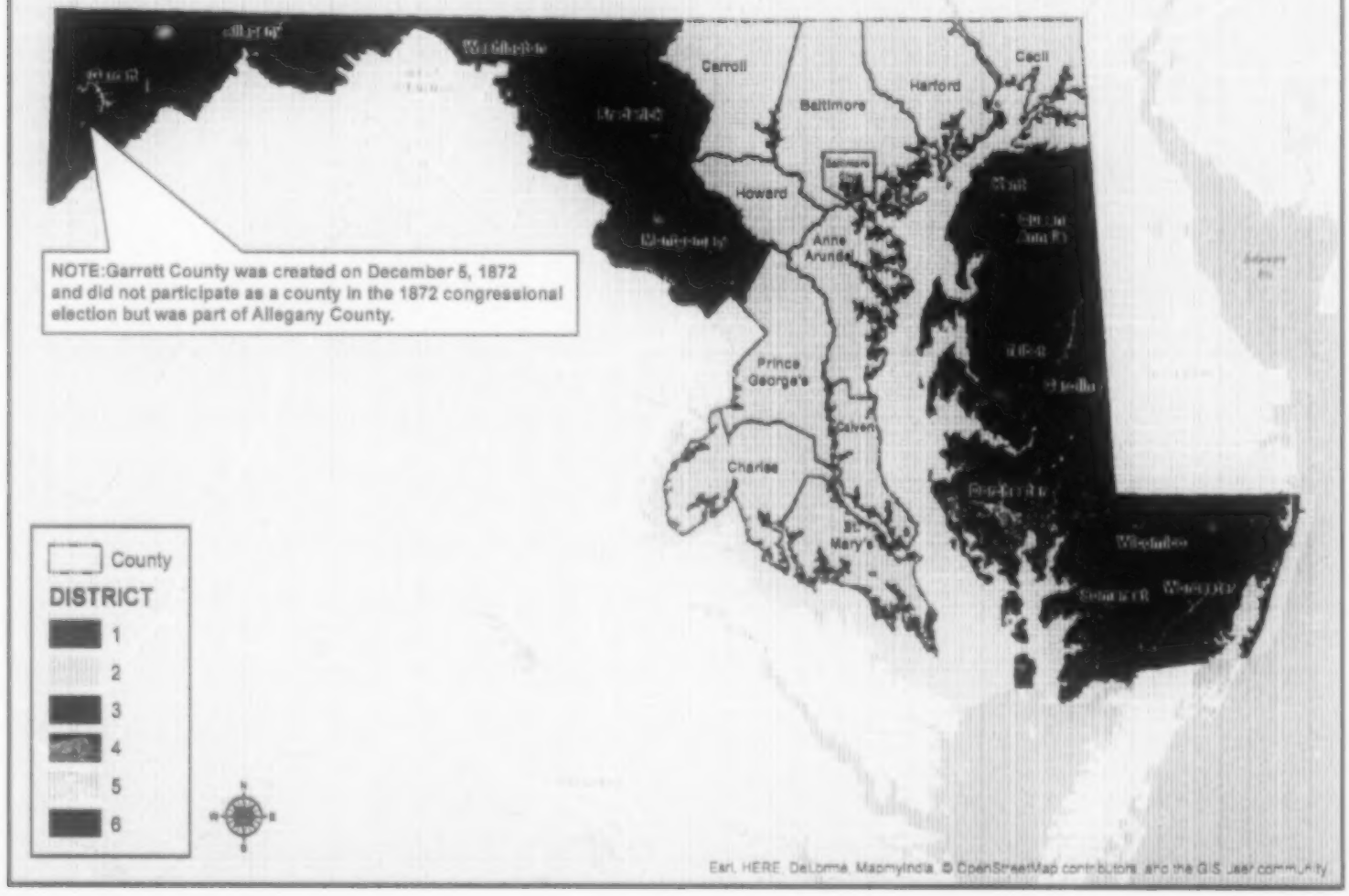
MAP 6

Maryland Congressional Districts
1862-1870



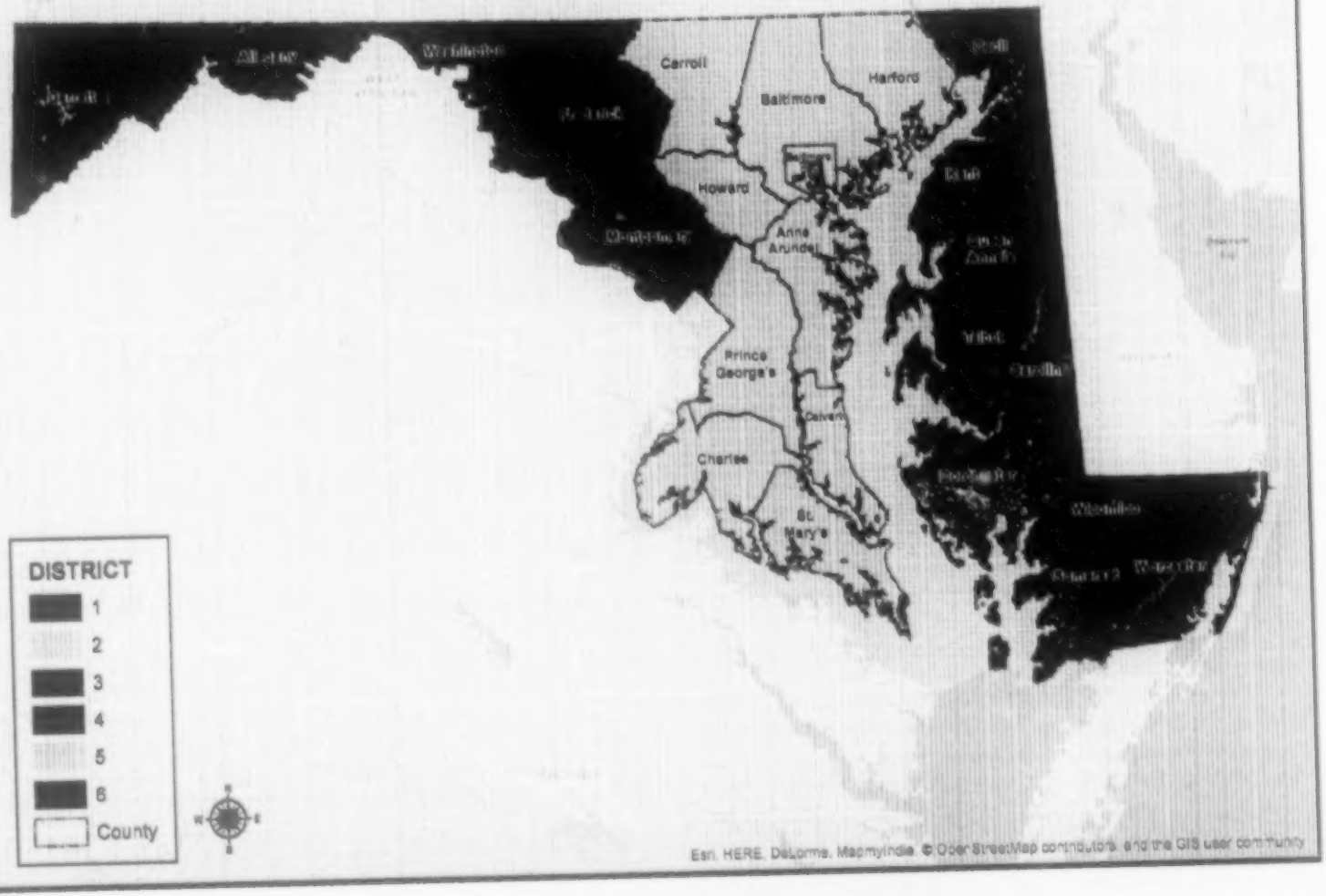
MAP 7

Maryland Congressional Districts
1872-1900



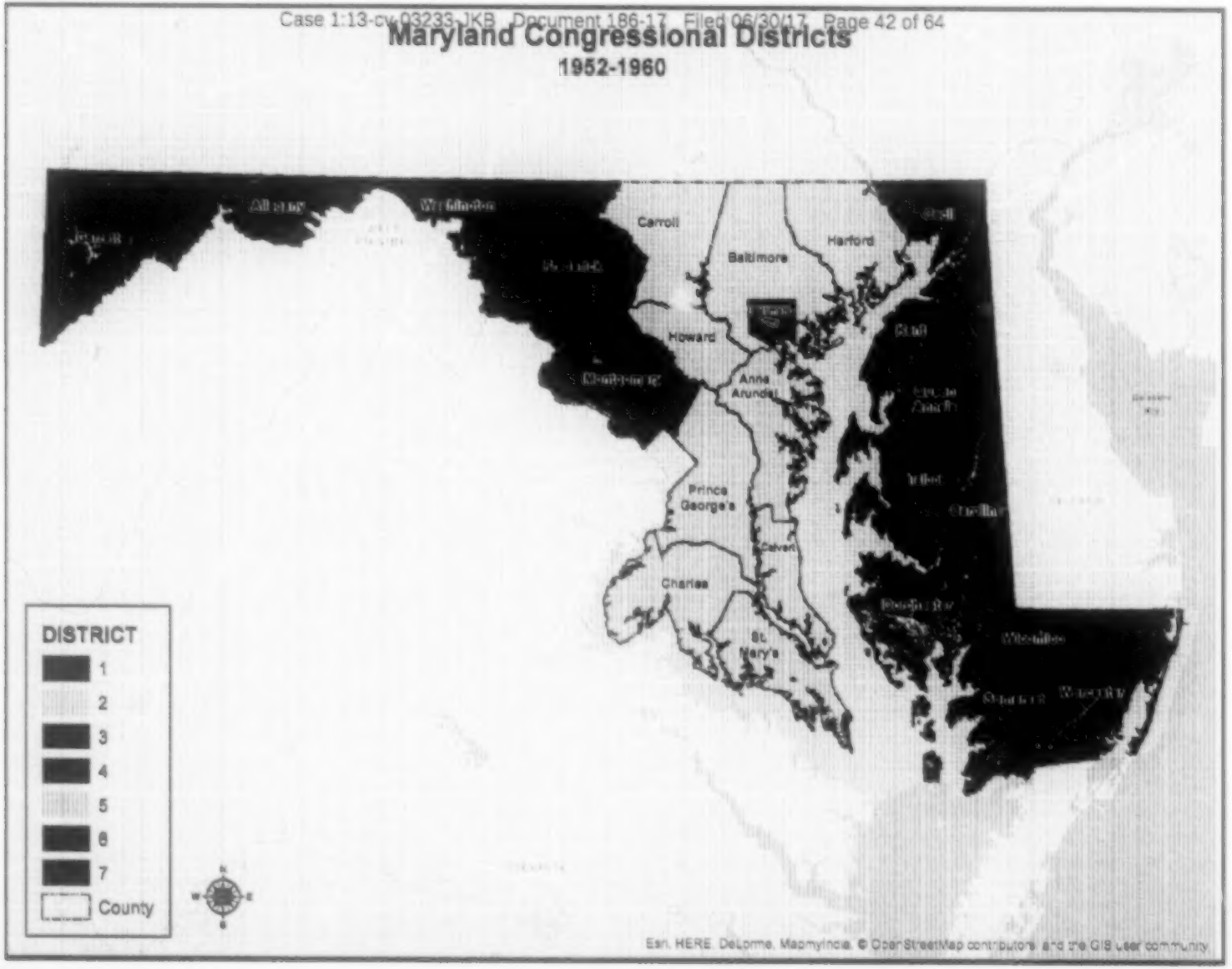
MAP 8

Maryland Congressional Districts
1902-1950



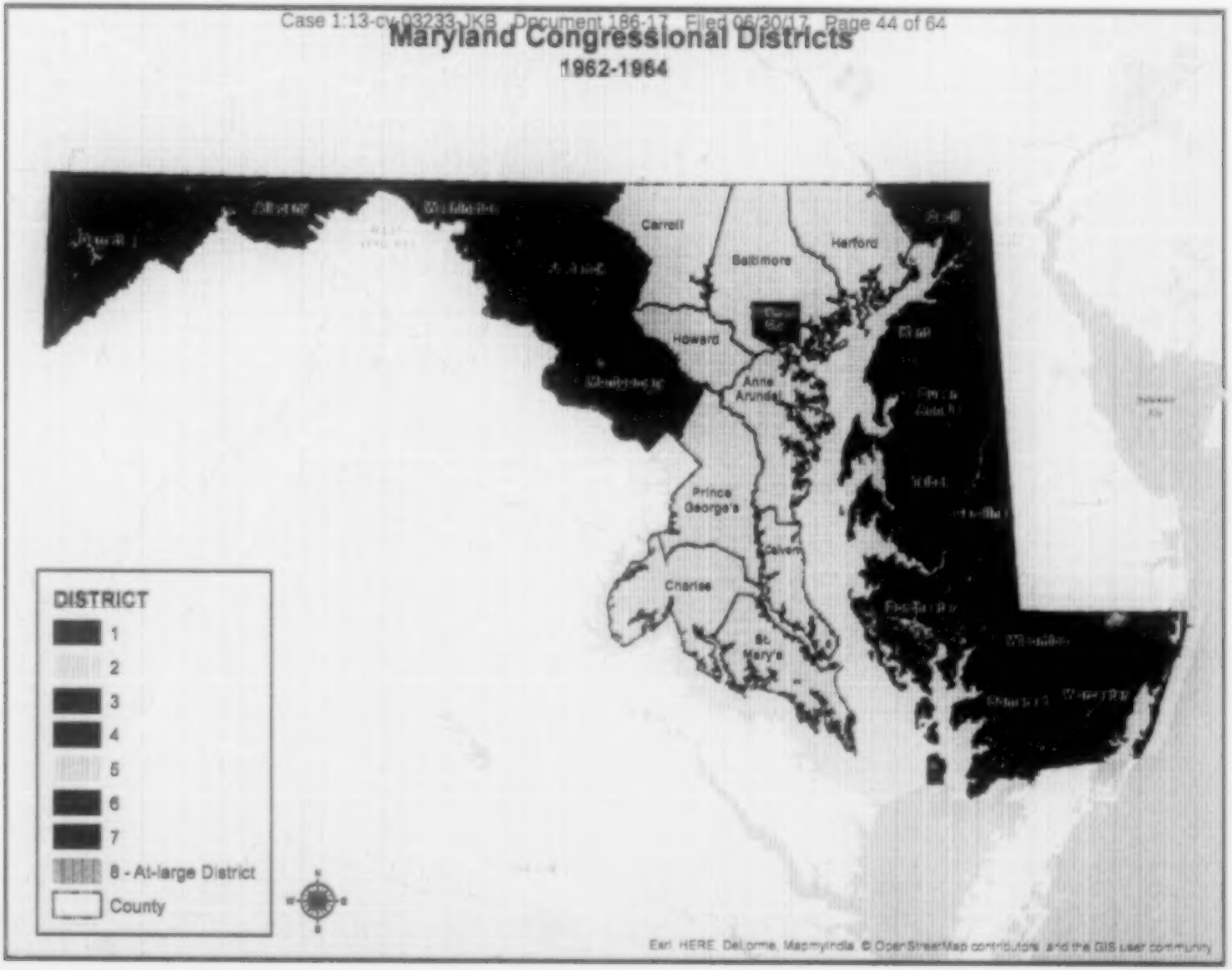
MAP 9

Maryland Congressional Districts
1952-1960



MAP 10

Maryland Congressional Districts
1962-1964



MAP 11

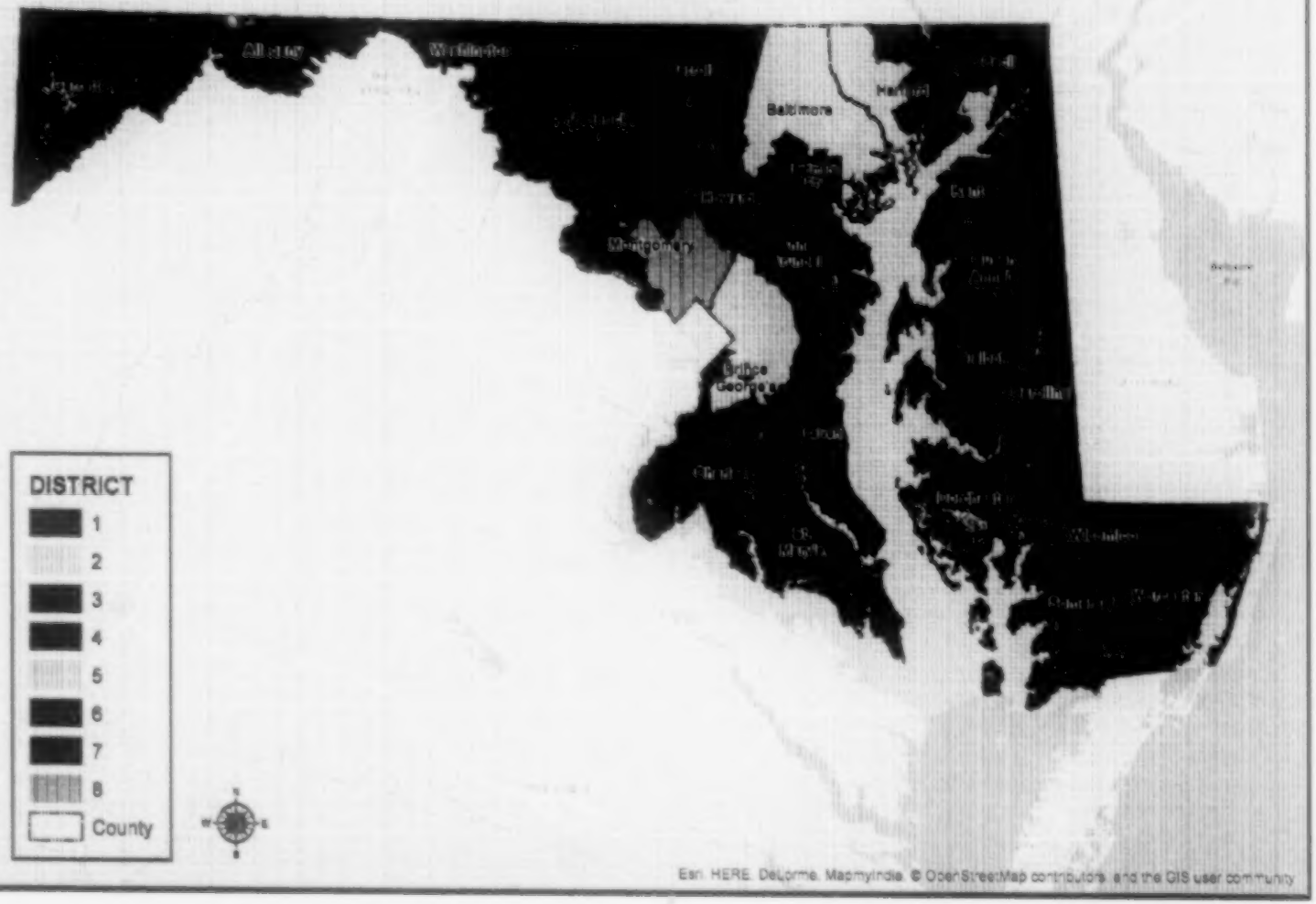
Maryland Congressional Districts
1966-1970

MAP 12

Maryland Congressional Districts
1972-1980

MAP 13

Maryland Congressional Districts
1982-1990



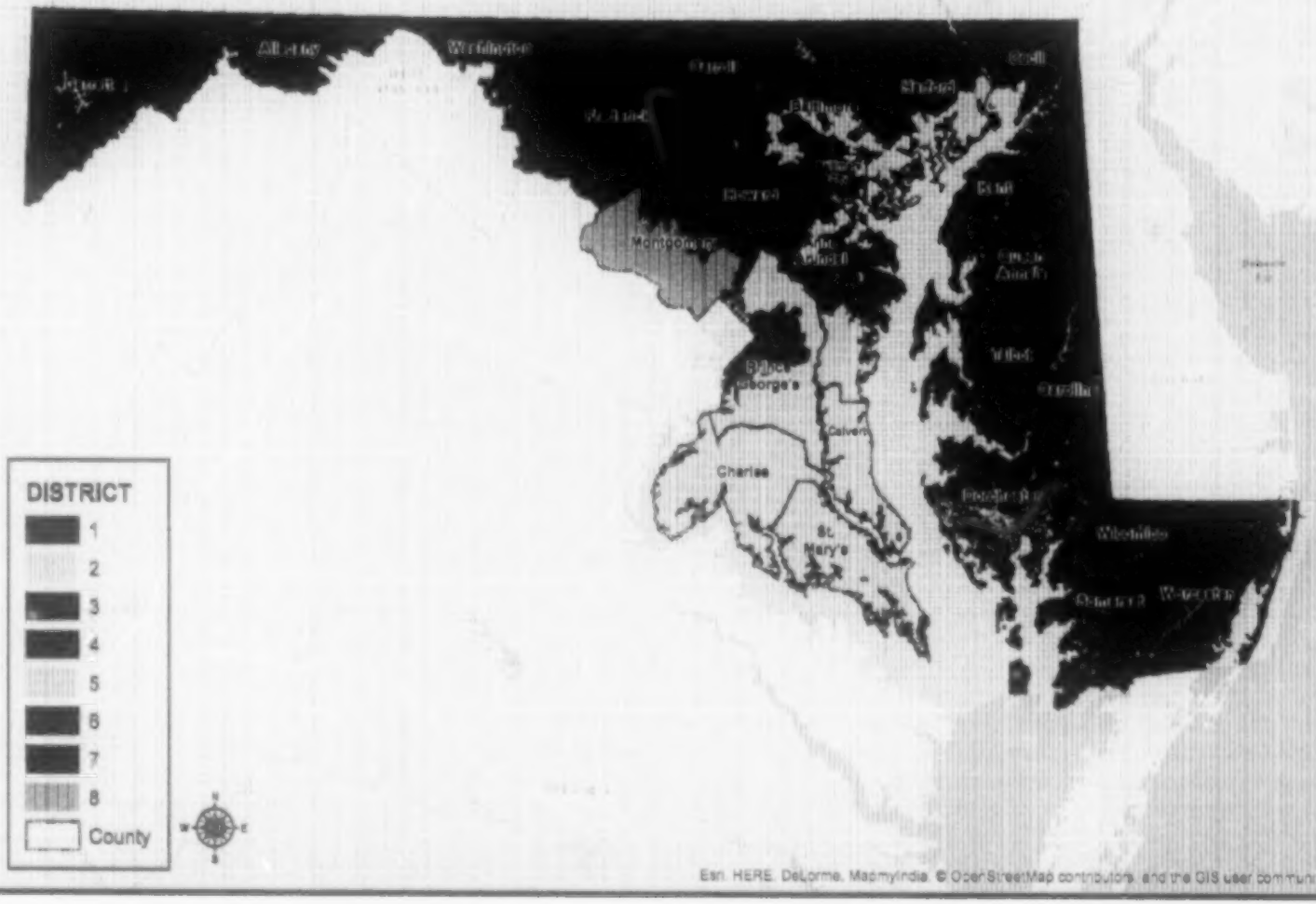
MAP 14

Maryland Congressional Districts
1992-2000

MAP 15

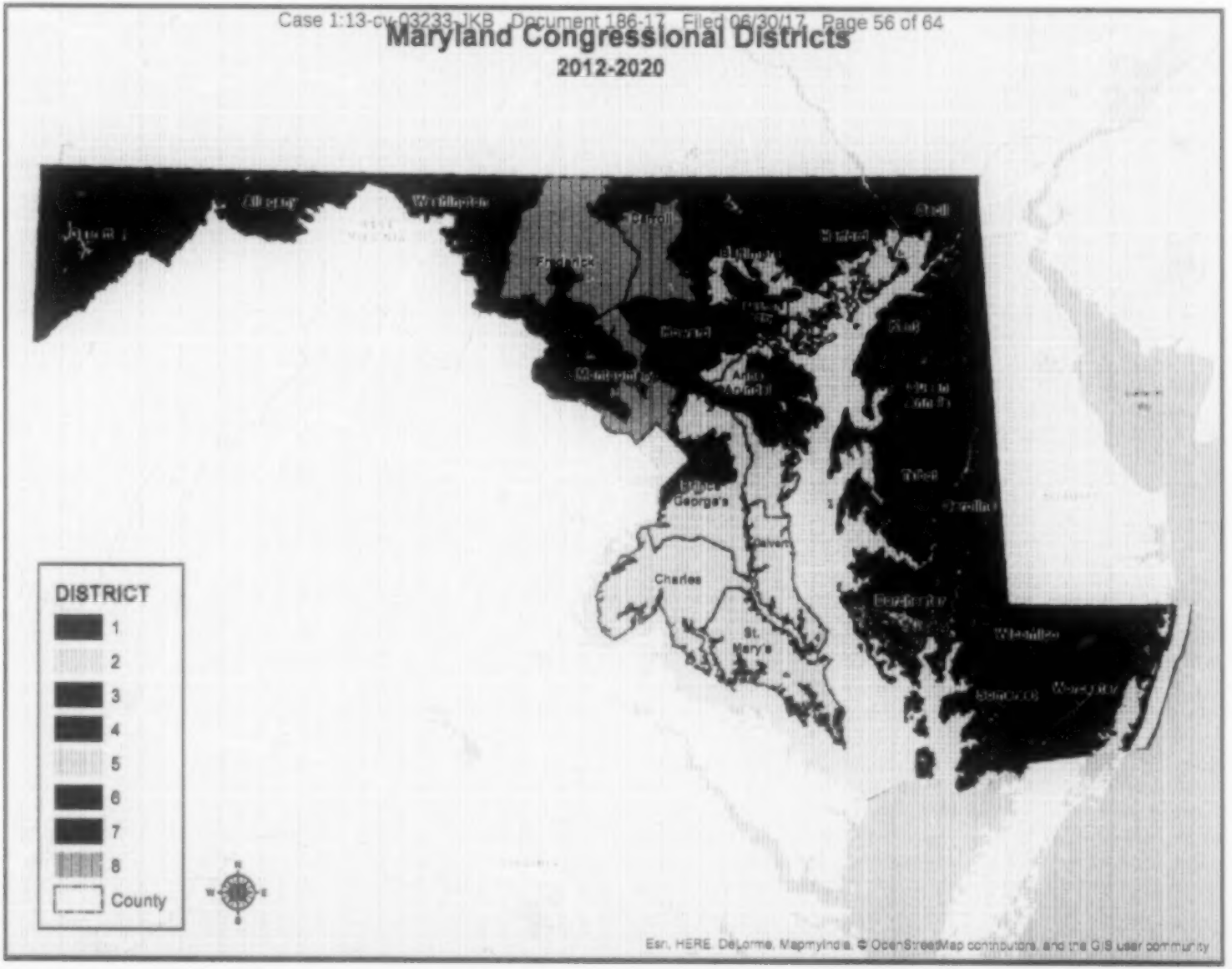
Maryland Congressional Districts

2002-2010



MAP 16

Maryland Congressional Districts
2012-2020



APPENDIX 2

1800 CENSUS: MARYLAND POPULATION

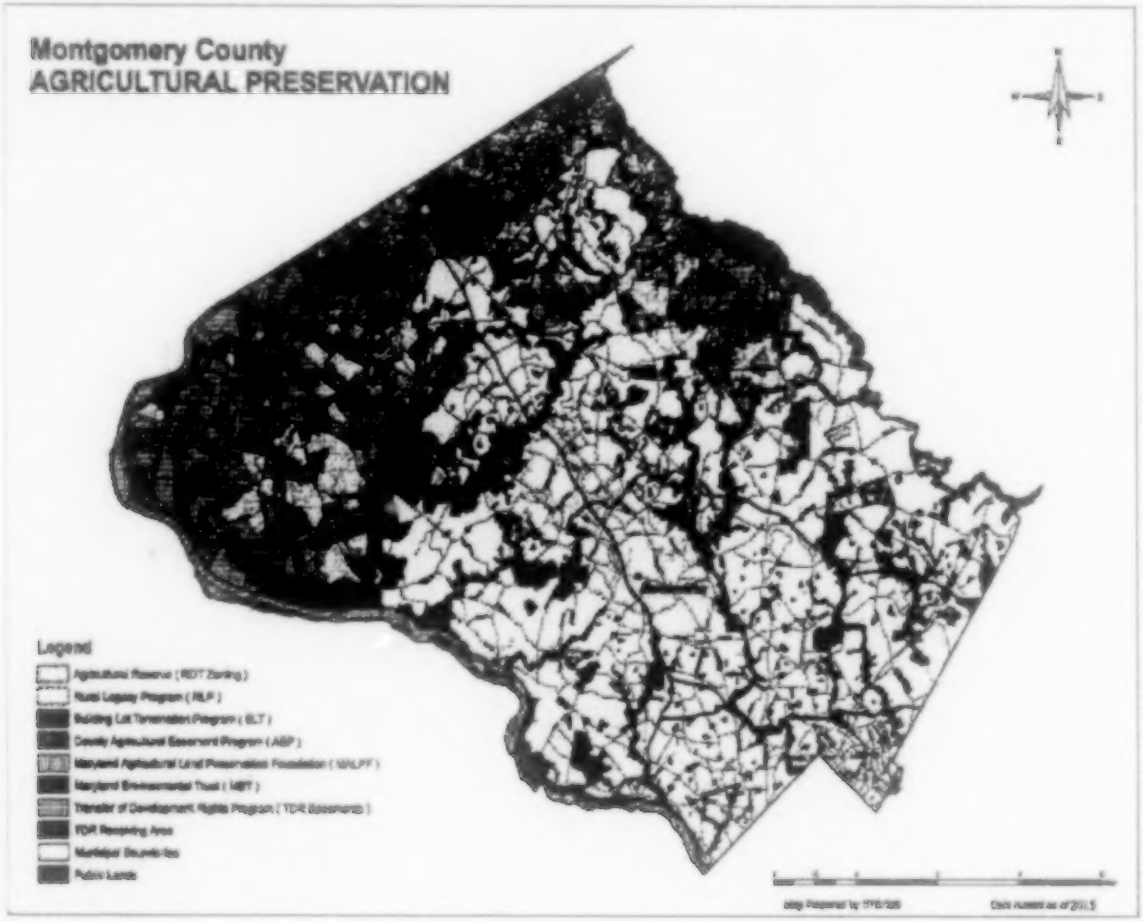
1850 CENSUS: MARYLAND POPULATION

1900 CENSUS: MARYLAND POPULATION

1950 CENSUS: MARYLAND POPULATION

2000 CENSUS MARYLAND POPULATION

APPENDIX 3


Montgomery County
AGRICULTURAL PRESERVATION
Legend
Public Lands

Eligible Active Voters on Precinct Register

Election: 2010 GUBERNATORIAL GENERAL ELECTION
Election Date: 11/2/10
Congressional District Code: All

Congr. Dist: 01	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Anne Arundel	28217	34103	193	20	229	13718	33	76513
Baltimore County	20483	20219	134	14	155	5924	641	47570
Caroline	7407	7461	36	5	59	2949	120	18037
Cecil	24530	22853	143	25	208	11218	860	59837
Dorchester	10362	6962	26	2	41	2185	150	19778
Harford	29456	37245	145	18	276	11426	354	78920
Kent	6170	4476	42	3	35	1621	135	12482
Queen Anne's	11059	13962	64	8	95	4290	207	29705
Somerset	7222	4329	21	3	26	1537	120	13256
Talbot	10166	11073	51	7	79	3615	315	25306
Wicomico	25366	19785	113	9	151	8176	668	54268
Worcester	15715	13903	68	5	105	5273	441	35510

Congr. Dist: 02	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Anne Arundel	31730	17744	139	15	196	11589	30	61443
Baltimore City	49583	4830	114	5	85	5629	204	60250
Baltimore County	134771	54578	522	38	666	29692	2550	222837
Harford	25544	15135	91	18	173	8089	272	49322

Congr. Dist: 03	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Anne Arundel	71718	53536	400	32	552	30096	61	156395
Baltimore City	70010	16964	562	9	332	16364	431	104662
Baltimore County	72403	30171	364	14	382	16919	1380	121633
Howard	26721	13611	134	14	173	10247	489	51389

Congr. Dist: 04	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Montgomery	91097	37059	389	18	397	33750	180	162890
Prince George's	223283	13537	204	30	239	17995	10279	265567

Eligible Active Voters on Precinct Register

Election: 2010 GUBERNATORIAL GENERAL ELECTION
Election Date: 11/2/10
Congressional District Code: All

Congr. Dist: 06	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Anne Arundel	14042	15587	108	9	137	6852	15	36750
Calvert	23171	22464	119	11	149	9860	526	56300
Charles	50767	24667	131	19	197	13609	579	89969
Prince George's	164522	31917	444	25	464	23026	11390	231788
Saint Mary's	24632	23454	160	14	191	10246	526	59213

Congr. Dist: 08	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Allegany	16606	19827	130	12	119	5305	449	42450
Baltimore County	9021	11289	95	3	86	3296	340	24130
Carroll	33156	54327	255	51	304	16309	799	105201
Frederick	52181	57958	359	32	453	26637	78	137698
Garrett	4994	11379	39	3	45	1788	186	18434
Harford	7100	10721	38	1	63	2795	93	20811
Montgomery	5315	5496	24	0	49	2785	10	13679
Washington	31340	37027	219	20	234	14347	89	83276

Congr. Dist: 07	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Baltimore City	170183	10433	738	15	284	18238	705	200596
Baltimore County	54320	12383	211	11	190	8875	709	76699
Howard	59324	41408	306	27	398	23912	1321	126694

Congr. Dist: 08	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Montgomery	227783	80698	1019	41	918	86052	351	396862
Prince George's	15777	1187	62	0	29	2040	1050	20145
	1,957,279	925,614	8,392	606	8,984	526,274	39,136	3,466,287

Maryland State Board of Elections

Official 2014 Gubernatorial General Election results for Governor / Lt. Governor

Last Updated 12/02/2014 03:17:03 PM

Return to Election Result Index

NR: not reported

Governor / Lt. Governor

(Vote for One) County Break Down

This table may scroll left to right depending on the screen size of your device.

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Brown/ Ulman	Democratic	164,219	608,476	46,195	818,890	47.2%
Hogan/ Rutherford ✔	Republican	136,781	710,854	36,765	884,400	51.0%
Quinn/ Gaztanaga	Libertarian	3,424	20,407	1,551	25,382	1.5%
Smith/ Tucker (Write In)	Democratic	96	181	6	283	0.0%
Tinus/ Richmond (Write In)	Unaffiliated	1	16	3	20	0.0%
Other Write-Ins	N/A	1,073	2,903	226	4,202	0.2%

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v. Case No. 13-cv-3233

LINDA H. LAMONE, *et al.*,

Defendants.

Supplemental Expert Report of Allan J. Lichtman
June 2, 2017

I. Reply Report of Dr. Morrison

A. Contradictions in Dr. Morrison's Reports on the Central Issue of Intent

In my opening report, I noted that Dr. Morrison lacks qualifications to analyze the intent of decision-makers. He now concedes this critical point in his reply report, stating, "I am not an expert on intent." (Morrison Reply Report. p. 18) Yet he continues to opine on intent.[1]

B. The Criteria in Dr. Morrison's *Fletcher* Report Still Prove That Current CD6 Represents a Community of Interest

In my opening report I examined the transportation, commuting, and jobs criteria that Dr. Morrison found sufficient in his December 16, 2016 Declaration to conclude that CD5 in the *Fletcher* plaintiffs' plan represents a community of interest. Based on Dr. Morrison's criteria, the evidence is much stronger that CD6 under the state's 2011 plan represents an *existing community of interest*. In response, Dr. Morrison states says that, "My point in Fletcher was that there was a corridor between Baltimore and Washington, D.C. that 'has grown in population and integration in the last three decades.'" (Morrison Reply Report, p. 22) The quoted phrase is from paragraph 3 of his December 16 Declaration, which examined in full demonstrates that the extracted phrase is supported by analysis that refers only to transportation, commuting, and jobs (extracted phrase in bold):

[1] Dr. Morrison also asserts that I relied on "anecdotal information, not hard demographic data" (Morrison Reply Report, p. 9,) ignoring the 20 analytic, quantitative tables in my opening report.

> "The scientific knowledge about functional regions applies to the Maryland Corridor, the area of intense urban development between Baltimore and Washington D.C. That corridor **has grown in population and integration in the last three decades**. Workers routinely flow among counties, **and in Howard, Prince George's and Charles Counties** more of the employed residents hold jobs outside the county than within their county of residence. Only 38-40 percent of workers are employed within Charles, Howard, and Prince Georges County and a slightly larger 59 percent in Montgomery County." (¶ 3)

Dr. Morrison further states that "As I noted in my Fletcher declaration, there are significant links between Baltimore and Washington, D.C. beyond commuting patterns." He states that 1) "the African-American and Hispanic share of registered voters in this area had increased significantly between 2000 and 2010;" that 2) "This migratory influx of African-Americans and Hispanics to the suburbs between Washington, D.C. and Baltimore was part of a national demographic trend toward more racially diverse suburbs, fueled by minority suburbanization;" and that 3) "**These minority populations were younger and replacing** older Caucasian voters in these suburban communities." (Morrison Reply Report, pp. 22-23)

Beyond the problem of trying to define communities of interest by race, Dr. Morrison, without informing the reader, has switched his references in each of these citations from his December 16 Declaration establishing a community of interest in CD5, to an earlier Declaration on a different topic filed on December 7, 2016.[2] The December 7 Declaration does not assess whether any proposed congressional district in *Fletcher* represents a community of interest. Rather its very different purpose was to assess whether minorities were sufficiently numerous and concentrated in Maryland for 3 majority-minority districts -- "Prong 1" of the so-called three-pronged "Gingles factors" in voting rights analysis. Thus, Dr. Morrison writes in his statement of purpose:

> "The primary focus of this analysis is Blacks' increasing presence among eligible voters in numerous communities across the State of Maryland, and the prospect of forming three Congressional districts to recognize and acknowledge these areas of Black voting strength, thereby affording minority voters the opportunity to elect candidates of their choice." (Morrison, December 7 Declaration, ¶ 2)

Dr. Morrison's December 16 Declaration does not cite his December 7 Declaration and does not mention the words African American, black, Hispanic, Latino, Caucasian, or voter. It mentions the word suburbs only in the context of transportation, commuting, and jobs.

Finally, in his reply report, Dr. Morrison returns to his December 16 Declaration saying, "My analysis showed that the minority communities in this 'Maryland corridor' had 'common needs' and 'shared concerns,' making them a 'natural community of shared interest.'" The extracted phrases are from a paragraph that again refers only to jobs, commuting, and transportation (referenced phrases in bold):

> "The counties between Baltimore and Washington D.C. comprise a regional corridor that is functionally integrated by regionwide transportation linkages facilitating extensive daily

[2] Morrison Declaration, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 7, 2011) (ECF No. 43-18).

flows of commuting. The commuters between suburban residences and workplaces throughout this **regional corridor** constitute a natural community of interest defined by the **common needs and the shared concerns** of workers who reside within the vast **commutershed between Baltimore and Washington** D.C. **Plaintiffs' Proposed** Congressional District # 5 encompasses this **natural community of shared interest."** (Morrison, December 16 Declaration, ¶ 1).

C. Dr. Morrison's "Objective Demographic Facts" are Neither Objective Nor Necessarily Facts

In response to my critique of Dr. Morrison's "objective demographic facts" relating to matters such as cultural and educational institutions, and media in western Maryland, Dr. Morrison responds only in a footnote saying that he only tried to show that western Maryland has its own institutions. However, without analysis, these institutions do not establish a distinctive community of interest in western Maryland. He misleadingly characterizes Frostburg State University as having "some students" from outside western Maryland, although Table 6 of my opening report demonstrates that nearly two-thirds of the students are from outside western Maryland. He does not rectify his inaccurate characterization of WWPX as being in Hagerstown, MD rather than in West Virginia.[3] He does not consider the "objective demographic fact" of voting on the 2011 congressional plan in the 2012 general election.

In his reply report, Dr. Morrison also highlights the importance of examining the "objective demographic data" of split Census places in CD6. He says that "In the prior version of CD6 (used for the 111th Congress), 4 of 35 (11 percent) communities of interest (also known as "Census Places") were split by the boundaries of the Sixth District. In the current version of CD6 (used for the 113th Congress), 13 of 22 (59 percent) of communities of interest were split by the boundaries of the Sixth District." (Morrison Reply Report, pp. 5-6)

He does not provide a citation for these claims, and his analysis of split Census places in the 2011 CD6 is not accurate. According to data from the U. S. Census for the 113th Congress, there are not 22 "Census Places" in Maryland CD6, but rather 148.[4] Thus the percentage of split Census places is 13 of 148 or 9 percent, not 59 percent. Similarly, the Census Report on Census places for the 108th Congress (under the 2001 plan) indicates that there were not 35, but 75 places in prior CD6.[5] Thus, the percentage of split Census places was 4 of 75 or 5 percent. This computes to a *de minimis* difference of 4 percentage points between the two plans for CD6, not a 48-percentage point difference.

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[3] A Federal Communications Commission Report also confirms my finding that WWPX is in West Virginia, not Maryland: FCC, REPORT NO. 48672, BROADCAST ACTIONS, 02/17/2016, https://apps.fcc.gov/edocs_public/attachmatch/DOC-337708A2.txt.

[4] "MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 113th Congress, https://www2.census.gov/geo/relfiles/cdsld13/24/pl_cd_24.txt.

[5] "MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 108th Congress, https://www2.census.gov/geo/relfiles/cd108th/MD/plc_c8_24.txt.

II. Reply Report of Dr. McDonald

A. According to Dr. McDonald's Own Methodology Maryland's 2011 Congressional Redistricting Plan is Not a Partisan Gerrymander

In my opening report, I applied to Maryland's 2011 congressional redistricting plan the methodology that Dr. McDonald used in his Texas partisan gerrymandering case, for which he referenced my methodology in the *Veith* case. Dr. McDonald does not dispute the numerical findings of my Maryland analysis. Instead, he abandons his Texas methodology and relies on a single comparison of the votes won by Republicans in an average election (39.1 percent) and their expected percentage of seats under the 2011 congressional plan: "Therefore Republicans can expect to win one of eight congressional districts, or 12.5% of the seats, in a typical Maryland election. Since this is less than 39.1% by 26.6 percentage points, I conclude that Maryland's 2011 congressional redistricting plan is a partisan gerrymander."

This conclusion contradicts the most fundamental principle of redistricting analysis: that *any given percentage of votes in a redistricting plan translates into a higher percentage of seats*. Dr. McDonald recognizes this principle in his scholarship:

"A performance measure of an electoral system for legislative bodies is to compare the percentage of votes to seats won by political parties. Only by happenstance do these percentages equate; *it is more often the case, particularly among electoral systems that employ single member districts, that the party that wins the most votes receives an even greater share of seats* (Rae 1967; Lijphart 1999). A plotting of the percentage of seats awarded *for all observed or predicted shares* of votes forms a curve that provides additional information about the relationship between votes and seats in an electoral system (Kendall and Stuart 1950; Tufte 1973; Grofman 1983; King and Browning 1987)" (emphasis added).[6]

This premium of seats over votes in a fair redistricting plan applies powerfully in states like Maryland, where one party commands more than 60 percent of the votes. As indicated in Tables 17 and 18 in my opening report, in all states with a 60%+ partisan majority and 4 to 8 CDs, the majority party won a minimum of 75 percent of the seats, with an average of 88 percent for the post-2000 redistricting and 91 percent of the post 2010 redistricting.

Dr. McDonald also states in the same article that: "There are two characteristics generally associated with these curves. *Bias* is a seat share bonus enjoyed by a party, typically measured as a function of the percent of vote *needed to win fifty percent of the seats*. *Responsiveness* (sometimes called the "swing ratio") is how a change in percent votes are related to a change in seats awarded to parties." (emphasis added)

In his Texas report, for both congressional and state legislative plans, Dr. McDonald computes such a seats-to-votes ratio, up to 60 percent votes for the minority Democrats, about 16 percentage points higher than their 43.6 percent in a "typical" election. Dr. McDonald's

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[6] Michael P. McDonald, "Seats to Votes Ratios in the United States, SSRN, https://www.google.com/#q=michael+p.+mcdonald+seats+to+votes+ratio.

seats/votes chart for the Texas 2011 congressional plan, replicated in the Appendix (Diagram1), demonstrates that Democrats would win only 32 percent of Texas seats with 51 percent of the vote. They would win more than 50 percent of seats only with 56 percent or more of the vote. For Maryland's 2011 plan, replicated in the Appendix as Chart 1, at 51 percent of the vote Republicans would win 63 percent of seats and at 54 percent would win 75 percent of seats. Analysis additionally shows that if Republicans won 43 percent of the vote, they would win 25 percent of seats. Similarly, if Democrats won 43 percent of the vote they would symmetrically win 25 percent of seats, winning only the two voting rights districts. Even at 46 percent of the vote, Democrats would still win only 25 percent of the districts. The curve for Maryland in Chart 1 also flattens at 54 percent Republican votes and 75 percent Republican seats, because of the two voting rights districts.[7]

B. Efficiency Analysis as Applied by Dr. McDonald's Demonstrates That Maryland's 2011 Congressional Redistricting Plan is Not a Partisan Gerrymander

My opening report did modify efficiency analysis by considering wasted votes in a winning district as the margin of victory. I considered this methodology most appropriate to a dominant-party state like Maryland where all losing votes in many districts would be counted as wasted votes. I should have explained this distinction in my opening report. However, accepting the original form of efficiency analysis as applied by Dr. McDonald, his own results demonstrate that Maryland's 2011 congressional plan is not a partisan gerrymander.

Dr. McDonald finds that Republicans had more wasted votes than Democrats, equal to an efficiency gap of 5.8 percent (McDonald Reply Report, p. 10). But he fails to apply this result to the threshold identified by Stephanopoulos and McGhee for identifying a gerrymandered congressional plan. In states like Maryland with a least 8 congressional seats the authors state: "we recommend setting the bar at *two seats* for congressional plans and 8 *percent* for state house plans."[8] However, Dr. McDonald's gap of 5.8 percent translates only into .46 congressional seats (8*5.8% = .46), far short of the threshold. Even the higher efficiency gap of 6.7 percent that Dr. McDonald computes through an alternative analysis, translates into only .54 congressional seats. Both of Dr. McDonald's efficiency gaps even fall short of the far more lenient threshold of an 8 percent gap for state house plans.

The analysis presented in the article by Stephanopoulos and McGhee (replicated in the Appendix) of 2012 results for states with at least 8 congressional districts, shows that Maryland has one of the lowest efficiency gaps, at just over 5 percent. The Maryland gap is well within their error margin, that is, it crosses the zero line into a gap that favors Republicans. It is equal to less than half a district, far short not only of their gerrymandering threshold, but also of 2012 absolute all-state average of 1.58 congressional seats (p. 872). The authors found that there were

---

[7] In Texas, McDonald notes that for all 33 statewide elections that formed the basis of his votes to seats analysis, the Democrats never won a statewide majority of the two-party vote across congressional districts. In contrast, for the 7 elections included in my Maryland analysis, Republicans won 5179 percent of the two-party vote across congressional districts in the 2014 gubernatorial election as demonstrated in Table 1 of my opening report.

[8] Nicholas O. Stephanopoulos & Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," 82 University of Chicago Law Review 831 (2015), p. 837.

7 congressional plans for 2012 that exceeded their 2-seat threshold, all of them "pro-Republican" (pp. 876, 890).[9]

C. Dr. McDonald's Application of Voting Rights Analysis Remains Misguided

Dr. McDonald misinterprets my critique of his application of voting rights analysis as referring to the existence of bloc voting. He still never explains why an analysis applied to a protected group like minorities should apply to political partisans. My point about partisan voting and partisan identification did not relate to bloc voting, but rather to the point that party identification and voting lacks the stability of racial identification. Dr. McDonald criticizes my Frederick County example because the county was split in the 2011 congressional plan. However, when the two components of Frederick County in 2012 are combined, the results demonstrate that unlike 2008, when Republicans won the county by 7,992 votes, in 2012 Republicans and Democrats about equally divided the vote: 53,674 for Democrats and 53,915 for Republicans. Dr. McDonald does not defend his failure to apply what he has recognized as an essential component of voting rights analysis, the scrutiny of the totality of circumstances.

D. Dr. McDonald's Reply Report Does Not Respond Adequately to Alternative Explanations for Maryland's 2011 Redistricting Plan.

Dr. McDonald does not deny that CD8 was packed with Democrats under the prior 2001 plan and that the new plan resulted in a substantial unpacking of this district. He seems to state unpacking only occurs if the extracted voters result in victory in another CD. However, in unpacking a district decision-makers would not know in advance the results of subsequent elections, but could only make predictions. The unpacking of CD8 is an explanation independent of any intent to retaliate against voters in CD6. Dr. McDonald cannot be defending a standard for redistricting that would compel plan drawers to maintain a packed district, simply because unpacking might increase their prospects for victory in another district.

I additionally noted in my opening report that Maryland's decision-makers sought to realize Maryland's very substantive Democratic majority. At the time of the redistricting Maryland lagged well behind comparable one-party dominant states. The 2011 plan brought Maryland more in line with other comparable states. Dr. McDonald does dispute these findings.

Drawing on the report of Mr. Cooper I also noted if Maryland's decision-makers truly intended to retaliate against Republicans, they could have drawn a plan with a Democratic advantage in all 8 congressional districts (similar to Massachusetts, where Democrats consistently won all 9 CDs). Dr. McDonald responds with a quibble suggesting that there might be some duplication of votes in consolidated precincts in Montgomery County. In his slightly revised plan that zeros out population deviations, Mr. Cooper also adjusted for this minor issue. He found that "The corrections I made to account for the duplicate vote count in the 11 consolidated precincts have a very minor downward impact on the 2008 Democratic vote

[9] These presumptively gerrymandered plans are in Florida, Michigan, North Carolina, Ohio, Pennsylvania, Texas, and Virginia (p. 890).

percentages in CD 6 (-0.7%) and hypothetical Districts 2 (-0.2%) and District 8 (-.04%) of the Zero Deviation 8-0 Plan."[10]

I also noted in my report that the reconfiguration of CD6 did not provide a safe Democratic district, but rather a competitive district that favored Democrats. I provided a set of analyses showing that new CD6 fell within the competitive range of 45 to 55 percent presented in Dr. McDonald's scholarship, and that the assessment of D+2 by the Cook Political Report places it within the tighter 48 to 52 percent competitive range that Dr. McDonald presents.

Dr. McDonald responds by quoting the following: "a normalized presidential vote within two competitiveness ranges, 45-55 and 48-52 percent, are presented in figure 10-1…[t]he wider 45-55 range is presented since it is commonly used to describe competitive congressional elections; *however, my analysis of the relationship between competitive districts and competitive elections suggests that the tighter range is a more valid definition of a competitive district*" (emphasis added).[11] Although he might personally prefer the tighter range, he indicates that the 45 to 55 percent range is the one commonly used by scholars. Dr. McDonald does not consider that analyses of CD6 prior to the 2012 general election included it as one of the nation's few competitive congressional districts. The 48 to 52 range, Dr. McDonald notes, is also normalized to the presidential vote which was 53 percent Democratic in 2008, the last presidential election before the 2011 redistricting. Thus, a 53 percent Democratic district would be normalized at 50 percent.

Dr. McDonald claims that since the publication of his 2006 book chapter, he no longer uses normalized votes to judge district competitiveness (McDonald Reply Report, p. 14). However, in that scholarship, notably an article just published on April 20, 2017 he now explicitly embraces the 45 percent to 55 percent competitiveness range. He even cites his earlier work from 2006 in support of that range: "We use a simple statistic to score competitive districts: the number of districts with a two-party 2008 presidential vote *within a .45 to .55 range*. This range is arbitrary but has foundation in prior research (McDonald, 2006b; Swain, Borrelli, & Reed, 1998)." (emphasis added)[12]

Real-world congressional elections demonstrate the fallacy of relying on a tight 48 to 52 percent criteria for CDs. In 2010, for example, Republicans won 52 congressional districts in which Democrats had prevailed in the previous 2008 contests by more than 52 percent. These results further demonstrate the malleability of identifying the partisanship of congressional districts.[13]

---

[10] Cooper Supplemental Declaration, p. 3.

[11] Michael P. McDonald. 2006. "Redistricting and Competitive Districts" in *The Marketplace of Democracy: Electoral Competition and American Politics*, Michael P. McDonald and John Samples, eds. Washington, DC: Brookings Press, p. 224.

[12] Micah Altman and Michael P. McDonald, "Redistricting by Formula: An Ohio Reform Experiment," *American Politics Research* (2017), p. 10.

[13] AR1, 2; AZ1, 5; CO3, FL2, 22, 24; GA8; IL8, 11, 14, 17; IN8, 9; KS3; LA3; MN8, MS1, 4; MO4; NV3; NH1, 2; NJ3; NM2; NY13, 19, 20, 25; NC2; ND at-large; OH1, 6, 16, 18; PA7, 8, 10; SC5; SD at-large; TN4, 6, 8; TX17, 27; VA2, 9; WA3; WV1; WI7, 8.

E. Dr. McDonald Rejects Communities of Interest as a Means for Analyzing Redistricting Plans

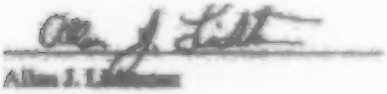
Although the claims of both Dr. Morrison and Dr. McDonald pivot on the concept of communities of interest, I noted in my opening report that Dr. McDonald's scholarship rejects the utility of this concept as a check on partisan gerrymandering. In his April 2017 article, Dr. McDonald rejects this concept even more emphatically than before:

> Criteria focusing on "communities of interest" have similarly been insufficient to constrain strongly political manipulation. Although many states have general requirements to respect communities of interest (National Conference of State Legislatures, 2009), and, in theory, measures applied to communities of interest could incorporate general representational criteria, this has not happened in practice within the United States. In practice, the communities of interest criterion has been either ignored or limited to protecting against districts that would divide concentrated homogeneous ethnic or racial groups. While this can indirectly constrain political goals, it may constrain one party substantially more than another (Altman & McDonald, 2014) and generally leaves ample room for political manipulation. Indeed, when communities of interest lack definitional foundation any boundary line can be argued to respect post hoc communities.
>
> If neither administrative criteria nor communities of interest are sufficient to constrain political goals, then a solution may be to explicitly incorporate political goals into the redistricting criteria.[14]

III. The Absence of Methodology for Analyzing Intent in Both Reports of Plaintiffs' Experts

Neither Dr. McDonald nor Dr. Morrison apply the Arlington Heights framework of analyzing intent, which is consistent with corresponding historical methodology. Dr. Morrison does not attempt to defend this lack of methodological standards for intent. Dr. McDonald attempts to excuse this flaw by saying, "Plaintiffs to this action did not ask me to examine these *Arlington Heights* factors." (McDonald Reply Report, p .16) However, instructions from attorneys do not excuse the failure of social science expert to rely on the appropriate methodology for assessing intent.

June 2, 2017



Allan J. Lichtman

[14] Altman and McDonald, "Redistricting by Formula," p. 6.

APPENDIX

Adopted Congressional Districts

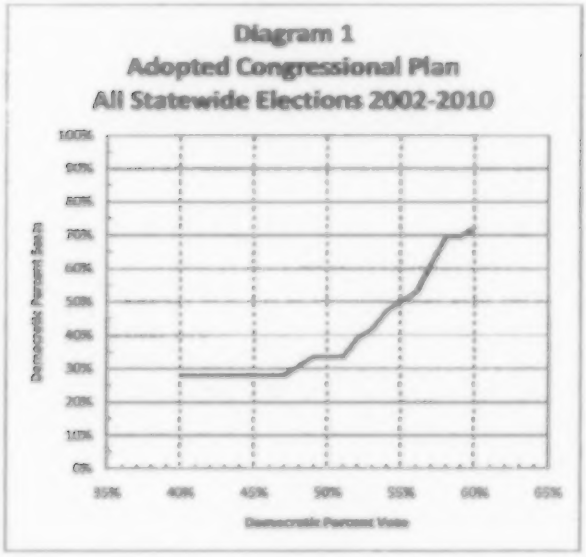
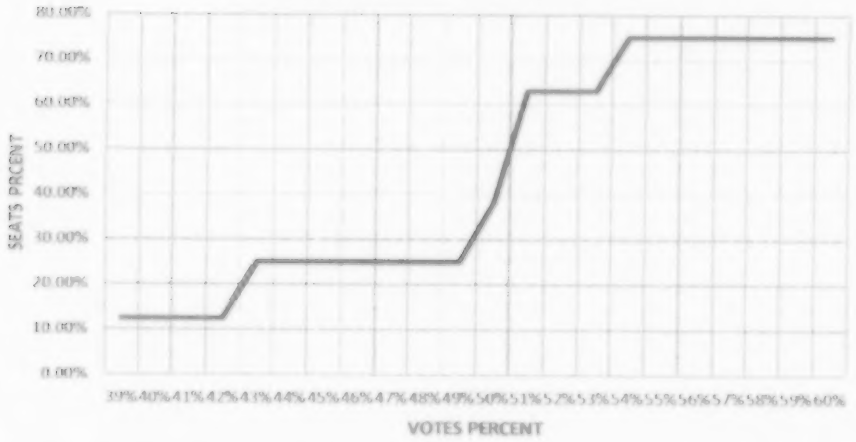
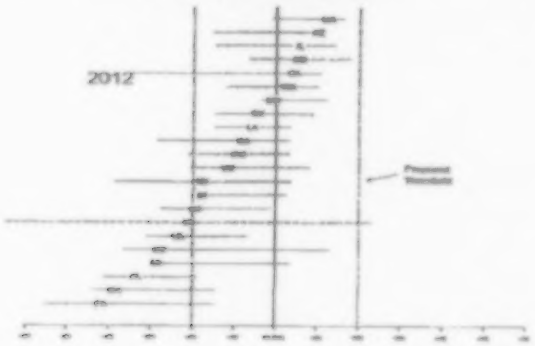


Chart 1
Adopted MD 2011 Congressional Plan
All Statewide Elections, 2012-2016



2016] *Partisan Gerrymandering and the Efficiency Gap* 879

FIGURE 7. EFFICIENCY GAPS FOR CONGRESSIONAL PLANS BY STATE, 1972–2012[188]



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Question 06

Civil Marriage Protection Act

Referendum Petition (Ch. 2 of the 2012 Legislative Session)

	Yes	No
Allegany County	9,985	16,927
Anne Arundel County ✔	130,053	130,883
Baltimore City ✔	136,097	109,294
Baltimore County ✔	194,100	181,182
Calvert County	20,206	23,944
Caroline County	4,786	8,139
Carroll County	37,891	48,253
Cecil County	18,379	32,883
Charles County	39,334	38,792
Dorchester County	8,948	8,943
Frederick County ✔	58,348	58,602
Garrett County	3,468	9,212
Harford County	55,057	66,785

Present

Howard County	58,769	61,139
Kent County	4,985	4,858
Montgomery County	286,625	100,498
Prince George's County	183,257	188,298
Queen Anne's County	10,768	13,000
St. Mary's County	20,909	25,671
Somerset County	3,467	6,244
Talbot County	9,567	10,280
Washington County	23,585	37,246
Wicomico County	16,107	24,485
Worcester County	11,088	15,212
Totals	1,373,504 (52.4%)	1,246,045 (47.6%)

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Question 07 ✔

Gaming Expansion

Gaming Expansion Referendum (Ch. 1 of the Second 2012 Special Session)

	Yes	No
Allegany County ✔	17,436	12,012
Anne Arundel County	117,127	139,484
Baltimore City ✔	128,870	118,478
Baltimore County	182,882	194,825
Calvert County ✔	25,398	19,585
Caroline County	6,012	7,127
Carroll County	38,936	47,921
Cecil County	17,815	23,990
Charles County ✔	40,887	39,580
Dorchester County	7,436	7,523
Frederick County ✔	59,998	60,195
Garrett County	5,357	7,486
Harford County	58,557	66,110

Prevent

Howard County	71,989	79,345
Kent County	4,068	5,810
Montgomery County ✔	340,885	280,579
Prince George's County ✔	222,275	152,000
Queen Anne's County	11,586	13,031
St. Mary's County ✔	27,315	19,898
Somerset County ✔	5,925	4,044
Talbot County	8,372	11,779
Washington County ✔	34,869	39,874
Wicomico County ✔	21,826	19,991
Worcester County ✔	14,474	12,414
Totals	1,373,888 (51.9%)	1,272,355 (48.1%)

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Representative in Congress

Congressional District 6

	Jennifer P. Dougherty Democratic	Roscoe Bartlett Republican	Gary W. Hoover, Sr. Libertarian	Other Write-ins N/A
Allegany	10,478	17,[illegible]	610	14
Baltimore	6,128	11,110	[illegible]	17
Carroll	26,182	51,[illegible]	2,494	68
Frederick	47,797	55,[illegible]	3,[illegible]	142
Garrett	3,[illegible]	8,445	254	2
Harford	5,[illegible]	10,198	[illegible]	23
Montgomery	4,[illegible]	5,[illegible]	301	11
Washington	24,277	32,278	2,[illegible]	27
Totals	128,[illegible] (38.8%)	190,[illegible] (57.8%)	11,[illegible] (3.3%)	342 (.1%)

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Representative in Congress

Congressional District 06

Democratic (Vote for One) View the breakdown of these results

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total Votes	Percentage
Charles Bailey	Democratic	142	1,304	126	1,572	4.2%
John Delaney ✓	Democratic	2,080	17,521	833	20,414	54.2%
Rob Garagiola	Democratic	1,417	9,050	514	10,981	29.1%
Ron Little	Democratic	117	957	77	1,131	3.0%
Mikel Poonen	Democratic	468	3,049	133	3,590	9.5%

Republican (Vote for One) View the breakdown of these results

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total Votes	Percentage
Kathy Alzell	Republican	294	3,575	146	4,115	10.2%
Roscoe G. Bartlett ✓	Republican	1,121	15,675	804	17,600	43.6%
David R. Brinkley	Republican	702	6,930	355	7,987	19.8%
Robert Coblentz	Republican	59	666	48	870	2.4%
Robin Ficker	Republican	257	2,462	165	2,864	7.1%
Peter James	Republican	51	848	34	933	2.3%

Present	Joseph T. Krysztofiński	Republican	268	2,661	72	3,073	7.6%
	Brandon Owren Rippeon	Republican	360	2,377	106	2,843	7.5%

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Representative in Congress

Congressional District 6

	John Delaney Democratic ✔	Roscoe G. Bartlett Republican	Nicholaus Mueller Libertarian	Other Write-Ins N/A
Allegany	11,[illegible]	15,730	1,048	18
Frederick	31,079	28,148	1,981	79
Garrett	3,[illegible]	6,445	387	4
Montgomery	105,831	44,425	3,[illegible]	259
Washington	28,381	28,[illegible]	2,774	41
Totals	181,821 (59.8%)	117,313 (37.9%)	9,918 (3.2%)	349 (.1%)

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Official 2014 Gubernatorial General Election results for Representative in Congress

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Congressional District 6

(Vote for One) County Breakdown

This table may scroll left to right depending on the screen size of your device.

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
John K. Delaney ✔	Democratic	12,996	76,322	5,386	94,704	49.7%
Dan Bongino	Republican	9,306	77,846	4,778	91,930	48.2%
George Gluck	Green	375	3,128	259	3,762	2.0%
Other Write-Ins	N/A	17	114	9	140	0.1%

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Representative in Congress

Congressional District 1

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Frank M. Kratovil, Jr.	Democratic	18,200	93,673	8,527	120,400	42.0%
Andy Harris ✓	Republican	21,422	125,773	7,923	155,118	54.1%
Richard James Davis	Libertarian	1,341	8,941	584	10,870	3.8%
Michael Kennedy (Write In)	Unaffiliated	0	18	0	18	0.0%
Jack N. Villers (Write In)	Unaffiliated	58	119	3	180	0.1%
Other Write-Ins	N/A	34	170	38	242	0.1%

Congressional District 2

(Vote for One) Details

Prince

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
C. A. Dutch Ruppersberger ✔	Democratic	15,814	111,266	7,023	134,103	64.2%
Marcelo Cardarelli	Republican	6,007	60,375	3,141	69,523	33.3%
Lorenzo Gardenega	Libertarian	391	4,453	246	5,090	2.4%
Other Write-Ins	N/A	18	131	9	158	0.1%

Congressional District 3

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
John Sarbanes ✔	Democratic	17,544	119,589	10,305	147,448	61.1%
Jim Wilhelm	Republican	8,476	73,477	4,994	86,947	36.0%
Jerry McGinley	Libertarian	401	4,509	302	5,212	2.2%
Alain Leneau	Constitution	148	1,391	87	1,634	0.7%
Other Write-Ins	N/A	24	152	12	188	0.1%

Congressional District 4

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Donna Edwards ✔	Democratic	27,325	122,356	10,547	160,228	83.4%
Robert Broadus	Republican	3,573	25,787	2,127	31,487	16.4%
Other Write-Ins	N/A	54	243	28	325	0.2%

Congressional District 5

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Steny H. Hoyer ✔	Democratic	21,333	124,078	9,699	155,110	64.3%
Charles Lollar	Republican	9,801	69,758	4,216	83,575	34.6%
H. Gavin Shickle	Libertarian	281	2,132	165	2,578	1.1%
Other Write-Ins	N/A	17	94	9	120	0.0%

Congressional District 6

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Andrew Duck	Democratic	6,754	69,073	4,848	80,455	33.2%

Roscoe G. Bartlett ✓	Republican	8,131	135,465	6,298	148,920	61.4%
Dan Massey	Libertarian	412	6,118	288	6,818	2.8%
Michael Reed	Constitution	274	5,278	255	5,807	2.4%
Other Write-Ins	N/A	12	187	12	191	0.1%

Congressional District 7

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Elijah Cummings ✓	Democratic	28,790	118,887	10,038	152,669	75.2%
Frank Mirabile, Jr.	Republican	6,191	37,755	2,429	46,373	22.8%
Scott Spencer	Libertarian	388	3,165	283	3,914	1.9%
Ray Sly (Write In)	Republican	6	14	0	20	0.0%
Fred Donald Dickson, Jr. (Write In)	Unaffiliated	4	51	0	55	0.0%
Other Write-Ins	N/A	24	100	11	135	0.1%

Congressional District 8

(Vote for One) Details

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Chris Van Hollen ✓	Democratic	12,930	126,102	15,581	155,613	73.3%
Michael Lee Philips	Republican	3,539	44,273	4,609	52,421	25.0%
Mark Grannis	Libertarian	160	2,330	283	2,713	1.3%
Fred Nordhorn	Constitution	48	594	54	699	0.3%
Other Write-Ins	N/A	14	188	22	224	0.1%

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MARYLAND CONGRESSIONAL DISTRICTS BY PLACE

Place	County/Independent City	Congressional District
Aberdeen Proving Ground CDP	Harford	2
Aberdeen city	Harford	1,2
Accident town	Garrett	6
Accokeek CDP	Prince George's	5
Adamstown CDP	Frederick	6
Adelphi CDP	Prince George's	4,5
Algonquin CDP	Dorchester	1
Allen CDP	Wicomico	1
Andrews AFB CDP	Prince George's	4,5
Annapolis Neck CDP	Anne Arundel	3,4
Annapolis city	Anne Arundel	3
Antietam CDP	Washington	6
Aquasco CDP	Prince George's	5
Arbutus CDP	Baltimore	2,7
Arden on the Severn CDP	Anne Arundel	4
Arnold CDP	Anne Arundel	4
Ashton-Sandy Spring CDP	Montgomery	3
Aspen Hill CDP	Montgomery	3,6,8
Avalon CDP	Prince George's	5
Avilton CDP	Washington	6
Bakersville CDP	Washington	6
Ballenger Creek CDP	Frederick	6,8
Baltimore Highlands CDP	Baltimore	2
Baltimore city	Baltimore	2,3,7
Barclay town	Queen Anne's	1
Barnesville town	Montgomery	6
Barrelville CDP	Allegany	6
Barton town	Allegany	6
Bartonsville CDP	Frederick	8
Beaver Creek CDP	Washington	6
Bel Air CDP	Allegany	6
Bel Air North CDP	Harford	1
Bel Air South CDP	Harford	1,2
Bel Air town	Harford	1
Beltsville CDP	Prince George's	4,5
Benedict CDP	Charles	5
Bennville CDP	Charles	5
Berlin town	Worcester	1
Berwyn Heights town	Prince George's	5
Bethesda CDP	Montgomery	8
Betterton town	Kent	1
Bier CDP	Allegany	6
Big Pool CDP	Washington	6
Big Spring CDP	Washington	6
Bishopville CDP	Worcester	1
Bivalve CDP	Wicomico	1
Bladensburg town	Prince George's	4
Bloomington CDP	Garrett	6
Boonsboro town	Washington	6
Bowie city	Prince George's	4,5
Bowleys Quarters CDP	Baltimore	2
Bowling Green CDP	Allegany	6
Bowmans Addition CDP	Allegany	6
Braddock Heights CDP	Frederick	8
Brandywine CDP	Prince George's	5
Breathedsville CDP	Washington	6
Bruntwood town	Prince George's	4
Bruch Hall CDP	Prince George's	4,5
Brookeville town	Montgomery	3
Brooklyn Park CDP	Anne Arundel	2
Brookmont CDP	Montgomery	8
Brookview town	Dorchester	1
Broomes Island CDP	Calvert	5
Brownsville CDP	Washington	6
Brunswick city	Frederick	6
Bryans Road CDP	Charles	5
Bryantown CDP	Charles	5
Buckeystown CDP	Frederick	6
Burkittsville town	Frederick	8
Burtonsville CDP	Montgomery	3
Butlertown CDP	Kent	1
Cabin John CDP	Montgomery	8
California CDP	St. Mary's	5
Calvert Beach CDP	Calvert	5
Calverton CDP	Montgomery	3
	Prince George's	4
Cambridge city	Dorchester	1
Camp Springs CDP	Prince George's	4,5
Cape St. Claire CDP	Anne Arundel	3,4
Capitol Heights town	Prince George's	4

Carlos CDP	Allegany	6
Carney CDP	Baltimore	1, 3
Catonsville CDP	Baltimore	7
Cavetown CDP	Washington	6
Clearfork CDP	Washington	6
Coulton town	Cecil	1
Cedarville CDP	Prince George's	5
Centreville town	Queen Anne's	1
Chance CDP	Somerset	1
Charlestown town	Cecil	1
Charlotte Hall CDP	St. Mary's	5
Charlton CDP	Washington	6
Chesapeake Beach town	Calvert	5
Chesapeake City town	Cecil	1
Chesapeake Ranch Estates CDP	Calvert	5
Chester CDP	Queen Anne's	1
Chestertown town	Kent	1
Cheverly town	Prince George's	4
Chevy Chase CDP	Montgomery	8
Chevy Chase Section Five village	Montgomery	8
Chevy Chase Section Three village	Montgomery	8
Chevy Chase View town	Montgomery	8
Chevy Chase Village town	Montgomery	8
Chevy Chase town	Montgomery	8
Chewsville CDP	Washington	6
Chillum CDP	Prince George's	4
Choptank CDP	Caroline	1
Church Creek town	Dorchester	1
Church Hill town	Queen Anne's	1
Clarksburg CDP	Montgomery	8
Claysville CDP	Allegany	6
Clear Spring town	Washington	6
Clinton CDP	Prince George's	5
Cloverly CDP	Montgomery	3, 8
Cobb Island CDP	Charles	5
Cockeysville CDP	Baltimore	1, 2, 7
Colesville CDP	Montgomery	3, 8
College Park city	Prince George's	5
Colmar Manor town	Prince George's	4
Columbia CDP	Howard	3, 7
Coral Hills CDP	Prince George's	4
Cordova CDP	Talbot	1
Corriganville CDP	Allegany	6
Cottage City town	Prince George's	4
Crellin CDP	Garrett	6
Crisfield city	Somerset	1
Crofton CDP	Anne Arundel	4, 5
Croom CDP	Prince George's	5
Crownsville CDP	Anne Arundel	4
Cumberland city	Allegany	6
Damascus CDP	Montgomery	6, 8
Dames Quarter CDP	Somerset	1
Danville CDP	Allegany	6
Dargan CDP	Washington	6
Darlington CDP	Harford	7
Darnestown CDP	Montgomery	6
Dawson CDP	Allegany	6
Deal Island CDP	Somerset	1
Deale CDP	Anne Arundel	5
Deer Park town	Garrett	6
Delmar town	Wicomico	1
Denton town	Caroline	1
Derwood CDP	Montgomery	6
Detmold CDP	Allegany	6
District Heights city	Prince George's	4
Downsville CDP	Washington	6
Drum Point CDP	Calvert	5
Dundalk CDP	Baltimore	2
Dunkirk CDP	Calvert	5
Eagle Harbor town	Prince George's	5
Eakles Mill CDP	Washington	6
East New Market town	Dorchester	1
East Riverdale CDP	Prince George's	4, 5
Easton town	Talbot	1
Eckhart Mines CDP	Allegany	6
Eden CDP	Somerset	1
Edmonville CDP	Kent	1
Edgemere CDP	Baltimore	2
Edgemont CDP	Washington	6
Edgewater CDP	Anne Arundel	4, 5
Edgewood CDP	Harford	1, 2
Edmonston town	Prince George's	4
Eldersburg CDP	Carroll	8
Eldorado town	Dorchester	1

Elkridge CDP	Howard	2, 5, 7
Elkton town	Cecil	1
Ellerslie CDP	Allegany	6
Ellicott City CDP	Howard	7
Elliott CDP	Dorchester	1
Emmitsburg town	Frederick	8
Ernstville CDP	Washington	6
Essex CDP	Baltimore	2
Fairland CDP	Montgomery	3
Fairlee CDP	Kent	1
Fairmount CDP	Somerset	1
Fairmount Heights town	Prince George's	4
Fairplay CDP	Washington	6
Fairview CDP	Washington	6
Fairwood CDP	Prince George's	4, 5
Fallston CDP	Harford	1
Federalsburg town	Caroline	1
Ferndale CDP	Anne Arundel	2, 3
Finzel CDP	Garrett	6
Fishing Creek CDP	Dorchester	1
Flintstone CDP	Allegany	6
Forest Glen CDP	Montgomery	8
Forest Heights town	Prince George's	4
Forestville CDP	Prince George's	4
Fort Meade CDP	Anne Arundel	2, 3
Fort Ritchie CDP	Washington	6
Fort Washington CDP	Prince George's	4, 5
Fountainhead-Orchard Hills CDP	Washington	6
Four Corners CDP	Montgomery	8
Franklin CDP	Allegany	6
Frederick city	Frederick	2, 8
Franchtown-Humbly CDP	Somerset	1
Friendly CDP	Prince George's	5
Friendship CDP	Anne Arundel	5
Friendship Heights Village CDP	Montgomery	8
Friendsville town	Garrett	6
Frostburg city	Allegany	6
Fruitland city	Wicomico	1
Fulton CDP	Howard	3
Funkstown town	Washington	6
Gaithersburg city	Montgomery	8
Galena town	Kent	1
Galestown town	Dorchester	1
Galesville CDP	Anne Arundel	5
Gambrills CDP	Anne Arundel	4
Gapland CDP	Washington	6
Garrett Park town	Montgomery	8
Garretts Mill CDP	Washington	6
Garrison CDP	Baltimore	3
Georgetown CDP	Kent	1
Germantown CDP	Montgomery	8
Gilmore CDP	Allegany	6
Girdletree CDP	Worcester	1
Glassmanor CDP	Prince George's	4
Glen Burnie CDP	Anne Arundel	2, 4
Glen Echo town	Montgomery	8
Glenarden city	Prince George's	4
Glenmont CDP	Montgomery	8
Glenn Dale CDP	Prince George's	4, 5
Golden Beach CDP	St. Mary's	5
Goldsboro town	Caroline	1
Gorman CDP	Garrett	6
Grahamtown CDP	Allegany	6
Grantsville town	Garrett	6
Grasonville CDP	Queen Anne's	1
Greenbelt city	Prince George's	5
Greensboro town	Caroline	1
Greenspring CDP	Washington	6
Hagerstown city	Washington	6
Halfway CDP	Washington	6
Hampstead town	Carroll	1
Hampton CDP	Baltimore	1, 2
Hancock town	Washington	6
Havre de Grace city	Harford	2
Hebron town	Wicomico	1
Henderson town	Caroline	1
Herald Harbor CDP	Anne Arundel	4
Highfield-Cascade CDP	Washington	6
Highland Beach town	Anne Arundel	3
Highland CDP	Howard	3, 7
Hillandale CDP	Montgomery	3
	Prince George's	4
Hillcrest Heights CDP	Prince George's	4
Hillsboro town	Caroline	1
Hughesville CDP	Charles	5

Huntingtown CDP	Calvert	5
Hurlock town	Dorchester	1
Hutton CDP	Garrett	6
Hyattsville city	Prince George's	4,5
Ilchester CDP	Howard	2,3,7
Indian Head town	Charles	5
Indian Springs CDP	Washington	6
Jarrettsville CDP	Harford	1
Jefferson CDP	Frederick	6,8
Jennings CDP	Garrett	6
Jessup CDP	Anne Arundel	2
	Howard	2
Jesterville CDP	Wicomico	1
Joppatowne CDP	Harford	1,2
Jug Town CDP	Washington	6
Keedysville town	Washington	6
Kemp Mill CDP	Montgomery	3
Kempe Mill CDP	Washington	6
Kennedyville CDP	Kent	1
Kensington town	Montgomery	8
Kent Narrows CDP	Queen Anne's	1
Kettering CDP	Prince George's	4
Kingstown CDP	Queen Anne's	1
Kingsville CDP	Baltimore	1
Kitzmiller town	Garrett	6
Klondike CDP	Allegany	6
Kontarra CDP	Prince George's	4,5
La Plata town	Charles	5
La Vale CDP	Allegany	6
Lake Arbor CDP	Prince George's	4
Lake Shore CDP	Anne Arundel	3,4
Landover CDP	Prince George's	4
Landover Hills town	Prince George's	4
Langley Park CDP	Prince George's	4
Lanham CDP	Prince George's	4,5
Lansdowne CDP	Baltimore	3
Largo CDP	Prince George's	4
Laurel city	Prince George's	4
Layhill CDP	Montgomery	8
Laytonsville town	Montgomery	6,8
Leisure World CDP	Montgomery	8
Leitersburg CDP	Washington	6
Leonardtown town	St. Mary's	5
Lexington Park CDP	St. Mary's	5
Libertytown CDP	Frederick	8
Linganore CDP	Frederick	6,8
Linthicum CDP	Anne Arundel	2,3
Little Orleans CDP	Allegany	6
Loch Lynn Heights town	Garrett	6
Lochearn CDP	Baltimore	2,7
Lonaconing town	Allegany	6
Long Beach CDP	Calvert	5
Luke town	Allegany	6
Lusby CDP	Calvert	5
Lutherville CDP	Baltimore	2
Madison CDP	Dorchester	1
Manchester town	Carroll	1
Mapleville CDP	Washington	6
Mardela Springs town	Wicomico	1
Marlboro Meadows CDP	Prince George's	5
Marlboro Village CDP	Prince George's	4,5
Marlow Heights CDP	Prince George's	4
Marlton CDP	Prince George's	5
Martin's Additions village	Montgomery	8
Marydel town	Caroline	1
Maryland City CDP	Anne Arundel	2,4
Maugansville CDP	Washington	6
Mayo CDP	Anne Arundel	5
Mays Chapel CDP	Baltimore	2,3,7
McCoole CDP	Allegany	6
Mechanicsville CDP	St. Mary's	5
Melwood CDP	Prince George's	5
Mercersville CDP	Washington	6
Middle River CDP	Baltimore	2
Middleburg CDP	Washington	6
Middletown town	Frederick	8
Midland town	Allegany	6
Midlothian CDP	Allegany	6
Milford Mill CDP	Baltimore	2,7
Millington town	Kent	1
	Queen Anne's	1
Mitchellville CDP	Prince George's	4
Monrovia CDP	Frederick	8
Montgomery Village CDP	Montgomery	6
Morningside town	Prince George's	4

Monrovia CDP	Allegany	6
Mount Aetna CDP	Washington	6
Mount Airy town	Carroll	6
	Frederick	6
Mount Briar CDP	Washington	6
Mount Lena CDP	Washington	6
Mount Rainier city	Prince George's	4
Mount Savage CDP	Allegany	6
Mount Vernon CDP	Somerset	1
Mountain Lake Park town	Garrett	6
Myersville town	Frederick	6
Nanticoke Acres CDP	Wicomico	1
Nanticoke CDP	Wicomico	1
National CDP	Allegany	6
National Harbor CDP	Prince George's	4
Naval Academy CDP	Anne Arundel	3
New Carrollton city	Prince George's	4,1
New Market town	Frederick	8
New Windsor town	Carroll	8
Newark CDP	Worcester	1
Nikep CDP	Allegany	6
North Beach town	Calvert	5
North Bethesda CDP	Montgomery	6
North Brentwood town	Prince George's	4
North Chevy Chase village	Montgomery	8
North East town	Cecil	1
North Kensington CDP	Montgomery	6
North Laurel CDP	Howard	2
North Potomac CDP	Montgomery	6,0
Oakland town	Garrett	6
Ocean CDP	Allegany	6
Ocean City town	Worcester	1
Ocean Pines CDP	Worcester	1
Odenton CDP	Anne Arundel	2,4
Oldtown CDP	Allegany	6
Olney CDP	Montgomery	3,8
Overlea CDP	Baltimore	2,3
Owings CDP	Calvert	5
Owings Mills CDP	Baltimore	2,3
Oxford town	Talbot	1
Oxon Hill CDP	Prince George's	4
Paramount-Long Meadow CDP	Washington	6
Parkville CDP	Baltimore	2,3
Parole CDP	Anne Arundel	3,4
Parsonsburg CDP	Wicomico	1
Pasadena CDP	Anne Arundel	3,4
Pecktonville CDP	Washington	6
Peppermill Village CDP	Prince George's	4
Perry Hall CDP	Baltimore	1,3
Perryman CDP	Harford	2
Perryville town	Cecil	1
Pikesville CDP	Baltimore	2,3
Pinesburg CDP	Washington	6
Piney Point CDP	St. Mary's	8
Pittsville town	Wicomico	1
Pleasant Grove CDP	Allegany	6
Pleasant Hills CDP	Harford	1
Pocomoke City city	Worcester	1
Point of Rocks CDP	Frederick	6
Pomfret CDP	Charles	5
Pondsville CDP	Washington	6
Poolesville town	Montgomery	6
Port Deposit town	Cecil	1
Port Tobacco Village town	Charles	5
Potomac CDP	Montgomery	6,8
Potomac Heights CDP	Charles	5
Potomac Park CDP	Allegany	6
Powellville CDP	Wicomico	1
Preston town	Caroline	1
Prince Frederick CDP	Calvert	5
Princess Anne town	Somerset	1
Pylesville CDP	Harford	1
Quantico CDP	Wicomico	1
Queen Anne CDP	Prince George's	5
Queen Anne town	Queen Anne's	1
	Talbot	1
Queenland CDP	Prince George's	5
Queenstown town	Queen Anne's	1
Randallstown CDP	Baltimore	2,3,1
Rawlings CDP	Allegany	6
Redland CDP	Montgomery	6,8
Reid CDP	Washington	6
Reisterstown CDP	Baltimore	2,3
Ridgely town	Caroline	1
Ringgold CDP	Washington	6

Rising Sun town	Cecil	1
Riva CDP	Anne Arundel	4
Riverdale Park town	Prince George's	4,5
Riverside CDP	Harford	2
Riviera Beach CDP	Anne Arundel	3,4
Robinwood CDP	Washington	6
Rock Hall town	Kent	1
Rock Point CDP	Charles	5
Rockville city	Montgomery	5,6
Rohrersville CDP	Washington	6
Rosaryville CDP	Prince George's	5
Rosedale CDP	Baltimore	2,3
Rosemont village	Frederick	6
Rossville CDP	Baltimore	2,3
Sabillasville CDP	Frederick	6
Salisbury city	Wicomico	1
San Mar CDP	Washington	6
Sandy Hook CDP	Washington	6
Savage CDP	Howard	2
Scaggsville CDP	Howard	2,5
Seabrook CDP	Prince George's	4,5
Seat Pleasant city	Prince George's	4
Secretary town	Dorchester	1
Severn CDP	Anne Arundel	2-4
Severna Park CDP	Anne Arundel	4
Shady Side CDP	Anne Arundel	5
Shaft CDP	Allegany	6
Sharpsburg town	Washington	6
Sharptown town	Wicomico	1
Silver Hill CDP	Prince George's	4
Silver Spring CDP	Montgomery	3,5
Smith Island CDP	Somerset	1
Smithsburg town	Washington	6
Snow Hill town	Worcester	1
Solomons CDP	Calvert	5
Somerset town	Montgomery	5
South Kensington CDP	Montgomery	5
South Laurel CDP	Prince George's	4,5
Spencerville CDP	Montgomery	3
Spring Gap CDP	Allegany	6
Spring Ridge CDP	Frederick	6
Springdale CDP	Prince George's	4
St. George Island CDP	St. Mary's	5
St. James CDP	Washington	6
St. Leonard CDP	Calvert	5
St. Michaels town	Talbot	1
Stevensville CDP	Queen Anne's	1
Stockton CDP	Worcester	1
Sudlersville town	Queen Anne's	1
Suitland CDP	Prince George's	4
Summerfield CDP	Prince George's	4
Swanton CDP	Garrett	6
Sykesville town	Carroll	5
Takoma Park city	Montgomery	5
Tall Timbers CDP	St. Mary's	5
Taneytown city	Carroll	1
Taylors Island CDP	Dorchester	1
Temple Hills CDP	Prince George's	4
Templeville town	Caroline	1
	Queen Anne's	1
Thurmont town	Frederick	6
Tilghman Island CDP	Talbot	1
Tilghmanton CDP	Washington	6
Timonium CDP	Baltimore	2,7
Tolchester CDP	Kent	1
Towson CDP	Baltimore	2,3
Trappe town	Talbot	1
Travilah CDP	Montgomery	6,8
Trego-Rohrersville Station CDP	Washington	6
Tyaskin CDP	Wicomico	1
Union Bridge town	Carroll	5
University Park town	Prince George's	5
Upper Marlboro town	Prince George's	5
Urbana CDP	Frederick	6
Vale Summit CDP	Allegany	6
Vienna town	Dorchester	1
Waldorf CDP	Charles	5
Walker Mill CDP	Prince George's	4
Walkersville town	Frederick	6
Washington Grove town	Montgomery	6
Waterview CDP	Wicomico	1
West Denton CDP	Caroline	1
West Laurel CDP	Prince George's	4
West Ocean City CDP	Worcester	1
West Pocomoke CDP	Somerset	1

Westernport town	Allegany	6
Westminster city	Carroll	8
Westphalia CDP	Prince George's	4,5
Whaleyville CDP	Worcester	1
Wheaton CDP	Montgomery	6,8
White Marsh CDP	Baltimore	1-3
White Oak CDP	Montgomery	3,8
Whitehaven CDP	Wicomico	1
Willards town	Wicomico	1
Williamsport town	Washington	6
Williston CDP	Caroline	1
Wilson-Conococheague CDP	Washington	6
Woodland CDP	Allegany	6
Woodlawn CDP	Baltimore	7
	Prince George's	4,5
Woodmore CDP	Prince George's	4,5
Woodsboro town	Frederick	8
Worton CDP	Kent	1
Yarrowsburg CDP	Washington	6
Zihlman CDP	Allegany	6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,		
Plaintiffs,		
v.		Case No. 13-cv-3233
LINDA H. LAMONE., *et al.*,		
Defendants.		

DECLARATION OF SHELLY APRILL

I, Shelly Aprill, under penalty of perjury, declare and state:

1. I, Shelly Aprill, am over the age of eighteen and am competent to testify to the matters stated below.

2. I am a planner in the Planning Data Analysis Unit of the Maryland Department of Planning. I have held this position for 8 years. As a planner, my background includes a Master of Urban and Regional Planning from Virginia Commonwealth University. Upon completion of my Master's degree, I was hired by the Department of Planning as a planner to assist with redistricting. After the completion of the 2011 and 2012 redistricting process, I continued to assist with redistricting related projects but took on other projects assigned to the Planning Data Analysis Unit as well. I currently utilize ArcMap 10.3 for analysis and producing maps. I have experience with many versions of ArcMap going back to 9.3.

3. I am familiar with ArcMap and with the definitions of Census Designated Places. On or about May 30, 2017, I created maps of Rockville and Frederick City that depict: 1) the borders of census designated places as provided by the Census; 2) the borders of municipalities (these are defined by the local government, not the Census); 3) the borders of the voting tabulation districts, which in Maryland are also known as precincts, as they existed in 2011; 4) the 2011 Congressional Districts. Copies of these maps are attached as Exhibit A.

5. For the detail map of Frederick City, I did a visual inspection of the boundary of Frederick City but was only able to find one split area. As a double check, I utilized a spatial join with the municipal boundary and the congressional district boundaries. A

spatial join joins attributes from one feature (the municipal boundary) to the attributes of another (the congressional district boundaries). The output table will contain a record for each piece of the municipal boundary in a different congressional district. The output table I generated with ArcMap only had two records for Frederick City, one for the Sixth Congressional District and one for the Eighth. Through this process, I could determine that there was exactly one place where the Eighth District crossed the municipal boundary of Frederick City. I then zoomed in to a scale of 1: 220, or one inch on the map equals about 220 feet on the ground. I placed a purple circle around the area where the Eighth District crosses the municipal boundary of Frederick City. Using the adjusted 2010 Census data and the identify function, I could determine that this area contained zero population.

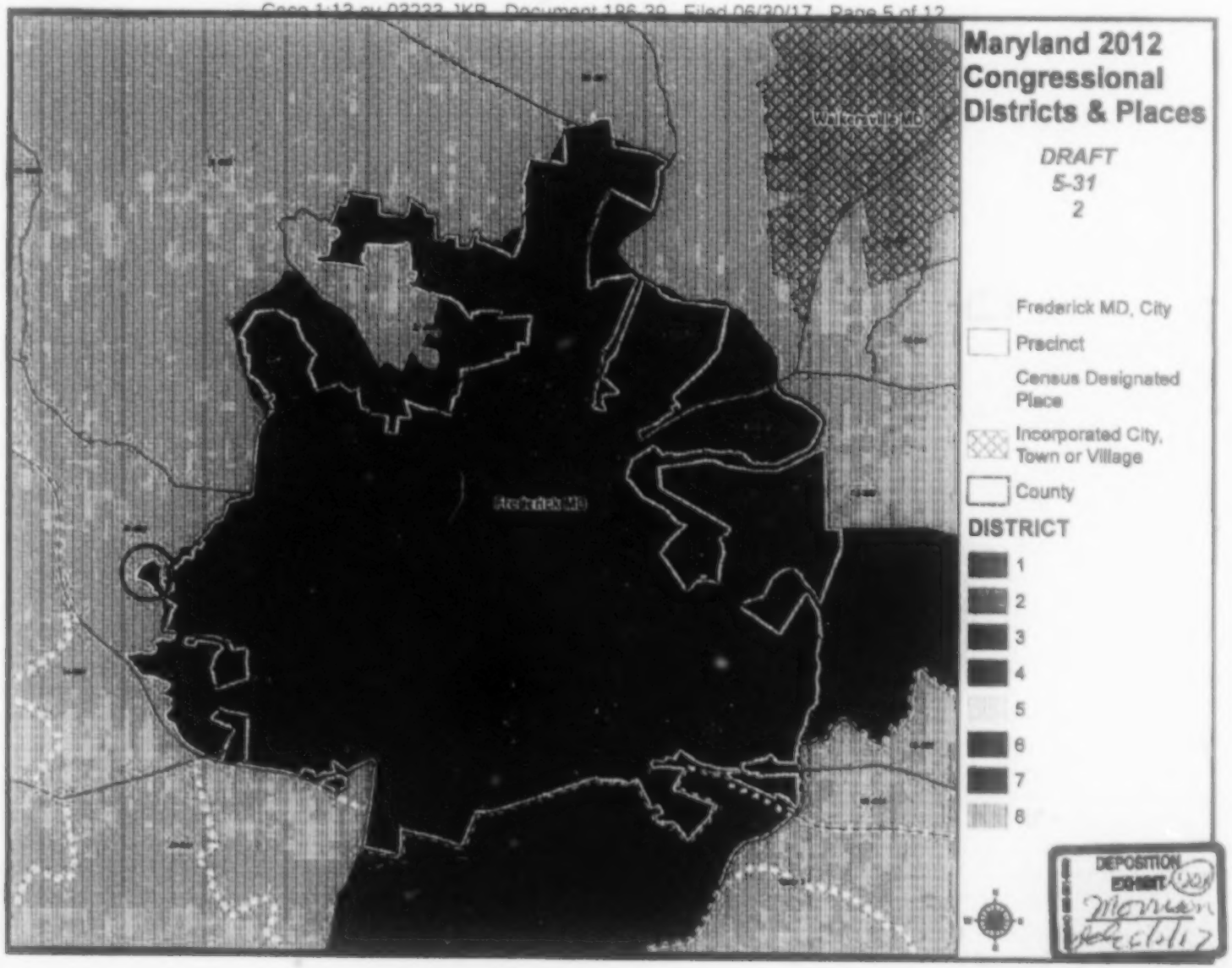
6. I have repeated this process to produce map details highlighting the areas where the Sixth District crosses the municipal boundary of Rockville. They are attached as Exhibit B. There are five areas and those follow the boundary of Precincts 04-026, 04-019, and 04-009. Using the adjusted 2010 Census data and the identify function, I could determine that one of the areas contained a population of 4 persons. The others areas contained no population.

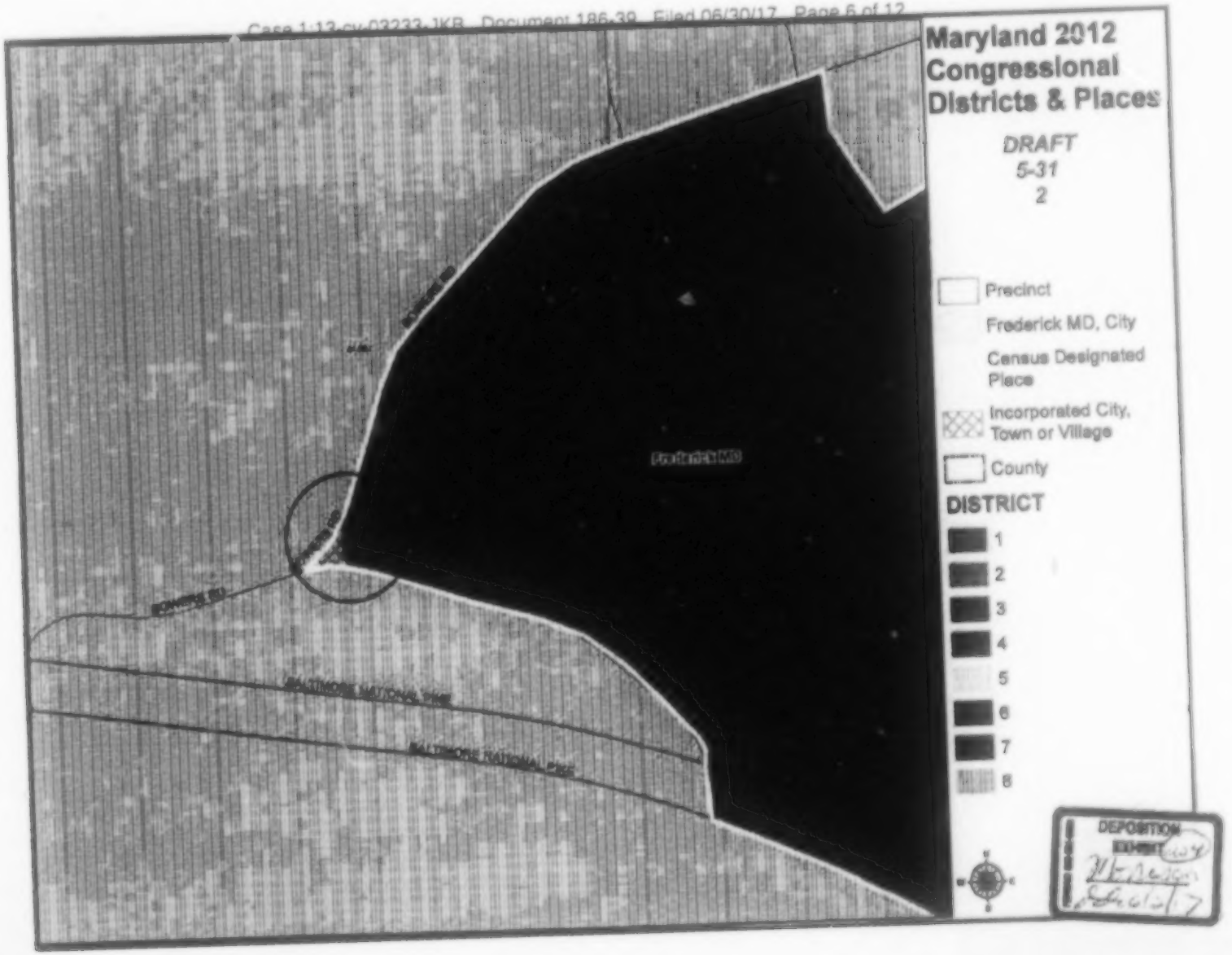
7. Other than Rockville and Frederick City, the Eighth District does not cross the municipal boundary of any city in the Sixth District. No district other than the Eighth borders the Sixth District. This was determined using a visual inspection of the Congressional Districts to determine neighboring districts. The output of the spatial join was used to determine if any other cities in the Sixth District were also crossed by the Eighth District.

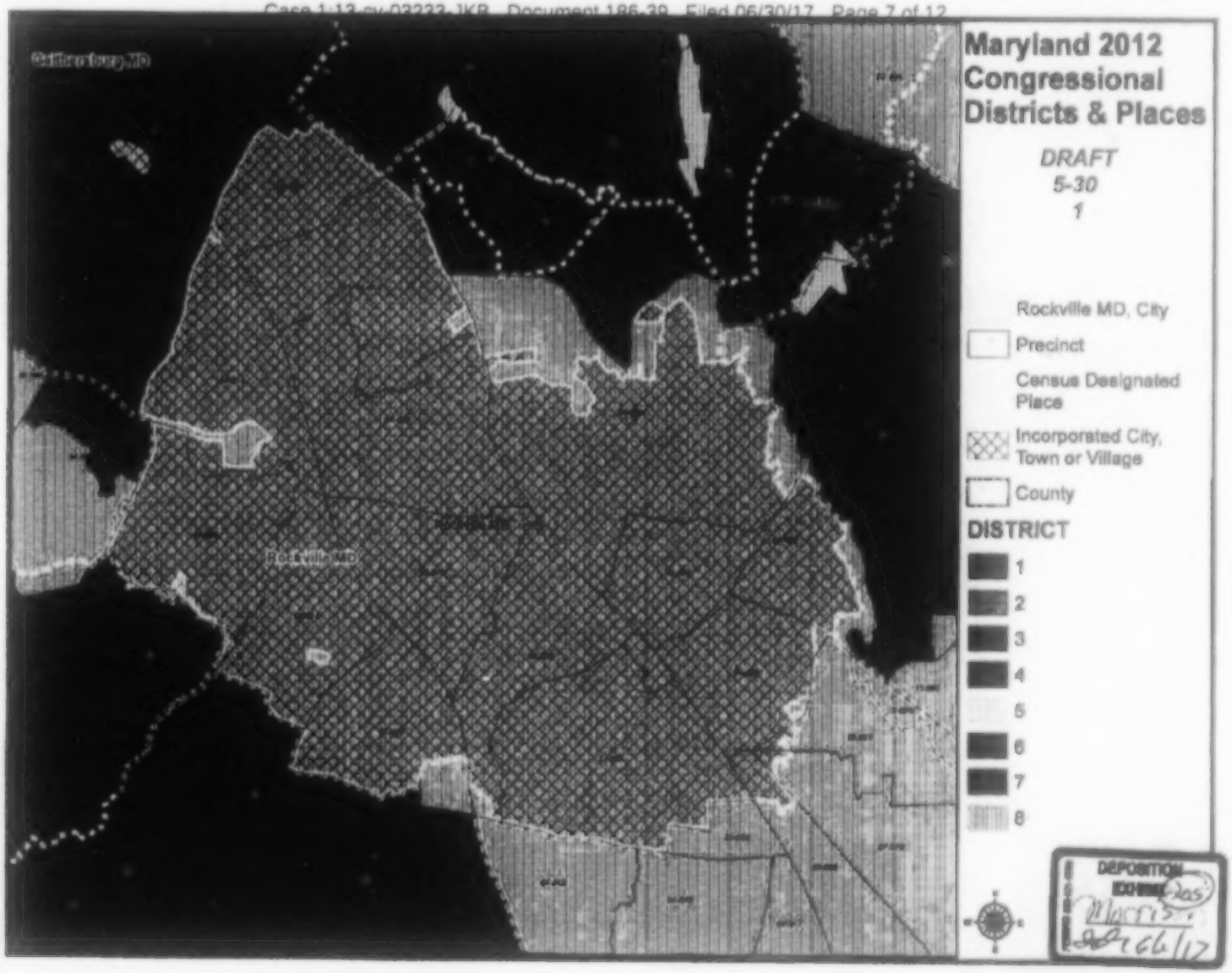
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

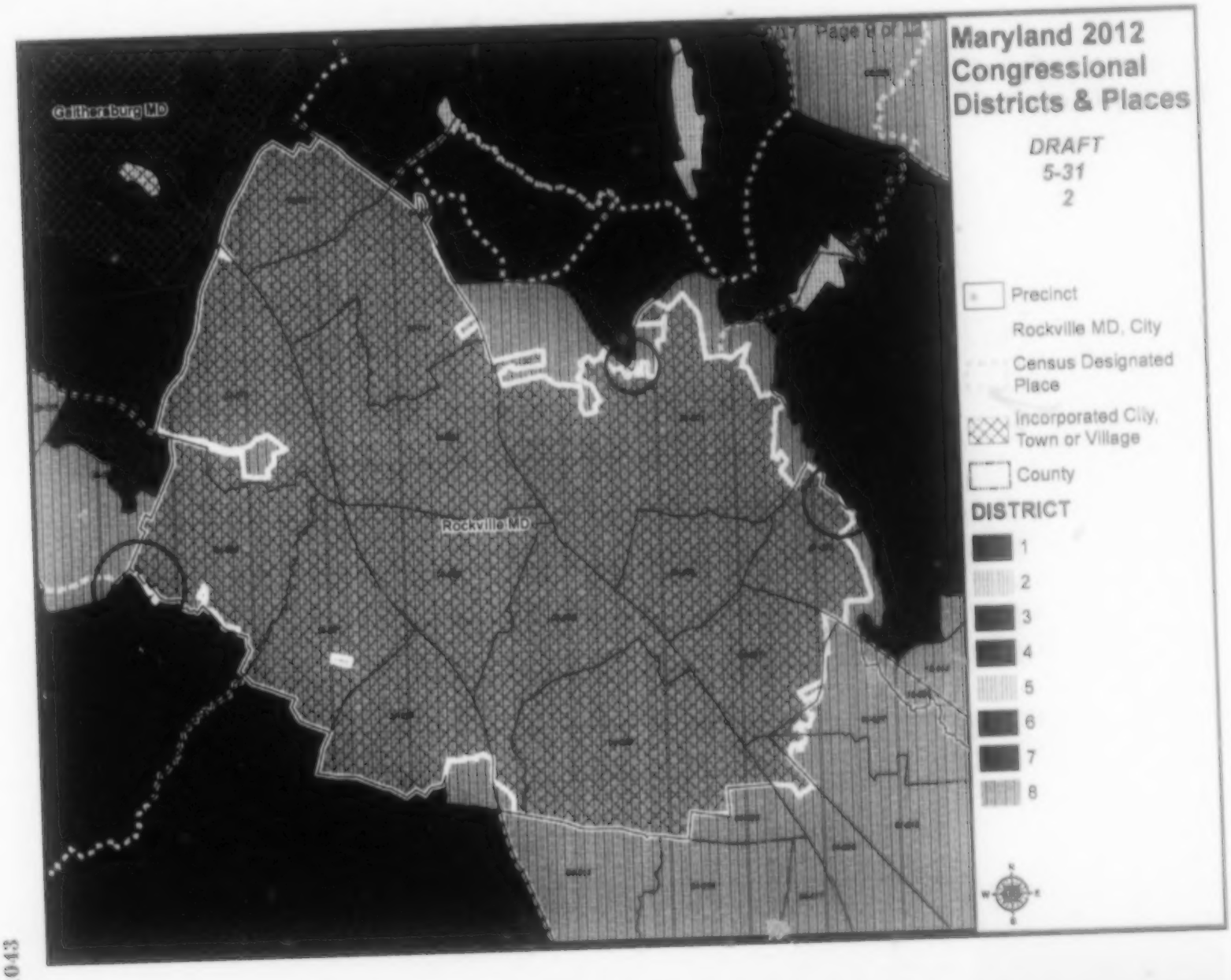
6/29/17
Date

Shelly Aprill
Shelly Aprill


Maryland 2012
Congressional
Districts & Places
DRAFT
5-31
2
Frederick MD, City
Precinct
Census Designated
Place
Incorporated City,
Town or Village
County
DISTRICT
1
2
3
4
5
6
7
8
DEPOSITION
EXHIBIT
120


Maryland 2012
Congressional
Districts & Places
DRAFT
5-31
2
Precinct
Frederick MD, City
Census Designated
Place
Incorporated City,
Town or Village
County
DISTRICT
1
2
3
4
5
6
7
8
BALTIMORE NATIONAL PIKE
BALTIMORE NATIONAL PIKE
DEPOSITION
EXHIBIT


Gaithersburg MD
Rockville MD
Maryland 2012
Congressional
Districts & Places
DRAFT
5-30
1
Rockville MD, City
Precinct
Census Designated
Place
Incorporated City,
Town or Village
County
DISTRICT
1
2
3
4
5
6
7
8
DEPOSITION
EXHIBIT
Harris
06/17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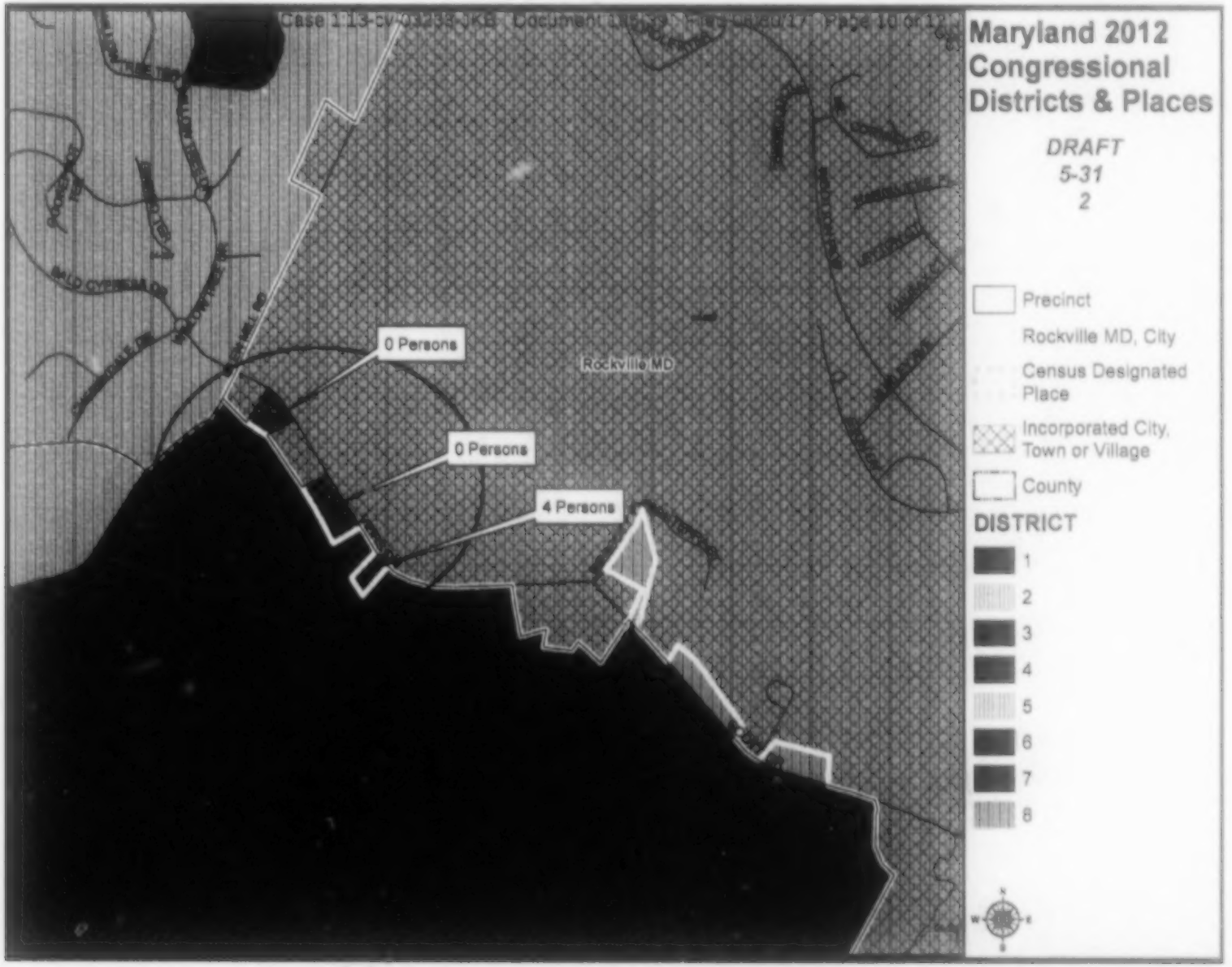
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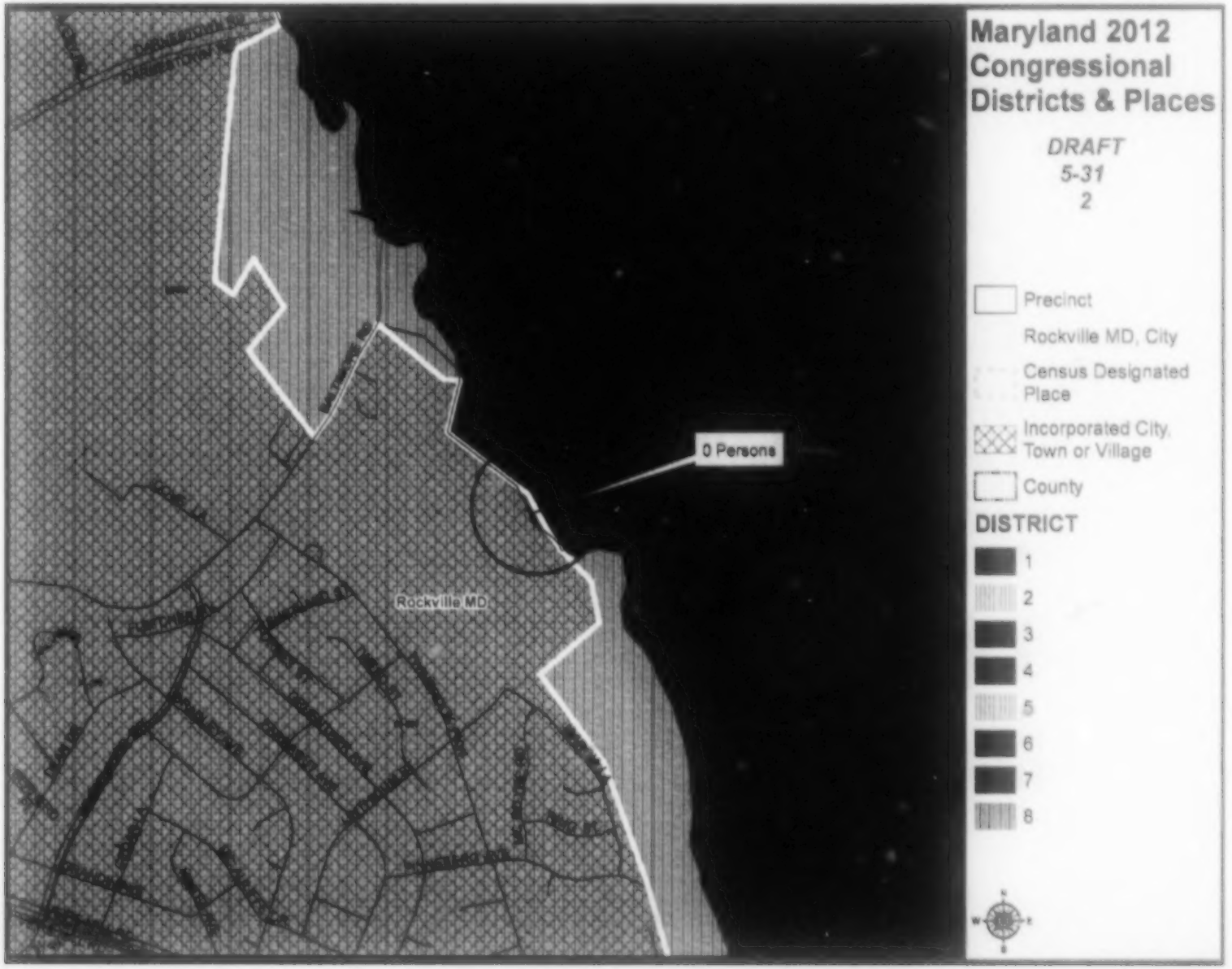
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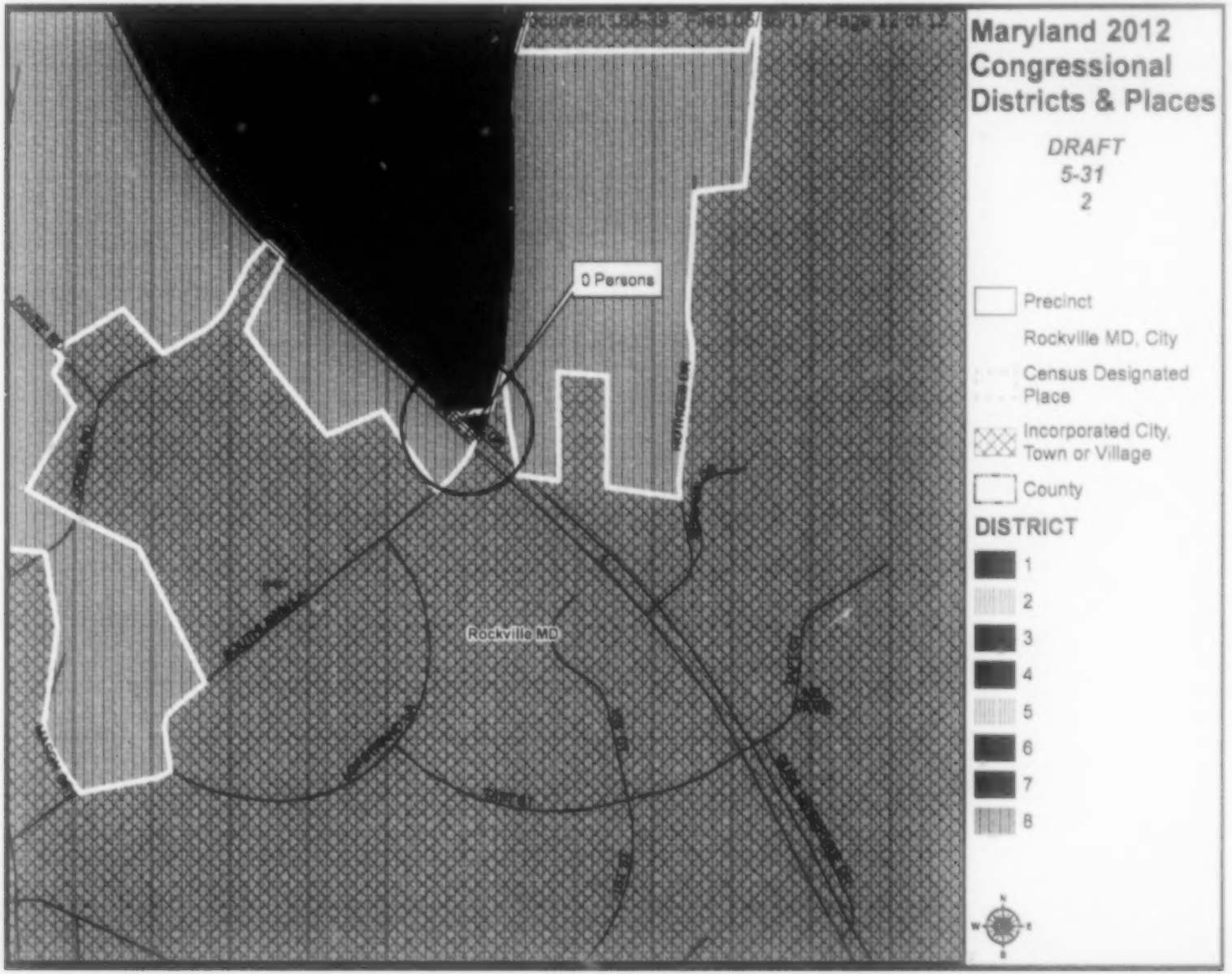
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Last Updated 11/[illegible]/2012 [illegible] AM

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NR: not reported

U.S. Senator

(Vote for One) View the breakdown of these results

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Ben Cardin ✓	Democratic	283,225	1,094,175	136,690	1,474,[illegible]	58.0%
Daniel John Bongino	Republican	67,972	554,858	50,361	693,291	28.3%
Dean Ahmad	Libertarian	3,190	26,160	2,862	32,252	1.2%
S. Rob Sobhani	Unaffiliated	46,947	363,320	20,767	430,934	16.4%
Lih Young (Write In)	Democratic	60	112	1	169	0.0%
Mary Podlesek (Write In)	Republican	2	18	1	21	0.0%
Brandy Baker (Write In)	Unaffiliated	34	106	11	151	0.0%
Ed Tinus (Write In)	Unaffiliated	6	37	2	46	0.0%
Other Write-Ins	N/A	272	1,863	221	2,346	0.1%

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NR: not reported

Representative in Congress

Congressional District 8

(Vote for One) View the breakdown of these results

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
John Delaney of	Democratic	30,452	137,029	14,440	181,921	59.6%
Roscoe G. Bartlett	Republican	13,582	95,383	8,438	117,313	37.8%
Nicholaus Mueller	Libertarian	609	8,350	657	9,616	3.2%
Other Write-Ins	N/A	59	304	36	399	0.1%

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Official 2014 Gubernatorial General Election results for Attorney General

Last Updated 12/02/2014 09:17:03 PM

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NR: not reported

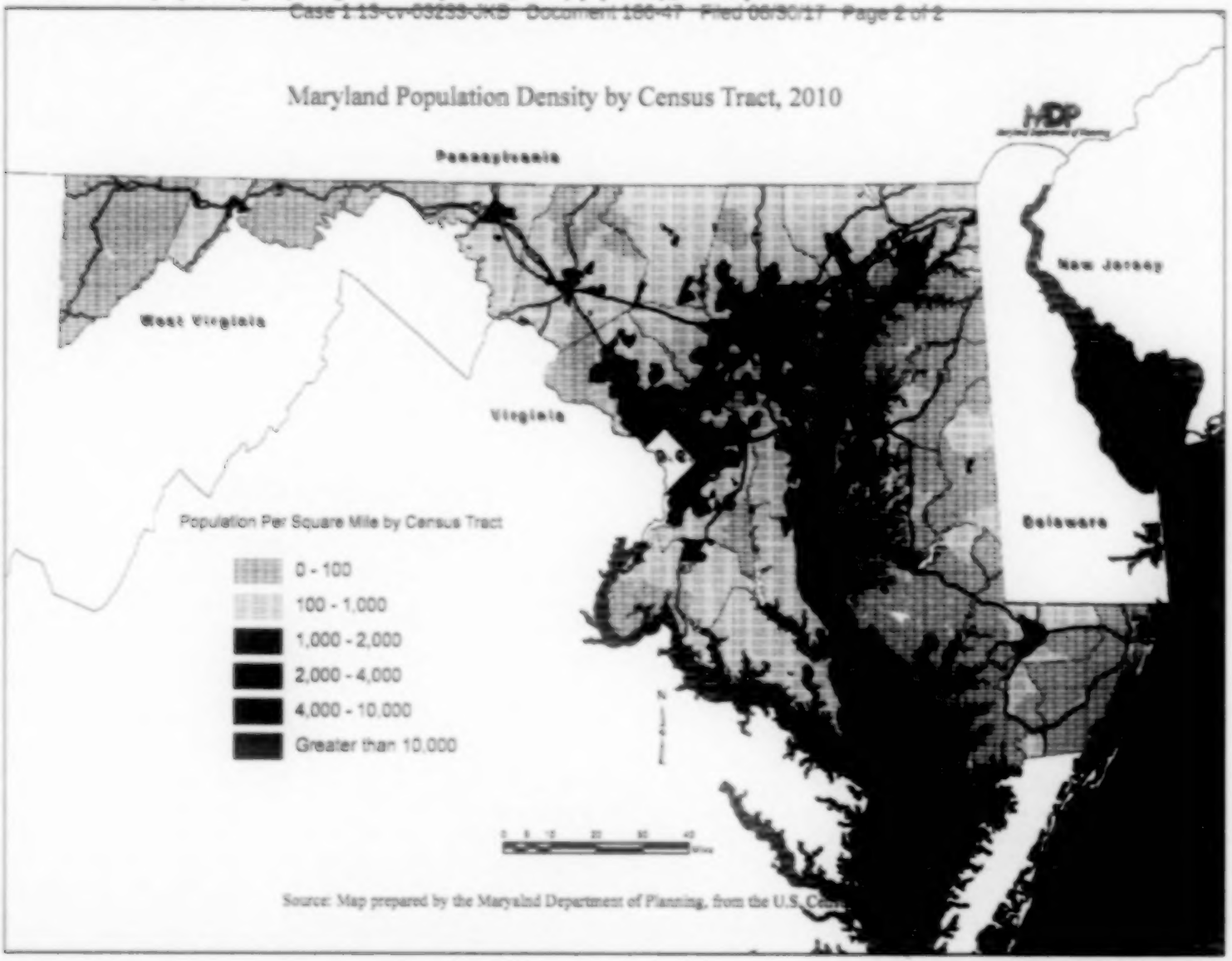
Printer Friendly Version

Attorney General

(Vote for One) County Break Down

Name	Party	Early Voting	Election Day	Absentee / Provisional	Total	Percentage
Brian E. Frosh ✔	Democratic	184,918	701,388	46,542	933,848	59.8%
Jeffrey N. Pritzker	Republican	104,787	648,904	28,594	682,285	40.7%
Lee Wayne Dymowski	Libertarian	7,180	46,783	3,138	57,099	3.4%
Other Write-Ins	N/A	434	1,570	68	2,068	0.1%

Available at http://planning.maryland.gov/msdc/Population_density/popdensity_2010ct3.pdf



Executive Summary

Administrative Action

(X) Environmental Assessment

(X) Alternatives Analysis

( ) Draft Environmental Impact Statement

( ) Section 4(f) Evaluation

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Description of Action/Purpose and Need

Description of the Action

The Maryland State Highway Administration (SHA) and Maryland Transit Administration (MTA) are developing a multimodal transportation project along the I-270/US 15 Corridor in Montgomery and Frederick Counties, Maryland. The project study area extends from I-270 at Shady Grove Road in Montgomery County to the US 15/Biggs Ford Road intersection in Frederick County. The project includes the development of transportation systems management (TSM)/transit demand management (TDM) strategies, enhancing the highway corridor with additional capacity in the form of general purpose and managed lanes, and constructing a new transit corridor for either light rail transit (LRT) or bus rapid transit (BRT). The project study area is shown in *Figure S-1*.

Initially, the study presented alternatives in a Draft Environmental Impact Statement (DEIS) that was published in June 2002. This document is intended to serve as a companion to the 2002 DEIS, and presents two new highway project alternatives that were developed since the 2002 DEIS was published for public review and comment.

This Alternatives Analysis/Environmental Assessment (AA/EA) document serves two purposes. As an EA, the document supplements the environmental evaluation presented in the 2002 DEIS. This EA provides an environmental evaluation, as required by the National Environmental Policy Act (NEPA) of two new highway build alternatives that propose Express Toll Lanes (ETLs[SM]) along with two transit alternatives that will provide LRT or BRT on the Corridor Cities Transitway (CCT). The EA provides the information that will allow a comparison of the DEIS alternatives and the new ETL alternatives to guide decision makers in the selection of a Locally Preferred Alternative and, finally, a Selected Alternative for construction.

Figure S-1: Project Area

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participation in, matters relating to human health or the environment." The Order directs agencies to ensure that:

- They do not discriminate on the basis of race, color, or national origin.
- They identify and address disproportionately high and adverse human health or environmental effects of their actions on minority and low-income communities.
- They provide opportunities for community input in the NEPA process, including input on potential effects and mitigation measures.

The analysis identified 21 census block groups that met the threshold where there would be a potentially disproportionate number of minority or low-income persons affected by the project. The block groups that met the minority EJ threshold are located adjacent to the corridor between I-370 and MD 124 in Montgomery County and north of MD 80 in Frederick County. These affected areas of EJ populations were compared to areas of no-impact or low impact to determine if the environmental effects could be considered "disproportionately high and adverse" on minority populations and/or low-income populations. The potential effects on land use, community facilities and services, air, noise, public health and safety, visual effects, and traffic and transportation are comparable throughout the corridor, and generally occur equally on both sides of the highway. Impacts and proposed mitigations in EJ areas were reviewed with regard to the following impact categories: displacements and relocation; community cohesion and access; economic activity; visual conditions; noise; and traffic and transportation.

Displacements and Relocation

Of the 256-260 potential displacements, 246 are located in areas considered potential EJ areas: between I-370 and MD 117 in the Brighton Woods (81 residences), London Derry (150 residences) and Caulfield (one residence) communities in Montgomery County and in the Foxcroft Ln community in the City of Frederick. The extent of the proposed impacts with regard to these resources would not be considered a disproportionately high and adverse effect under the EJ guidelines. However, the potential number of property displacements and adverse effects in EJ areas, when compared to non-EJ areas along the corridor, suggests a disproportionately high or adverse impact. Alternatives 6A/B and 7A/B follow existing I-270 and include relatively equal widening on both sides of the roadway for the entire length of the project. The highway design is similar in other areas along the corridor but results in more adverse effects in the EJ areas due to the density of the residential areas and their proximity to the highway.

The widening of I-270 would result in unavoidable adverse effects to EJ areas on both sides of the roadway. Given that the corridor widening is relatively equal on both side of the existing roadway, the potential impacts to adjacent EJ areas will be generally distributed equally on both sides, as well, with no intent to incur greater impacts to one side of the roadway and avoid impacts to the other side. The large number of potential displacements in these EJ areas (compared to other areas along the corridor) may be reduced through the use of retaining walls and narrowed shoulders that will be determined during design.

The transitway will also affect the same residences in the Caulfield community. A potential Ohkhl site in this same census tract would displace up to four additional residences in this area. The final location of an Ohkhl facility for the transitway has not yet been identified, and this site may not be chosen. These displacements may be considered a disproportionately high or adverse impact to EJ populations if this site is chosen.

Community Cohesion and Access

The alternatives would not affect community cohesion in the traditional sense, as the communities and the impacts to these communities are located adjacent to an existing highway facility. The improvements would not divide communities. The loss of neighbors adjacent to the highway would disrupt the sense of community cohesion as they are relocated. There are no impacts to access with the build alternatives. Relocations within the same neighborhoods, if available, could minimize the sense of loss of community.

Economic Activity

The analysis identified positive economic impacts associated with the project including potential increases in property value due to increased transit access, improved travel time in both ETLs and general purpose lanes, and the addition of three transitway station locations in EJ areas (East Gaither, West Gaither, and Metropolitan Grove) that would provide improved access to transit opportunities. The potential for increased housing costs does exist for historically minority and low-income neighborhoods located in or near the City of Frederick due to improved access to the corridor that would be provided by the highway improvements. Another potential concern is determining the extent to which low-income populations would be able to benefit from the use of ETLs based upon the pricing index and trip diversion to the general purpose lanes.

Visual Conditions

Alternatives 6A/B and 7A/B would increase the visual presence of the highway with additional lanes, retaining walls (recommended for minimizing potential displacements), and noise barriers (for noise reduction). Alternatives 6A/B and 7A/B are expected to have similar visual effects although Alternative 7A/B would add two lanes in each direction between MD 121 and north of MD 80 in Frederick County and Alternative 6A/B would add one lane in each direction. Noise barriers would provide a measure of visual screening as well as noise abatement where they are installed.

The transitway alignment will have moderate visual effects since it would travel mostly at ground level. The potential transit station sites would have the greatest degree of visual effect on EJ areas. These station sites will use land within several new and emerging communities. The East and West Gaither Stations and the Metropolitan Grove Station would add new visual elements and public activity centers within EJ areas. The visual effects may be somewhat offset by designing stations to be visually compatible with the surrounding neighborhoods.

Noise

Potential noise effects from the project would occur throughout the corridor. Noise barriers would reduce adverse noise effects from the project. Noise barriers will be provided where feasible and reasonable. After mitigation, no further noise impacts are anticipated on EJ areas from the highway or transitway alignments or associated facilities. Therefore, the extent of the projected impacts on the block groups identified within EJ areas would not be considered a disproportionately high and adverse impact under the EJ guidelines.

Traffic and Transportation

All residents in the corridor, including those who live in EJ areas, can expect to benefit from the project through improved transportation access and a modest reduction in traffic on local roads with the provision of more public transportation in the area. Alternatives 6A/B and 7A/B include improvements to existing interchanges, construction of new interchanges, and construction of access roads in several locations that will improve traffic, transportation access, and safety. The access improvements would benefit all travelers within the corridor including those who live and work in EJ areas. Four of ten interchange improvements are located in EJ areas, but no new interchanges are located in EJ areas.

Both residents and employers in the corridor can expect transportation benefits from the project. With the transitway, area residents will have improved access throughout the corridor and the surrounding area can expect a modest reduction in traffic on local roads as a result of more public transportation in the area.

Economic Environment

Existing Economic Environment

The I-270/US 15 Corridor is one of Maryland's premier economic regions. Frederick and Montgomery Counties combined account for *21.8 percent of all* jobs in Maryland. *Many of these jobs are located directly along the* I-270/US 15 and CCT alignments, with the highest concentrations in central Montgomery County. Workers in Montgomery and Frederick Counties actually take home over a quarter (*25.4 percent) of the state's* total wages.

Montgomery County's economy is led by three industries that make up over half of the county's total employment: professional and business services; education and health services; and trade, transportation and utility-related industries. Montgomery County's portion of the I-270/US 15 corridor is the favored location for many high-tech businesses, especially biotechnology and information technology firms. Montgomery County leads the state in the number of high-tech firms.

The Frederick County economy is led by four key industries that also account for over half of the county's employment: education and health services; trade, transportation and utilities; professional and business services; and construction. Frederick County is developing two technology parks, Mount Saint Mary's Bio Park and Jefferson Technology Park, and already houses several major bio-tech employers including the US Army Medical Research Institute of Infectious Diseases at Fort Detrick.

In the I-270/US 15 Corridor, most major employment centers in the corridor are located in the southern end in Montgomery County, within the Corridor Cities of Rockville, Gaithersburg, Germantown and Clarksburg. The City of Frederick is the major location of employment in Frederick County.

Economic Impacts

Overall, the build alternatives will create relatively small positive economic development effects when compared with the large amount of economic growth forecasted to occur in the project area, with or without the project. Nonetheless, the congestion relief provided will provide a positive impact with increased accessibility of people, goods, and workers, thus helping the area maintain its economic edge. Accessibility is measured in three areas: ease of getting to employment destinations; ease in getting to shopping destinations; and, from a business perspective, ease in attracting potential customers.

Consumers would benefit from the project with better access to shopping destinations. Retail businesses could see a benefit from a broader customer base that can reach stores in a shorter time. Workers would benefit in two ways. In the shorter term, workers would benefit from the number of jobs that construction of the project would provide. Both Alternative 6A/B and 7A/B would provide a similar amount of jobs, with the construction of the light rail requiring about 400 more jobs than building the bus rapid transit line. A more permanent benefit to workers is increased accessibility to jobs in a shorter time and/or within a wider area.

Local government property tax revenues could be influenced in three ways by the project: (1) through direct takings of property off the tax rolls to construct the improvements; (2) the stimulation of new development which would increase property tax revenues; and (3) ground property value increases associated with the accessibility improvements. Both highway options are expected to increase the value of, and development potential for, open lands along the corridor, especially in northern Montgomery County and central and southern Frederick County. The transit options also have the potential to increase transit oriented development opportunities.

Cultural Resources

Cultural resources and the impacts of the project on these resources are described in greater detail in Chapter IV.D. Ten historic properties were identified within the Area of Potential Effects (APE) of Alternatives 6A/B and 7A/B. Impacts to historic properties include the physical taking of land, trains, and visual changes that would result in adverse effects.

Of the ten historic properties within the APE, Alternatives 6A/B and 7A/B would have an adverse effect on eight, listed below with their Maryland Inventory of Historic Properties (MIHP) numbers:

- **England/Crown Farm (M:20-17)**
- **Belward Farm (M:20-21)**
- **Atomic Energy Commission Building (M:19-41)**
- **Monocacy National Battlefield (F-5-42)**
- **Schiffbauer (F-5-47)**
- **Rose Hill Manor (F-5-128)**
- **Spring Bank (F-5-22)**
- **Rizzy-Rockley Farm (F-5-134)**

Alternatives 6A/B and 7A/B would have no adverse effect on the remaining two properties, Worman House (F-5-198) and Harmony Grove Union Chapel (F-5-197).

No additional archeological investigations were done since the DEIS. Additional archeological investigations will be necessary once an alternative is selected. Owners of the properties have been notified and have been invited to consult with SHA, MTA and the MD SHPO about the effects of the project and potential minimization and mitigation efforts. A Memorandum of Agreement (MOA) is being coordinated with the MD SHPO and the owners of affected properties that will identify the measures to be taken to address the adverse effects. The MOA will also include stipulations to identify and treat any unanticipated archeological discoveries if they are found.

Section 4(f) Summary

The Section 4(f) evaluation was performed in accordance with the US Department of Transportation Act of 1966, 49 USC 303(c), as implemented through 23 CFR 774 by the FHWA. In summary, the evaluation, detailed in **Chapter IV.E**, identified 13 publicly-owned public parks or recreation areas and seven historic properties that would be affected by Alternatives 6A/B and 7A/B. The methodology to evaluate Section 4(f) resources included the following steps: identification of resources via coordination with the agency with jurisdiction over the resource; identification of potential uses of Section 4(f) properties caused by Alternatives 6A/B and 7A/B (including property acquisition, impacts to activities, impacts such as noise and visual effects); exploring potential avoidance alternatives; and evaluating planning to minimize harm. Quantitative efforts included measurements of property acreage impacts, predicting future noise levels, and projecting future air quality in the project corridor. Qualitative efforts included an assessment of visual impacts, including those from mitigation efforts. The project team intends to pursue a *de minimus* finding for nine public parks that are impacted by the alternatives. Throughout the Section 4(f) process, SHA and MTA have consulted with the Maryland State Historic Preservation Officer (SHPO), owners of the historic resources, and parks officials in matters of potential impacts including potential avoidance and minimization efforts.

Section 4(f) Resources

The following publicly-owned public parks and recreation areas would be impacted by Alternatives 6A/B and 7A/B: Malcolm King Park, Manor Park, Seneca Creek State Park, Middlebrook Hill Neighborhood Conservation Area, North Germantown Greenway, Black Hill Regional Park, Little Bennett Regional Park, Urbana Lake Fish Management Area, Urbana Elementary School Recreation Area, Urbana Community Park, Monocacy National Battlefield, Baker Park and Rose Hill Manor Park. Historic properties impacted by Alternatives 6A/B and 7A/B include England/Crown Farm, Belward Farm, the Atomic Energy Commission Building, Monocacy National Battlefield National Historic Landmark, Schiffbauer, Rose Hill Manor, and Rizzy-Rockley Farm.

Section 4(f) Uses

Alternatives 6A/B and 7A/B would require right-of-way from each Section 4(f) resource listed above for the construction of additional lanes, ramps and intersections along the I-270/US 15 corridor. Most of these impacts would require the acquisition of a narrow strip of land from the resource adjacent to the existing highway. The uses and impacts are shown on Table *IV-18* and *Table IV-19* in **Chapter IV.E**.

Avoidance Analysis

While the No-Build Alternative and the TSM/TDM Alternative (discussed in the 2002 DEIS) would be considered as avoidance alternatives, they do not meet the project's purpose and need. Due to the magnitude and scope of the project, an avoidance alternative that eliminates all of the impacts is not prudent or feasible.

The project team intends to pursue a *de minimis* finding for nine of the public parks (not including Urbana Elementary School Recreation Area, Monocacy National Battlefield, Baker Park and Rose Hill Manor Park) impacted by the alternatives.

Least Overall Harm Analysis

Avoidance options, including retaining walls, centerline shifts and design changes, were evaluated for each individual resource. Measures to minimize harm to each of the resources impacted include the use of 2:1 slopes in the conceptual highway design as well as the potential for retaining walls, minimized shoulder widths, and design modifications. These minimization

Republican Registration, Compiled from http://elections.state.md.us/press_room/2010_stats/gg10_statewide.pdf; http://elections.state.md.us/press_room/documents/PG12/PrecinctRegisterCounts/Statewide.pdf; http://elections.state.md.us/press_room/2014_stats/PrecinctRegisterCounts_ByCounty_GG14.pdf; http://elections.state.md.us/press_room/2016_stats/PG16_Eligible_Active_Voters_by_County.pdf				
County	**2010 General Election**	**2012 General Election**	**2014 General Election**	**2016 General Election**
Allegany	19,827	20,006	20,200	21,060
Carroll	54,327	56,870	58,969	62,535
Frederick	57,958	61,079	61,145	65,905
Garrett	11,379	11,625	12,018	12,466
Washington	37,027	38,551	39,134	41,912

Eligible Active Voters on Precinct Register

Election: 2010 GUBERNATORIAL GENERAL ELECTION

Election Date: 11/2/10

*As of 10/17/10

Counts by County

	Dems	Reps	Grn	Con	Lib	UNA	OTH	Subtotal
Allegany	16,608	19,827	130	12	119	5,305	449	42,450
Anne Arundel	145,707	120,970	840	76	1,114	62,255	139	331,101
Baltimore City	289,776	32,027	1,404	29	701	40,231	1,340	365,508
Baltimore County	290,998	128,638	1,326	80	1,499	64,706	5,620	492,869
Calvert	23,171	22,464	119	11	149	9,860	526	56,300
Caroline	7,407	7,461	36	5	59	2,949	120	18,037
Carroll	33,156	54,327	256	51	304	16,309	799	105,201
Cecil	24,530	22,853	143	25	208	11,218	860	59,837
Charles	50,767	24,687	131	19	197	13,609	579	89,989
Dorchester	10,392	6,982	26	2	41	2,185	150	19,778
Frederick	52,181	57,958	359	32	453	26,637	78	137,698
Garrett	4,994	11,379	39	3	45	1,788	186	18,434
Harford	62,100	63,101	274	37	512	22,310	719	149,053
Howard	86,045	55,017	440	41	571	34,159	1,810	178,083
Kent	6,170	4,476	42	3	35	1,621	135	12,482
Montgomery	324,195	123,253	1,432	59	1,364	122,587	541	573,431
Prince George's	403,582	46,641	710	55	732	43,061	22,719	517,500
Queen Anne's	11,059	13,982	64	8	95	4,290	207	29,705
Saint Mary's	24,632	23,454	150	14	191	10,246	526	59,213
Somerset	7,222	4,329	21	3	26	1,537	120	13,258
Talbot	10,166	11,073	51	7	79	3,615	315	25,306
Washington	31,340	37,027	219	20	234	14,347	89	83,276
Wicomico	25,366	19,785	113	9	151	8,176	668	54,268
Worcester	15,715	13,903	68	5	105	5,273	441	35,510
	1,957,279	925,614	8,392	606	8,964	528,274	39,136	3,468,287

Election: 2012 PRESIDENTIAL GENERAL ELECTION
Election Date: 11/6/2012
STATEWIDE

*As of 10/21/2012

Legislative Districts in this report reflect the districts as defined prior to the 2010 Census.

Countywide Counts

	Dems	Reps	Grn	Lib	UNA	OTH	Subtotal
Allegany	15,557	20,006	121	143	5,891	410	42,128
Anne Arundel	149,232	125,386	874	1,393	71,623	262	348,770
Baltimore City	308,078	33,005	1,401	917	46,849	1,534	392,584
Baltimore County	297,941	132,720	1,338	1,808	75,760	5,843	515,408
Calvert	23,349	23,448	136	192	11,201	535	58,863
Caroline	7,183	7,636	36	59	3,108	141	18,165
Carroll	32,778	56,870	270	396	19,092	988	110,394
Cecil	24,197	24,372	140	244	12,824	744	62,521
Charles	55,690	25,339	140	234	15,712	572	97,687
Dorchester	10,414	7,131	25	47	2,424	126	20,167
Frederick	54,564	61,079	401	577	31,441	94	148,156
Garrett	4,724	11,825	36	52	2,064	208	18,729
Harford	63,549	67,467	315	649	26,856	1,133	159,968
Howard	90,072	56,330	471	696	38,779	2,398	188,748
Kent	6,085	4,572	35	44	1,708	140	12,594
Montgomery	345,449	125,185	1,509	1,745	139,040	3,072	616,000
Prince George's	443,643	47,472	765	940	56,106	19,665	568,591
Queen Anne's	11,366	15,284	84	111	5,295	209	32,329
Saint Mary's	25,295	25,721	144	245	12,049	469	63,923
Somerset	7,249	4,600	19	30	1,694	121	13,713
Talbot	9,896	10,979	48	91	4,012	267	25,295
Washington	31,750	38,551	236	322	16,150	282	87,291
Wicomico	25,474	20,855	117	192	9,310	676	56,424
Worcester	14,997	14,423	71	126	6,080	382	36,079
	2,059,544	959,858	8,718	11,266	614,667	40,266	3,694,527

Eligible Active Voters on the Precinct Register - By County

2014 GUBERNATORIAL GENERAL ELECTION

Election Date: 11/04/2014

***As of October 18, 2014*

COUNTY	DEM	REP	LIB	GRN	OTH	UNA	TOTAL
Allegany	15,140	20,200	203	116	378	6,523	42,560
Anne Arundel	147,091	123,998	1,748	825	320	75,331	349,313
Baltimore City	293,242	30,156	1,094	1,215	1,366	46,098	373,171
Baltimore County	297,506	131,289	2,321	1,293	4,845	83,876	521,130
Calvert	23,222	23,930	271	129	485	11,956	59,976
Caroline	6,944	7,740	88	31	148	3,402	18,353
Carroll	31,084	58,969	596	266	882	21,149	112,946
Cecil	22,917	24,692	300	129	665	13,288	61,991
Charles	56,745	24,352	329	122	541	18,360	100,449
Dorchester	10,306	7,237	65	29	118	2,711	20,466
Frederick	54,421	61,145	781	401	200	33,947	150,895
Garrett	4,617	12,018	74	36	187	2,360	19,292
Harford	62,814	88,958	903	321	1,227	30,557	184,780
Howard	93,408	55,440	907	478	2,213	42,994	195,440
Kent	6,023	4,550	54	29	129	1,939	12,724
Montgomery	357,137	121,520	2,216	1,602	3,840	148,348	634,663
Prince George's	427,948	41,780	1,059	746	14,752	58,394	544,677
Queen Anne's	10,964	15,877	153	54	199	5,928	33,175
Saint Mary's	25,034	25,797	316	128	449	12,786	64,510
Somerset	6,409	4,731	31	15	101	1,712	12,999
Talbot	9,647	11,156	114	47	221	4,478	25,663
Washington	31,917	39,134	425	240	330	18,051	90,097
Wicomico	25,314	20,504	268	118	534	9,958	56,696
Worcester	14,433	14,391	161	75	360	6,279	35,699
	2,036,281	949,564	14,477	8,445	34,470	658,428	3,701,665

Eligible Active Voters on the Precinct Register - By County

Election: 2016 Presidential General Election

Election Date: November 08, 2016

***As of October 23, 2016*

county	DEM	REP	LIB	GRN	UNA	OTH	Total
Allegany	14,477	21,080	245	118	6,830	321	43,051
Anne Arundel	158,739	135,542	2,364	821	79,071	965	377,502
Baltimore City	308,854	32,337	1,354	1,216	45,351	1,504	390,616
Baltimore County	307,392	143,003	2,899	1,404	87,703	4,485	546,886
Calvert	23,487	25,817	395	146	12,462	393	62,700
Caroline	6,844	8,803	112	27	3,582	130	19,498
Carroll	32,290	62,535	771	250	22,462	835	119,143
Cecil	22,476	27,579	399	148	13,717	577	64,896
Charles	64,092	26,123	428	139	17,065	489	108,334
Dorchester	10,240	7,880	105	27	2,880	111	21,223
Frederick	80,747	65,905	1,091	411	36,035	275	184,464
Garrett	4,425	12,466	90	41	2,389	153	19,544
Harford	63,984	75,417	1,165	341	32,287	1,140	174,334
Howard	102,742	56,959	1,120	473	44,060	1,891	207,245
Kent	6,085	4,700	58	22	1,973	116	12,952
Montgomery	384,194	121,644	2,760	1,609	141,731	4,736	656,674
Prince George's	454,428	43,135	1,445	942	63,551	12,308	575,809
Queen Anne's	10,803	17,289	211	79	6,236	177	34,795
Saint Mary's	25,690	29,054	478	123	13,607	420	69,372
Somerset	6,049	5,071	40	14	1,695	79	12,948
Talbot	10,030	11,625	137	42	4,721	192	26,747
Washington	32,182	41,912	615	241	18,329	407	93,686
Wicomico	26,134	22,255	349	143	10,387	444	59,712
Worcester	14,431	16,216	218	80	6,721	313	37,979
	2,150,795	1,014,307	18,845	8,857	674,825	32,461	3,900,090

2008 and 2012 Presidential-Year Turnout for Former Sixth District Counties [Source: http://elections.state.md.us/elections/2008/turnout/general/2008_Presidential_General_Statewide.html; http://elections.state.md.us/elections/2012/turnout/general/2012_General_Statewide.html]								
	Numbers of Democrats who Voted		Numbers of Republicans who Voted		Percent Registered Democrats who Voted		Percent Registered Republicans who Voted	
	2008	2012	2008	2012	2008	2012	2008	2012
Allegany	12,079	11,027	14,822	15,395	71.32%	70.88%	75.46%	76.95%
Carroll	28,235	26,164	44,994	47,547	81.61%	79.82%	83.11%	83.61%
Frederick	44,195	44,443	48,249	50,522	85.58%	81.45%	84.82%	82.72%
Garrett	3,598	3,216	8,332	8,784	70.11%	68.08%	74.96%	75.56%
Washington	24,511	23,177	28,869	30,076	74.54%	73.00%	76.63%	78.02%

2010 and 2014 Gubernatorial-Year Turnout for Former Sixth District Counties [Source: http://elections.state.md.us/elections/2010/turnout/general/2010_General_Statewide.html; http://elections.state.md.us/elections/2014/turnout/general/GG14_Turnout_by_party_by_county.xlsx]								
	Numbers of Democrats who Voted		Numbers of Republicans who Voted		Percent Registered Democrats who Voted		Percent Registered Republicans who Voted	
	2010	2014	2010	2014	2010	2014	2010	2014
Alleghany	8,585	7,079	12,043	11,537	51.69%	46.8%	60.74%	57.1%
Carroll	19,745	16,605	36,957	39,118	59.55%	53.4%	68.03%	66.3%
Frederick	29,114	28,901	36,390	38,157	55.79%	53.1%	62.79%	62.4%
Garrett	2,449	2,025	6,799	6,638	49.03%	43.9%	59.75%	55.2%
Washington	15,081	12,858	21,570	21,193	48.12%	40.3%	58.25%	54.2%

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Statewide Total Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	42,170	27,808	381	1,823	30,090	71.35%
Anne Arundel	329,437	240,189	3,942	17,540	261,671	79.43%
Baltimore City	356,142	227,796	7,779	15,562	251,137	66.21%
Baltimore	532,323	354,339	6,077	24,280	384,708	76.58%
Calvert	55,555	40,188	756	3,471	44,414	79.95%
Caroline	17,588	12,347	207	805	13,359	75.92%
Carroll	105,449	79,404	721	5,192	85,317	80.91%
Cecil	58,934	39,884	811	2,494	42,789	72.60%
Charles	87,731	64,418	884	5,384	70,686	80.57%
Dorchester	19,351	14,054	229	1,156	15,439	79.78%
Frederick	154,287	102,487	1,889	7,887	112,063	85.46%
Garrett	18,102	11,775	137	1,100	13,012	71.88%
Harford	149,861	114,437	1,710	8,102	124,249	83.03%
Howard	175,115	131,441	2,320	12,543	146,304	83.55%
Kent	12,769	9,014	100	1,045	10,159	79.82%
Montgomery	557,873	393,590	7,581	52,172	443,652	79.55%
Prince George's	497,421	339,216	12,481	29,228	380,925	76.58%
Queen Anne's	29,334	21,840	481	1,886	24,207	82.79%
St. Mary's	57,744	40,312	730	3,752	44,794	77.57%

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Somerset	13,071	9,148	343	736	10,125	77.46%
Talbot	34,866	17,847	135	2,791	30,473	82.82%
Washington	85,163	57,048	1,014	4,185	62,345	73.57%
Wicomico	52,668	37,822	730	3,732	42,384	80.14%
Worcester	34,351	24,273	356	3,108	27,835	80.40%
Total	3,438,836	2,400,870	91,163	210,072	2,891,900	77.83%

Statewide Democratic Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	19,938	11,181	191	757	12,579	71.32%
Anne Arundel	146,791	110,084	1,708	7,784	119,576	81.48%
Baltimore City	283,575	186,753	6,444	12,376	205,473	71.01%
Baltimore	358,781	217,210	5,520	14,714	236,744	78.80%
Calvert	23,283	17,276	265	1,313	19,084	82.04%
Caroline	7,483	5,394	91	371	5,756	76.92%
Carroll	34,586	26,573	199	1,960	28,280	81.81%
Cecil	34,878	18,712	282	1,047	18,021	75.02%
Charles	48,357	37,516	604	2,920	40,996	84.94%
Dorchester	10,250	7,457	137	884	8,348	80.47%
Frederick	91,843	40,140	707	3,343	44,190	86.09%
Garrett	5,132	3,211	40	347	3,598	70.11%
Harford	94,714	48,899	710	3,479	94,077	85.09%
Howard	84,799	65,014	1,127	6,326	73,387	86.41%
Kent	6,422	4,839	80	523	5,359	81.11%
Montgomery	513,089	334,952	4,468	32,445	391,873	83.11%
Prince George's	385,052	276,666	10,386	25,391	310,368	80.64%
Queen Anne's	11,318	8,439	141	785	9,355	82.68%
St. Mary's	24,889	17,772	288	1,887	19,756	79.34%
Somerset	7,413	5,162	170	497	5,771	77.86%
Talbot	10,116	7,256	59	1,080	8,348	82.51%
Washington	32,884	23,360	409	1,713	34,211	74.24%
Wicomico	34,828	18,008	372	1,827	20,368	81.00%
Worcester	13,524	11,001	117	1,464	12,572	80.89%
Total	1,843,311	1,393,854	33,580	123,095	1,549,329	79.84%

Statewide Republican Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	19,842	13,710	122	660	14,502	75.48%
Anne Arundel	131,113	90,068	1,281	6,773	98,130	81.03%
Baltimore City	52,585	16,754	447	1,947	18,848	57.54%
Baltimore	131,873	83,888	1,245	8,704	101,837	77.32%
Calvert	23,230	16,018	275	1,404	18,215	81.06%

Caroline	7,665	5,012	66	522	5,700	80.36%
Carroll	54,136	42,126	366	2,466	44,864	83.11%
Cecil	22,479	15,890	209	1,038	17,136	76.19%
Charles	25,638	18,344	212	1,720	20,176	78.73%
Dorchester	8,770	5,344	58	397	5,799	84.05%
Frederick	58,886	44,017	571	3,181	48,249	84.82%
Garrett	11,115	7,811	78	643	8,532	74.98%
Harford	82,574	49,066	661	3,572	53,329	86.50%
Howard	68,299	42,504	486	3,597	46,417	89.88%
Kent	4,476	3,358	29	421	3,708	82.84%
Montgomery	134,543	85,804	1,421	10,017	97,442	78.34%
Prince George's	46,629	37,015	647	5,084	31,239	86.10%
Queen Anne's	13,665	10,010	215	913	11,843	84.58%
St. Mary's	23,468	18,157	270	1,917	17,844	79.91%
Somerset	4,681	3,013	39	283	3,315	81.83%
Talbot	10,801	7,952	61	1,248	9,249	85.83%
Washington	37,672	28,570	383	1,919	30,866	76.63%
Wicomico	18,399	14,869	252	1,446	16,347	84.31%
Worcester	13,211	9,911	83	1,253	11,157	84.46%
Total	835,366	668,099	9,569	57,137	732,765	79.10%

Statewide Green Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	132	70	1	12	83	62.88%
Anne Arundel	852	487	14	48	549	64.44%
Baltimore City	1,480	791	19	82	892	57.77%
Baltimore	1,306	824	30	66	920	67.79%
Calvert	118	69	4	2	72	61.02%
Caroline	29	19	1	1	21	72.41%
Carroll	248	160	3	8	171	68.82%
Cecil	133	79	4	8	88	66.92%
Charles	127	74	0	9	83	65.35%
Dorchester	24	15	0	4	19	79.17%
Frederick	349	240	3	10	261	74.79%
Garrett	30	8	1	2	9	30.00%
Harford	269	174	3	15	192	71.38%
Howard	466	273	6	32	311	66.74%
Kent	49	30	0	2	28	58.33%
Montgomery	1,394	769	30	138	929	66.91%
Prince George's	664	361	12	30	403	60.69%
Queen Anne's	61	38	3	2	43	70.49%

St. Mary's	144	66	2	10	98	68.06%
Somerset	16	12	1	1	14	87.50%
Talbot	34	32	1	6	39	73.23%
Washington	239	131	4	13	138	66.53%
Wicomico	102	53	3	12	68	66.67%
Worcester	63	36	3	5	46	73.02%
Total	8,379	4,803	149	494	5,446	64.96%

Statewide Libertarian Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	85	50	1	4	55	64.71%
Anne Arundel	865	577	25	45	646	72.58%
Baltimore City	588	338	18	25	377	66.37%
Baltimore	1,167	701	20	47	628	69.59%
Calvert	120	70	3	7	80	66.67%
Caroline	51	21	1	1	23	45.10%
Carroll	220	146	4	12	162	73.64%
Cecil	166	102	2	7	111	66.87%
Charles	151	65	0	18	101	66.89%
Dorchester	35	20	0	3	23	65.71%
Frederick	326	231	16	15	262	79.86%
Garrett	34	15	0	0	15	44.12%
Harford	394	289	9	15	310	78.68%
Howard	413	289	13	32	313	75.79%
Kent	22	14	0	0	14	63.64%
Montgomery	1,059	673	24	84	781	71.86%
Prince George's	598	320	24	20	364	61.90%
Queen Anne's	85	59	5	3	67	78.82%
St. Mary's	138	85	3	6	95	68.84%
Somerset	13	6	0	1	7	53.85%
Talbot	66	39	1	6	46	67.85%
Washington	213	116	4	7	127	59.67%
Wicomico	116	69	2	6	77	66.38%
Worcester	66	39	3	8	50	56.16%
Total	7,040	4,374	186	354	4,914	69.80%

Statewide Independent Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	26	19	0	2	21	80.77%
Anne Arundel	1,098	790	27	179	996	90.71%
Baltimore City	593	449	44	88	581	94.80%
Baltimore	1,133	745	51	287	1,083	88.47%

Calvert	105	70	7	19	96	91.43%
Caroline	87	68	0	2	66	79.19%
Carroll	402	211	4	159	404	100.50%
Cecil	109	84	0	13	103	98.33%
Charles	391	303	4	70	377	95.69%
Dorchester	40	31	0	6	37	92.50%
Frederick	494	282	24	141	457	98.49%
Garrett	21	12	0	8	16	95.71%
Harford	383	238	3	97	338	92.60%
Howard	747	323	24	365	702	93.98%
Kent	27	20	2	4	26	98.30%
Montgomery	3,169	1,016	72	1,865	2,953	92.80%
Prince George's	959	637	65	250	952	104.73%
Queen Anne's	70	53	4	13	70	100.00%
St. Mary's	67	65	1	4	60	92.79%
Somerset	16	15	1	1	17	94.44%
Talbot	40	30	0	6	36	90.00%
Washington	160	101	3	55	160	88.60%
Wicomico	84	62	3	11	76	90.48%
Worcester	32	25	2	5	32	100.00%
Total	10,228	5,087	369	3,648	9,984	94.86%

Statewide Constitution Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	2	2	0	0	2	100.00%
Anne Arundel	17	15	0	0	15	94.12%
Baltimore City	7	4	0	0	4	57.14%
Baltimore	11	6	2	2	10	90.91%
Calvert	4	2	0	1	3	75.00%
Caroline	2	1	0	0	1	50.00%
Carroll	3	3	0	0	3	100.00%
Cecil	4	4	2	0	6	150.00%
Charles	3	2	0	0	2	66.67%
Dorchester	0	0	0	0	0	N/A
Frederick	7	7	0	0	7	100.00%
Garrett	1	1	0	0	1	100.00%
Harford	7	7	0	1	8	114.29%
Howard	8	5	0	2	7	87.50%
Kent	1	0	0	1	1	100.00%
Montgomery	12	7	1	1	9	75.00%
Prince George's	8	5	1	1	7	87.50%

Queen Anne's	1	1	0	0	1	100.00%
St. Mary's	1	1	0	0	1	100.00%
Somerset	1	1	0	0	1	100.00%
Talbot	0	0	0	0	0	N/A
Washington	5	5	0	0	5	100.00%
Wicomico	1	1	0	0	1	100.00%
Worcester	0	0	0	0	0	N/A
Total	108	81	8	9	98	90.57%

Statewide Unaffiliated Turnout

County	Registered	Voted Polls	Provisional	Absentee	Total Voted	% Voted
Allegany	5,347	2,794	76	158	3,028	56.63%
Anne Arundel	58,703	38,149	907	2,710	41,766	71.15%
Baltimore City	39,324	19,709	807	1,486	22,002	55.95%
Baltimore	67,879	40,915	901	2,460	44,276	65.13%
Calvert	9,725	8,188	171	505	8,864	70.58%
Caroline	2,841	1,634	48	108	1,790	63.01%
Carroll	15,943	10,683	145	522	11,348	71.85%
Cecil	11,391	6,813	125	393	7,331	64.53%
Charles	13,173	8,197	184	647	9,008	66.38%
Dorchester	2,232	1,287	43	92	1,422	63.71%
Frederick	24,591	17,055	366	1,209	18,632	75.77%
Garrett	1,799	919	18	102	1,039	56.73%
Harford	31,540	14,758	324	923	16,005	74.30%
Howard	33,436	22,904	494	1,899	25,287	75.63%
Kent	1,764	1,000	19	94	1,173	66.50%
Montgomery	112,387	70,999	1,537	7,152	79,688	70.90%
Prince George's	82,477	33,690	1,423	2,492	37,605	80.19%
Queen Anne's	4,116	2,770	113	245	3,128	76.00%
St. Mary's	10,011	8,138	188	515	8,811	88.04%
Somerset	1,549	907	30	63	1,000	64.56%
Talbot	3,608	2,359	19	377	2,755	76.36%
Washington	13,889	7,743	211	472	8,426	60.33%
Wicomico	8,286	5,032	148	430	5,610	67.87%
Worcester	5,432	3,359	36	381	3,776	69.55%
Total	531,472	328,052	8,285	20,435	359,772	67.69%

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2010 Gubernatorial General Election - Voter Turnout

By Party and County

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Statewide Turnout

County	Dem	Rep	Other	Total Votes	Eligible Voters	Turnout
Allegany	20,232	1,036	182	1,056	22,468	42,480	52.88%
Anne Arundel	165,055	30,941	4,190	8,308	304,394	391,101	91.71%
Baltimore City	132,054	19,856	5,589	7,078	164,569	365,505	45.02%
Baltimore County	241,911	31,297	4,688	12,655	290,560	492,869	58.97%
Calvert	27,153	3,283	493	1,569	32,298	56,300	57.37%
Caroline	6,105	1,012	160	598	10,169	16,057	63.35%
Carroll	58,210	5,208	471	2,269	64,158	108,201	60.80%
Cecil	25,840	3,367	391	1,057	30,575	66,857	60.79%
Charles	36,666	5,127	756	1,459	47,911	86,669	62.57%
Dorchester	8,484	1,548	167	1,016	13,037	18,778	69.71%
Frederick	66,745	5,812	983	2,668	76,207	137,668	55.34%
Garrett	5,307	669	84	599	6,660	18,434	58.49%
Harford	79,749	11,106	1,006	3,221	95,133	148,053	63.82%
Howard	88,743	14,882	2,167	4,818	108,423	179,060	60.80%
Kent	6,101	1,027	94	915	8,337	12,462	66.79%

Present

Montgomery	240,120	35,790	8,827	30,791	284,804	573,431	51.09%
Prince George's	178,734	38,540	6,676	9,832	233,778	617,500	46.17%
Queen Anne's	16,049	3,703	930	946	30,090	39,706	97.43%
Saint Mary's	27,407	2,873	341	1,383	32,004	59,213	54.05%
Somerset	8,350	970	212	436	7,967	13,268	59.94%
Talbot	11,440	3,858	151	1,250	16,500	25,309	65.20%
Washington	36,730	2,598	938	1,686	40,975	83,278	49.20%
Wicomico	23,795	3,971	462	1,802	30,030	54,398	55.34%
Worcester	17,059	2,769	162	1,714	21,699	35,510	61.10%
Total Voter Turnout	1,638,716	218,834	37,399	87,901	1,873,541	3,466,397	54.02%

Democratic Party							
County	Polls	DV	Provi	Abs	Total Voters	Eligible Voters	Turnout
Allegany	7,855	431	91	458	8,380	16,808	51.89%
Anne Arundel	70,936	14,241	1,891	4,074	91,212	140,707	62.05%
Baltimore City	110,394	17,868	4,089	5,680	138,012	289,776	47.65%
Baltimore County	142,385	21,720	3,140	8,104	175,359	280,998	60.29%
Calvert	11,271	1,449	194	842	13,656	23,171	58.92%
Caroline	3,147	675	98	233	4,111	7,407	55.50%
Carroll	16,801	1,886	147	909	19,743	35,186	56.09%
Cecil	10,385	1,401	119	573	12,458	24,530	50.79%
Charles	33,703	5,080	694	939	39,143	60,767	64.43%
Dorchester	4,593	662	119	726	6,128	10,562	58.01%
Frederick	24,726	2,852	430	1,906	29,114	52,181	55.79%
Garrett	1,970	398	21	190	2,449	4,994	49.04%
Harford	32,330	4,911	434	1,954	39,629	62,100	63.80%
Howard	42,111	8,586	1,242	2,672	54,610	86,045	63.47%
Kent	2,983	808	48	391	4,127	8,170	50.52%
Montgomery	143,794	18,017	4,437	13,866	179,914	324,186	55.50%
Prince George's	149,056	33,906	6,780	7,994	198,737	400,582	49.70%
Queen Anne's	5,733	1,097	120	470	7,410	11,058	67.00%
Saint Mary's	11,397	1,293	130	704	13,451	24,888	54.01%
Somerset	3,210	462	156	293	4,075	7,322	55.62%
Talbot	4,580	1,410	78	940	6,460	10,199	63.33%
Washington	13,202	876	131	872	15,081	31,340	48.12%
Wicomico	10,588	1,886	271	1,031	13,716	25,368	54.07%
Worcester	7,346	1,218	70	823	9,455	15,715	60.17%
Total Turnout	663,713	149,980	24,374	59,970	1,873,533	1,867,370	54.04%

Republican Party							

County	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	10,913	522	77	531	12,043	19,827	60.74%
Anne Arundel	67,502	11,011	1,308	2,995	82,814	120,970	68.46%
Baltimore City	11,160	986	359	706	13,211	32,027	41.25%
Baltimore County	73,144	7,257	1,027	3,383	84,901	128,838	65.92%
Calvert	12,227	1,412	204	592	14,435	22,464	64.26%
Caroline	3,983	704	58	139	4,884	7,491	65.46%
Carroll	32,702	2,915	232	1,108	36,957	54,327	68.03%
Cecil	11,585	1,591	125	376	13,627	22,058	59.83%
Charles	11,952	1,597	119	479	14,147	24,687	57.31%
Dorchester	4,079	804	46	231	4,918	6,982	70.46%
Frederick	32,587	2,418	359	1,028	36,390	57,958	62.79%
Garrett	5,914	617	47	321	6,799	11,379	59.75%
Harford	36,112	5,329	430	1,276	45,147	63,101	71.55%
Howard	30,810	4,379	473	1,255	36,917	55,017	67.15%
Kent	2,429	645	41	187	3,302	4,476	73.77%
Montgomery	67,459	6,139	1,179	4,119	67,886	123,263	55.09%
Prince George's	15,784	2,554	367	1,022	19,727	46,641	42.30%
Queen Anne's	8,441	1,356	148	378	10,323	13,982	73.83%
Saint Mary's	12,429	1,313	141	542	14,425	23,454	61.50%
Somerset	2,484	421	39	166	3,110	4,329	71.84%
Talbot	5,587	1,884	62	520	8,033	11,073	72.55%
Washington	19,582	1,018	128	632	21,570	37,027	58.26%
Wicomico	10,467	1,690	123	651	12,931	19,785	65.36%
Worcester	7,847	1,238	71	650	9,624	13,903	69.22%
Total Turnout	488,869	66,535	7,189	23,486	578,031	926,814	62.46%

Libertarian Party

County	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	34	3	2	1	40	119	33.61%
Anne Arundel	403	61	16	21	501	1,114	50.36%
Baltimore City	202	15	19	11	347	701	39.34%
Baltimore County	607	58	15	25	703	1,499	46.90%
Calvert	60	12	1	3	69	149	46.31%
Caroline	15	2	0	1	18	59	30.51%
Carroll	132	5	2	2	141	304	46.38%
Cecil	70	8	2	2	82	208	39.42%
Charles	46	14	0	4	65	197	33.50%
Dorchester	17	1	0	2	20	41	48.78%
Frederick	167	10	6	5	190	453	41.94%
Garrett	6	0	1	2	9	45	20.00%

Harford	228	28	7	9	359	912	42.64%
Howard	216	27	11	14	268	571	46.94%
Kent	12	0	1	0	19	35	54.29%
Montgomery	566	41	28	35	482	1,364	38.07%
Prince George's	174	15	12	8	359	732	28.56%
Queen Anne's	38	2	2	6	46	95	48.42%
Saint Mary's	74	11	4	4	80	191	48.69%
Somerset	7	1	0	0	9	26	30.77%
Talbot	29	2	0	2	38	79	41.77%
Washington	75	2	4	9	60	234	38.46%
Wicomico	62	11	3	2	66	191	45.03%
Worcester	35	4	0	2	41	105	39.05%
Total Turnout	3,149	337	136	167	3,782	8,984	42.10%

Green Party							
County	Polls	ED	Prov	Abs	Total Votes	Eligible Voters	Turnout
Allegany	30	1	1	4	36	130	27.69%
Anne Arundel	391	45	20	20	384	848	45.28%
Baltimore City	449	39	25	11	524	1,404	37.32%
Baltimore County	498	48	13	36	595	1,356	44.10%
Calvert	32	5	0	2	39	119	32.77%
Caroline	10	1	0	0	11	36	30.56%
Carroll	79	2	0	2	83	256	32.55%
Cecil	36	5	1	3	44	143	30.77%
Charles	33	3	1	4	41	131	31.30%
Dorchester	11	1	1	0	13	29	44.83%
Frederick	142	5	3	3	153	358	42.82%
Garrett	4	1	1	0	6	39	15.38%
Harford	87	11	4	3	105	274	38.32%
Howard	143	34	10	11	197	446	42.50%
Kent	15	1	0	2	18	42	42.86%
Montgomery	429	62	26	26	544	1,432	37.99%
Prince George's	195	22	5	10	232	710	32.68%
Queen Anne's	36	2	0	0	37	94	42.19%
Saint Mary's	52	2	0	1	55	150	36.67%
Somerset	4	0	0	2	6	21	28.57%
Talbot	16	2	0	3	21	51	41.18%
Washington	69	6	3	2	80	219	36.77%
Wicomico	29	5	2	3	39	113	34.51%
Worcester	22	4	0	1	27	66	36.71%
Total Turnout	2,874	294	116	169	3,223	8,392	38.41%

Constitution Party

County	Polls	BV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	7	0	0	0	7	12	58.33%
Anne Arundel	41	13	0	3	57	76	75.00%
Baltimore City	8	1	0	2	9	29	31.03%
Baltimore County	38	4	1	1	42	80	52.50%
Calvert	3	1	0	2	6	11	54.55%
Caroline	3	0	0	0	3	5	60.00%
Carroll	34	1	0	2	37	51	72.55%
Cecil	11	2	1	0	14	25	56.00%
Charles	11	1	1	1	14	19	73.68%
Dorchester	1	0	0	0	1	2	50.00%
Frederick	18	2	2	0	20	32	62.50%
Garrett	2	0	0	0	2	3	66.67%
Harford	23	1	1	0	25	37	67.57%
Howard	20	6	0	1	27	41	65.85%
Kent	2	0	0	0	2	3	66.67%
Montgomery	25	4	1	4	34	59	57.63%
Prince George's	19	3	0	1	23	55	41.82%
Queen Anne's	5	0	0	2	7	8	87.50%
Saint Mary's	8	0	0	0	8	14	57.14%
Somerset	1	0	0	0	1	3	33.33%
Talbot	4	2	0	0	6	7	85.71%
Washington	9	1	0	0	10	20	50.00%
Wicomico	4	1	0	0	5	9	55.56%
Worcester	2	0	0	0	2	5	40.00%
Total Turnout	255	43	7	19	302	600	50.74%

Unaffiliated

County	Polls	BV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	1,431	91	21	47	1,590	5,305	29.41%
Anne Arundel	23,767	3,557	911	1,080	29,345	62,269	46.98%
Baltimore City	9,594	878	578	455	11,505	40,231	28.60%
Baltimore County	22,281	1,642	677	682	25,672	64,709	39.67%
Calvert	3,345	348	90	129	3,912	9,860	39.69%
Caroline	884	124	38	32	1,078	2,949	36.49%
Carroll	6,212	434	85	174	6,905	16,309	42.34%
Cecil	3,245	355	41	64	3,725	11,219	33.21%
Charles	3,993	455	73	127	4,648	13,609	34.15%

Dorchester	683	74	25	59	840	2,186	38.44%
Frederick	9,082	719	171	324	10,296	26,837	38.85%
Garrett	430	39	14	15	498	1,786	27.86%
Harford	8,753	1,074	167	243	10,237	22,310	45.89%
Howard	12,863	1,778	408	810	15,410	34,159	45.11%
Kent	598	148	8	31	783	1,621	48.30%
Montgomery	37,882	3,482	1,242	2,910	45,516	122,587	37.13%
Prince George's	9,024	1,276	592	472	11,364	43,081	26.39%
Queen Anne's	1,708	240	52	66	2,066	4,290	48.50%
Saint Mary's	3,239	278	64	128	3,705	10,248	36.16%
Somerset	604	74	21	11	810	1,837	38.89%
Talbot	1,301	321	17	117	1,758	3,615	48.58%
Washington	3,772	191	41	117	4,121	14,347	28.72%
Wicomico	2,414	358	57	105	2,932	8,176	35.86%
Worcester	1,903	251	16	117	2,289	5,273	43.41%
Total Turnout	168,888	18,314	5,317	8,374	200,763	620,274	37.59%

Other Parties

County	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	192	18	0	15	225	449	50.11%
Anne Arundel	45	15	18	5	81	139	58.27%
Baltimore City	349	51	21	27	448	1,340	33.43%
Baltimore County	2,670	330	53	184	3,237	5,622	57.58%
Calvert	222	37	4	19	282	526	53.61%
Caroline	51	8	0	3	60	120	50.00%
Carroll	250	13	5	22	290	799	36.30%
Cecil	348	55	2	20	425	860	49.42%
Charles	226	21	1	5	253	579	43.70%
Dorchester	70	16	1	1	88	150	58.67%
Frederick	25	8	9	2	44	78	56.41%
Garrett	81	8	0	8	97	186	52.15%
Harford	316	54	12	39	421	719	58.58%
Howard	791	142	18	53	1,004	1,810	55.47%
Kent	82	10	1	4	88	136	63.70%
Montgomery	153	21	15	20	209	541	38.63%
Prince George's	4,488	762	114	135	5,494	22,719	24.18%
Queen Anne's	101	16	1	1	119	207	57.49%
Saint Mary's	238	21	2	6	267	526	50.76%
Somerset	40	12	2	3	57	120	47.50%
Talbot	133	38	2	18	191	315	60.63%
Washington	32	3	1	4	40	89	44.94%

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Worcester	198	38	3	21	260	441	58.96%
Total Turnout	11,338	1,784	[illegible]	[illegible]	14,917	39,139	[illegible]

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Statewide Turnout

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	25,423	2,695	1,466	571	30,145	42,129	71.56%
Anne Arundel	203,418	38,138	13,119	7,410	262,081	348,778	75.14%
Baltimore City	187,721	45,510	11,202	12,986	257,399	392,606	65.56%
Baltimore County	302,292	56,236	19,932	9,946	388,406	515,420	75.36%
Calvert	35,453	7,039	2,528	893	45,913	58,884	78.00%
Caroline	10,257	2,385	531	321	13,474	18,165	74.16%
Carroll	72,620	10,408	3,912	1,149	88,089	110,400	79.79%
Cecil	34,419	5,890	1,851	609	42,769	62,524	68.40%
Charles	58,693	11,988	3,314	1,851	75,846	97,887	77.84%
Dorchester	11,878	2,495	949	259	15,551	20,166	77.11%
Frederick	98,185	13,882	5,939	2,103	118,088	148,160	79.70%
Garrett	10,862	1,550	875	176	13,263	18,729	70.82%
Harford	103,062	18,390	5,219	2,205	128,876	159,971	79.31%
Howard	111,939	30,491	8,723	3,246	154,369	188,755	81.78%
Kent	8,840	2,385	641	158	10,024	12,584	79.59%
Montgomery	329,728	77,939	39,714	13,508	460,885	618,018	74.62%
Prince George's	264,899	69,929	20,944	16,944	302,718	568,817	69.07%
Queen Anne's	19,332	4,012	1,279	478	25,101	32,332	77.64%

Present

Saint Mary's	37,363	7,066	2,737	1,093	48,259	63,839	75.54%
Somerset	7,881	1,855	510	861	10,487	13,715	76.48%
Talbot	12,845	5,948	1,520	302	20,615	25,295	81.50%
Washington	51,898	7,349	3,033	1,032	63,310	87,298	72.52%
Wicomico	32,109	8,410	2,829	1,361	42,714	56,429	75.70%
Worcester	21,840	2,824	2,425	563	27,652	35,080	78.84%
Totals	2,088,531	430,547	155,181	79,805	2,754,062	3,694,860	74.00%

Democratic Party

County	Polls	EV	Abs	Prov	Total Votes	Eligible Voters	Turnout
Allegany	9,115	1,128	558	226	11,027	15,557	70.89%
Anne Arundel	86,006	20,053	6,037	3,427	115,523	148,232	77.41%
Baltimore City	151,500	40,348	8,880	10,380	211,017	309,078	68.27%
Baltimore County	172,358	40,534	12,144	6,225	231,251	297,941	77.62%
Calvert	13,984	3,274	1,084	343	18,645	23,349	79.86%
Caroline	3,935	1,039	232	144	5,350	7,183	74.48%
Carroll	20,734	3,897	1,368	395	26,164	32,778	79.82%
Cecil	13,030	2,411	654	341	16,516	24,197	68.26%
Charles	33,854	8,958	1,917	1,185	45,312	55,890	81.36%
Dorchester	5,908	1,417	587	154	8,067	10,414	77.46%
Frederick	34,343	8,898	2,490	914	44,443	54,564	81.46%
Garrett	2,484	434	244	54	3,216	4,724	68.08%
Harford	39,869	7,429	2,326	998	50,621	63,549	79.66%
Howard	51,707	18,149	4,800	1,788	76,224	90,072	84.63%
Kent	3,348	1,244	318	82	4,990	6,095	80.23%
Montgomery	184,484	52,920	24,097	8,162	269,645	345,449	78.08%
Prince George's	229,581	62,113	16,727	13,573	321,994	443,643	72.58%
Queen Anne's	6,570	1,800	485	166	8,821	11,386	77.81%
Saint Mary's	14,558	2,867	1,204	482	19,311	25,395	76.34%
Somerset	3,972	982	269	512	5,735	7,249	79.11%
Talbot	4,861	2,560	573	133	8,127	9,868	82.11%
Washington	18,498	3,058	1,189	434	23,177	31,750	73.00%
Wicomico	14,084	3,241	1,483	709	19,517	25,474	76.62%
Worcester	9,035	1,214	1,109	399	11,823	14,987	77.50%
Totals	1,127,584	287,034	90,643	60,953	1,566,214	2,059,544	76.06%

Republican Party

County	Polls	EV	Abs	Prov	Total Votes	Eligible Voters	Turnout
Allegany	13,130	1,295	755	308	15,585	20,008	78.85%
Anne Arundel	78,077	12,179	4,728	2,180	98,165	125,388	78.29%
Baltimore City	15,080	1,964	1,029	836	18,891	33,005	57.24%
Baltimore County	85,830	10,084	5,139	1,877	102,930	132,720	77.55%
Calvert	15,189	2,740	1,042	269	19,260	23,448	82.18%
Caroline	4,711	1,067	238	107	6,103	7,656	79.80%
Carroll	39,848	5,269	1,926	607	47,547	56,870	83.61%
Cecil	14,722	2,568	707	202	18,189	24,372	74.63%
Charles	16,406	2,104	1,039	322	19,843	25,259	78.31%
Dorchester	4,706	653	273	59	5,871	7,131	82.33%
Frederick	42,736	4,782	2,370	632	50,522	61,079	82.72%
Garrett	7,137	997	581	69	8,784	11,626	75.56%
Harford	46,854	6,920	2,113	720	56,107	67,467	83.16%
Howard	36,714	7,181	2,301	698	46,994	56,330	83.41%
Kent	2,855	663	232	42	3,792	4,572	82.94%
Montgomery	73,411	11,285	7,782	1,821	94,299	125,186	75.41%
Prince George's	23,499	2,539	2,002	966	28,994	47,472	61.01%
Queen Anne's	9,720	1,936	602	202	12,460	15,284	81.52%

Saint Mary's	15,970	3,071	1,087	324	20,462	25,721	79.53%
Somerset	2,865	608	199	58	3,620	4,600	78.67%
Talbot	5,937	2,841	699	58	9,384	10,879	85.28%
Washington	26,094	3,352	1,414	316	30,076	38,551	78.02%
Wicomico	13,141	2,382	678	244	16,845	20,865	81.52%
Worcester	9,308	1,253	1,013	185	11,867	14,423	81.89%
Totals	683,547	89,391	40,278	13,191	746,397	959,958	77.79%

Libertarian Party

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	77	8	1	3	89	143	62.24%
Anne Arundel	744	100	37	52	939	1,385	67.41%
Baltimore City	415	49	14	38	514	917	56.05%
Baltimore County	992	130	61	33	1,212	1,808	67.11%
Calvert	89	16	11	7	123	192	64.06%
Caroline	28	3	1	1	33	59	55.93%
Carroll	227	29	16	0	281	360	78.43%
Cecil	116	9	7	4	136	244	55.74%
Charles	113	13	9	4	139	234	59.40%
Dorchester	32	1	0	0	33	47	70.21%
Frederick	359	36	24	22	423	577	73.31%
Garrett	23	1	1	1	26	52	50.00%
Harford	384	39	23	13	459	640	70.72%
Howard	369	57	28	11	494	698	69.34%
Kent	35	6	3	0	34	44	77.27%
Montgomery	835	118	72	43	1,068	1,746	61.20%
Prince George's	409	43	28	34	513	940	54.57%
Queen Anne's	64	8	1	4	77	111	69.37%
Saint Mary's	133	16	8	8	165	245	67.35%
Somerset	9	2	2	2	15	30	50.00%
Talbot	44	6	4	3	57	91	62.64%
Washington	173	17	13	8	211	322	65.53%
Wicomico	83	14	10	7	114	192	59.38%
Worcester	58	6	6	6	74	126	58.73%
Totals	5,757	713	380	328	7,219	11,258	64.13%

Green Party

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	53	6	0	3	66	121	56.20%
Anne Arundel	420	59	35	22	534	874	61.10%
Baltimore City	587	82	39	33	741	1,401	52.86%
Baltimore County	660	79	46	39	829	1,358	61.06%
Calvert	62	10	5	2	79	138	57.25%
Caroline	13	4	1	2	20	36	55.56%
Carroll	132	16	11	11	172	270	63.70%
Cecil	51	5	5	0	61	140	43.57%
Charles	51	9	13	5	75	140	53.57%
Dorchester	9	2	1	0	12	25	48.00%
Frederick	219	28	13	10	270	401	67.33%
Garrett	10	3	1	1	15	39	38.47%
Harford	151	17	8	0	186	315	59.05%
Howard	257	39	22	6	321	471	68.15%

Kent	20	2	0	0	22	35	62.86%
Montgomery	612	127	83	52	874	1,559	57.82%
Prince George's	324	47	22	28	419	785	54.77%
Queen Anne's	32	3	1	2	38	64	59.38%
Saint Mary's	81	8	5	4	98	144	68.06%
Somerset	3	0	4	2	9	19	47.37%
Talbot	21	5	5	1	32	48	66.67%
Washington	101	16	8	1	126	239	53.39%
Wicomico	41	7	7	9	64	117	54.70%
Worcester	20	4	1	1	26	71	48.30%
Totals	3,044	574	341	241	5,100	8,718	58.51%

Americans Elect Party

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	1	0	0	0	1	1	100.00%
Anne Arundel	4	0	0	0	4	8	50.00%
Baltimore City	10	3	1	1	15	22	68.18%
Baltimore County	4	0	0	0	4	10	40.00%
Calvert	0	1	0	0	1	1	100.00%
Caroline	0	0	0	0	0	0	0.00%
Carroll	1	0	1	0	2	6	33.33%
Cecil	2	0	1	1	4	3	133.33%
Charles	0	0	0	2	2	0	0.00%
Dorchester	1	0	0	0	1	1	100.00%
Frederick	3	1	0	0	4	4	100.00%
Garrett	0	0	0	0	0	0	0.00%
Harford	2	0	0	0	2	3	66.67%
Howard	5	0	0	0	5	7	71.43%
Kent	0	0	0	0	0	0	0.00%
Montgomery	9	0	4	0	13	16	81.25%
Prince George's	9	1	0	2	12	28	48.15%
Queen Anne's	3	0	0	0	3	3	100.00%
Saint Mary's	2	0	2	3	7	5	140.00%
Somerset	1	0	0	0	1	2	50.00%
Talbot	0	0	0	0	0	0	0.00%
Washington	5	0	0	0	5	7	71.43%
Wicomico	3	0	0	0	3	5	60.00%
Worcester	1	0	0	0	1	1	100.00%
Totals	66	8	9	9	90	131	68.70%

Unaffiliated

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	2,830	236	104	127	3,398	5,891	55.78%
Anne Arundel	37,021	6,721	2,273	1,705	46,720	71,623	65.23%
Baltimore City	19,521	3,050	1,159	1,594	25,324	46,849	54.29%
Baltimore County	39,460	4,871	1,712	1,846	47,709	75,760	62.97%
Calvert	5,877	595	392	239	7,403	11,301	65.59%
Caroline	1,494	348	60	62	1,964	3,108	59.97%
Carroll	11,213	1,320	439	248	13,219	19,092	69.24%
Cecil	6,169	628	275	157	7,375	12,824	57.51%
Charles	8,165	1,158	446	304	10,071	15,712	64.10%
Dorchester	1,143	166	82	44	1,485	2,424	60.44%

Frederick	18,484	2,310	1,037	511	23,342	31,441	71.09%
Garrett	800	105	52	30	1,087	2,084	52.19%
Harford	15,438	2,179	530	431	18,578	28,855	66.19%
Howard	21,800	4,719	958	710	28,187	38,779	72.63%
Kent	830	238	78	33	1,178	1,708	68.97%
Montgomery	69,576	13,288	6,357	3,179	92,398	139,040	66.45%
Prince George's	24,903	4,115	1,722	2,038	32,798	58,108	58.40%
Queen Anne's	2,822	442	188	152	3,552	5,280	67.08%
Saint Mary's	6,349	1,015	387	254	7,915	12,049	65.69%
Somerset	791	144	30	87	1,052	1,894	60.33%
Talbot	1,980	676	234	66	2,925	4,012	70.41%
Washington	7,921	971	314	267	9,473	19,150	58.89%
Wicomico	4,440	662	299	278	5,710	9,310	61.33%
Worcester	3,145	313	283	150	3,521	6,080	62.80%
Totals	311,971	49,773	19,330	14,160	395,270	614,987	64.29%

Other Parties

County	Polls	EV	Abs	Prov	Total Voters	Eligible Voters	Turnout
Allegany	218	25	32	4	279	410	68.05%
Anne Arundel	144	18	10	24	196	262	74.81%
Baltimore City	628	114	71	84	897	1,534	58.47%
Baltimore County	2,983	572	830	108	4,471	5,846	76.49%
Calvert	273	63	44	13	393	536	73.46%
Caroline	76	14	9	5	104	141	73.76%
Carroll	467	75	153	9	704	985	71.47%
Cecil	380	72	22	4	488	744	65.59%
Charles	352	53	20	29	404	572	70.63%
Dorchester	76	16	6	2	102	126	80.95%
Frederick	59	7	4	14	84	94	89.36%
Garrett	98	20	16	1	135	208	65.53%
Harford	585	108	216	34	923	1,138	81.47%
Howard	1,089	319	744	53	2,194	2,398	91.08%
Kent	84	31	12	1	108	140	77.14%
Montgomery	819	305	1,310	149	2,480	3,072	81.05%
Prince George's	6,206	1,071	443	329	8,049	19,865	40.93%
Queen Anne's	121	23	4	2	150	208	71.77%
Saint Mary's	270	37	34	10	351	489	70.59%
Somerset	50	19	6	2	77	121	63.64%
Talbot	132	80	28	2	210	267	78.65%
Washington	108	35	65	6	242	292	82.82%
Wicomico	317	79	52	13	461	676	68.20%
Worcester	218	34	34	5	391	392	76.19%
Totals	15,622	3,088	4,194	900	23,772	40,298	59.03%

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Totals	POLLS	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	18,480	1,504	687	222	42,560	49.1%
Anne Arundel	133,124	38,654	5,784	3,913	349,313	52.0%
Baltimore City	107,961	25,921	3,829	4,650	373,171	38.1%
Baltimore County	203,005	51,812	7,089	4,419	521,130	51.1%
Calvert	27,092	4,751	942	461	59,076	55.4%
Caroline	7,396	1,606	183	121	18,353	50.7%
Carroll	54,680	8,016	1,534	587	112,946	57.4%
Cecil	22,033	4,123	570	241	61,091	43.5%
Charles	38,989	6,880	1,089	877	100,449	47.6%
Dorchester	8,459	1,608	620	144	20,466	52.9%
Frederick	66,795	10,710	2,353	989	150,895	53.6%
Garrett	7,569	1,357	405	83	19,292	48.8%
Harford	70,888	18,007	1,625	1,470	164,780	55.8%
Howard	80,528	21,431	2,481	1,718	195,440	54.3%
Kent	5,532	1,969	318	37	12,724	61.7%
Montgomery	211,729	35,443	13,730	6,554	634,663	42.1%
Prince George's	162,406	46,227	5,891	6,676	544,677	40.6%
Queen Anne's	13,759	5,156	463	166	33,175	58.9%
Saint Mary's	26,991	4,471	976	412	64,510	50.9%
Somerset	5,111	1,263	254	172	12,999	52.3%
Talbot	9,697	4,869	595	193	25,663	59.8%
Washington	34,015	3,504	1,246	432	90,097	43.5%
Wicomico	19,871	4,944	1,033	336	56,696	46.2%
Worcester	14,820	3,439	954	190	35,699	54.4%
Total	1,350,930	307,665	54,651	35,063	3,701,665	47.2%

Republican	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	10,306	771	361	99	20,200	57.1%
Anne Arundel	57,411	15,702	2,012	1,308	123,998	61.6%
Baltimore City	9,457	1,354	392	384	30,156	38.4%
Baltimore County	64,647	13,327	2,217	1,142	131,289	61.9%
Calvert	12,476	2,141	425	198	23,930	63.7%
Caroline	3,855	821	87	55	7,740	62.2%
Carroll	33,027	4,888	881	322	58,989	66.3%
Cecil	11,056	2,089	260	110	24,692	54.7%
Charles	11,488	1,687	376	183	24,352	56.4%
Dorchester	3,990	698	159	27	7,237	67.3%
Frederick	32,190	4,436	1,122	409	81,145	62.4%
Garrett	5,352	968	269	49	12,018	55.2%
Harford	35,582	8,551	813	648	88,958	66.1%
Howard	27,657	6,183	833	448	55,440	63.3%
Kent	2,292	760	125	14	4,550	70.1%
Montgomery	48,623	6,202	3,333	1,263	121,520	48.9%
Prince George's	14,013	2,779	807	455	41,780	43.2%

Queen Anne's	7,531	2,817	218	92	15,877	67.1%
Saint Mary's	12,666	2,092	401	145	25,797	59.3%
Somerset	2,411	553	100	42	4,731	65.7%
Talbot	4,826	2,539	305	98	11,156	69.6%
Washington	18,489	1,875	629	200	39,134	54.2%
Wicomico	9,261	2,153	412	101	20,504	58.2%
Worcester	7,003	1,653	426	87	14,391	63.7%
Total	445,609	87,039	16,963	7,879	949,564	58.7%

Democrat	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	6,135	597	278	69	15,140	46.8%
Anne Arundel	52,936	17,889	2,987	1,778	147,091	51.4%
Baltimore City	88,452	23,168	3,155	3,733	293,242	40.4%
Baltimore County	111,396	33,818	4,127	2,531	297,506	51.0%
Calvert	10,167	2,051	360	160	23,222	54.9%
Caroline	2,524	628	89	31	6,944	47.1%
Carroll	13,673	2,314	475	143	31,084	53.4%
Cecil	7,392	1,532	224	74	22,917	40.2%
Charles	22,539	4,534	582	568	58,745	48.0%
Dorchester	3,650	792	431	94	10,306	48.2%
Frederick	22,864	4,765	940	332	54,421	53.1%
Garrett	1,600	307	101	17	4,817	43.9%
Harford	24,479	7,289	625	485	62,814	52.3%
Howard	37,784	12,279	1,249	853	93,408	55.8%
Kent	2,523	1,010	153	18	6,023	61.5%
Montgomery	125,358	24,514	8,162	3,938	357,137	45.4%
Prince George's	133,677	40,800	4,477	5,425	427,946	43.1%
Queen Anne's	4,209	1,772	189	34	10,964	56.6%
Saint Mary's	10,097	1,836	467	157	25,034	50.2%
Somerset	2,199	594	138	111	6,409	47.5%
Talbot	3,412	1,781	221	56	9,647	56.7%
Washington	10,952	1,281	494	131	31,917	40.3%
Wicomico	8,035	2,256	512	157	25,314	43.3%
Worcester	5,671	1,381	430	67	14,433	52.3%
Total	711,724	189,188	30,866	20,962	2,036,281	46.8%

Libertarian	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	72	7	2	2	203	40.9%
Anne Arundel	567	85	19	32	1,748	40.2%
Baltimore City	279	38	8	13	1,094	30.9%
Baltimore County	805	127	20	20	2,321	41.9%
Calvert	90	11	5	2	271	39.9%
Caroline	26	2	1	1	88	34.1%
Carroll	239	23	5	4	596	45.5%

Cecil	75	10	2	1	300	29.3%
Charles	91	11	7	7	329	35.3%
Dorchester	23	1	1	2	65	41.5%
Frederick	271	24	9	10	781	40.2%
Garrett	18	2	1	1	74	29.7%
Harford	314	49	6	17	903	42.7%
Howard	320	41	16	12	907	42.9%
Kent	18	5	1	2	54	48.1%
Montgomery	497	51	36	36	2,216	28.0%
Prince George's	222	27	11	21	1,059	26.5%
Queen Anne's	52	13	1	3	153	45.1%
Saint Mary's	113	15	3	2	316	42.1%
Somerset	14	3	0	0	31	54.8%
Talbot	42	8	1	1	114	45.6%
Washington	107	9	5	5	425	29.6%
Wicomico	67	14	4	7	268	34.3%
Worcester	50	13	4	0	161	41.6%
Total	4,372	589	168	201	14,477	36.8%

Green	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	21	1	3	1	116	22.4%
Anne Arundel	215	41	8	12	825	33.5%
Baltimore City	305	41	7	18	1,215	30.5%
Baltimore County	375	54	15	12	1,283	35.3%
Calvert	46	3	3	1	129	41.1%
Caroline	5	1	0	1	31	22.6%
Carroll	81	7	1	0	266	33.5%
Cecil	14	3	1	0	129	14.0%
Charles	30	2	3	1	122	29.5%
Dorchester	6	2	0	1	29	31.0%
Frederick	147	13	5	5	401	42.4%
Garrett	5	1	0	1	36	19.4%
Harford	77	16	3	6	321	31.8%
Howard	137	26	8	4	478	36.6%
Kent	8	0	0	0	29	27.6%
Montgomery	387	59	41	18	1,602	31.5%
Prince George's	173	26	8	10	740	29.1%
Queen Anne's	10	2	1	0	54	24.1%
Saint Mary's	35	4	2	3	128	34.4%
Somerset	1	2	0	1	15	26.7%
Talbot	8	3	1	1	47	27.7%
Washington	57	3	4	1	240	27.1%
Wicomico	15	2	2	3	118	18.6%
Worcester	14	7	0	0	75	28.0%
Total	2,172	319	116	100	8,445	32.1%

Other	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	164	12	12	4	378	50.8%
Anne Arundel	91	32	8	12	320	44.7%
Baltimore City	285	59	24	18	1,366	28.3%
Baltimore County	1,890	543	188	38	4,845	54.9%
Calvert	189	44	16	4	465	54.4%
Caroline	65	12	1	0	148	52.7%
Carroll	294	61	32	6	882	44.6%
Cecil	227	53	9	4	665	44.1%
Charles	200	26	8	5	541	44.2%
Dorchester	51	9	2	0	118	52.5%
Frederick	92	6	18	1	200	58.5%
Garrett	65	13	6	1	187	45.5%
Harford	438	132	43	18	1,227	51.4%
Howard	735	212	76	29	2,213	47.5%
Kent	55	14	5	0	129	57.4%
Montgomery	914	151	358	39	3,840	38.1%
Prince George's	2,779	614	98	56	14,752	24.0%
Queen Anne's	83	24	5	0	199	56.3%
Saint Mary's	185	24	7	4	449	49.0%
Somerset	28	15	2	0	101	44.6%
Talbot	68	37	4	2	221	50.2%
Washington	119	22	20	2	330	49.4%
Wicomico	164	42	15	2	534	41.8%
Worcester	148	43	9	3	360	56.4%
Total	9,329	2,200	966	248	34,470	37.0%

Unaffiliated	Polls	EV	ABS	PROV	ELIGIBLE_VOTERS	Percent Turnout
Allegany	1,782	116	31	47	6,523	30.3%
Anne Arundel	21,904	4,905	750	771	75,331	37.6%
Baltimore City	9,183	1,261	243	484	46,098	24.2%
Baltimore County	23,892	3,943	522	676	83,878	34.6%
Calvert	4,124	501	133	96	11,959	40.6%
Caroline	921	142	5	33	3,402	32.4%
Carroll	7,366	723	140	112	21,149	39.4%
Cecil	3,269	436	74	52	13,288	28.8%
Charles	4,641	620	113	113	16,360	33.5%
Dorchester	739	106	27	20	2,711	32.9%
Frederick	11,231	1,466	259	232	33,947	38.8%
Garrett	529	66	28	14	2,360	27.0%
Harford	9,998	1,970	135	296	30,557	40.6%
Howard	13,895	2,690	299	372	42,994	40.1%
Kent	636	180	34	3	1,939	44.0%

Montgomery	35,950	4,466	1,800	1,260	148,348	29.3%
Prince George's	11,542	1,981	490	709	58,394	25.2%
Queen Anne's	1,874	528	49	37	5,928	42.0%
Saint Mary's	3,895	500	96	101	12,786	35.9%
Somerset	458	96	14	18	1,712	34.2%
Talbot	1,341	501	63	35	4,478	43.3%
Washington	4,291	314	94	93	18,051	26.5%
Wicomico	2,329	477	88	66	9,958	29.7%
Worcester	1,934	342	85	33	6,279	38.1%
Total	177,724	28,330	5,572	5,673	658,428	33.0%

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

LINDA H. LAMONE., *et al.*,

Defendants.

Case No. 13-cv-3233

DECLARATION OF MARY CRAMER WAGNER

I, Mary Cramer Wagner, under penalty of perjury, declare and state:

1. I, Mary Cramer Wagner, am over the age of eighteen and am competent to testify to the matters stated below.

2. I am the Director of Voter Registration and Petitions Division with the Maryland State Board of Elections. I have held this position for 16 years.

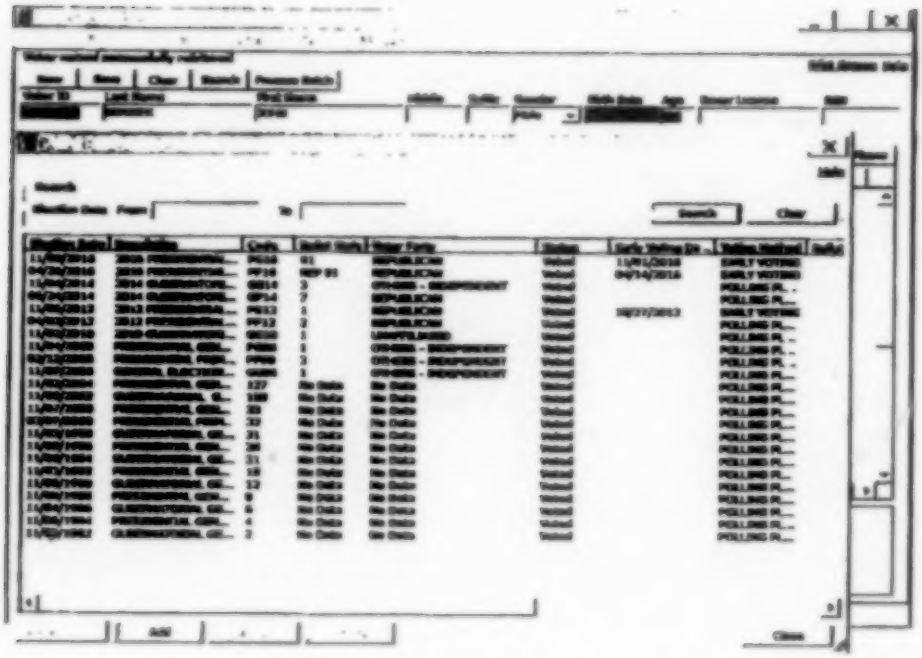
3. Attached as Exhibit A to my declaration is the voting record for O. John Benisek who resides at 11237 Kemps Mill Road in Williamsport, MD 21795.

4. I retrieved the document attached as Exhibit A on June 29, 2017, from State Board of Elections records that are kept in the normal course of business.

5. This document indicates that O. John Benisek was an unaffiliated voter in Maryland's 2010 general gubernatorial election, and that he was registered as a Republican in Maryland's 2012 presidential primary and general elections.

6/30/17
Date

MC Wagner
Mary Cramer Wagner



Official
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MCWagner 6/30/17
Maryland State Board of Elections

Exhibit A

Declaration of Dr. Michael McDonald

Summary

I previously offered an initial expert report and reply expert report in this case. These reports are Exhibits Q and BBB to the Plaintiffs' Motion for Preliminary Injunction, and to Advance and Consolidate the Trial on the Merits or, in the alternative, for Summary Judgment. I make this declaration in support of the same motion.

In this declaration, I analyze Maryland congressional redistricting plans and associated statistics present in redistricting software known as Maptitude that were produced to Plaintiffs by the office of Maryland Senate President Thomas V. "Mike" Miller, Jr. I understand that these files resided on a laptop that was used by Senate President Miller's staffer, Yaakov "Jake" Weissmann for analyzing and drawing congressional maps during the 2011 redistricting process. The characteristics of these redistricting plans and the timing of when external plans were loaded into the redistricting software, or when a user drew plans with it, provide evidence of what was known to Senate President Miller and his staff at particular stages of Maryland's 2011 congressional redistricting process.

Nearly all of the plans present on Senate President Miller's Maptitude software appear to be entire, well-formed plans created by external entities. These Maptitude data files produced by the office of Senate President Miller provide insights to Maryland's redistricting process.

- Senate President Miller and his staff had election data that permitted his office to evaluate the Democratic performance of redistricting plans on the Maptitude software. The Maptitude software also had partisan registration and past turnout data.

- The first three plans loaded into the Maptitude software had a highly Republican Sixth Congressional District that largely followed the pre-redistricting, benchmark district. President Miller and his staff were thus reasonably aware that the Sixth Congresaional District could be drawn similar to its prior configuration.

- Two plan proposals were loaded into President Miller's Maptitude software on October 3, 2011—the day before the Governor Redistricting Advisory Commission (GRAC) released its proposed congressional map. One option, shown at Figure 4, follows more closely the Maryland-Pennsylvania border, before curving to the south along its eastern boundary. Another option, shown at Figure 5, appears to be the basis for the adopted Sixth Congressional District, in that it largely follows the Maryland-Virginia border along the Potomac River. The first option has a democratic performance of 50.50%, and the second option has a performance of 51.36%. The second option, with the higher democratic performance, was chosen as worthy of further plan development.

- It appears that Senate President Miller's staffer, Mr. Weissmann, made relatively minor alterations to the first of these proposals to arrive at the GRAC's map. These alterations increased the democratic performance of the Sixth Congressional District.

- Governor O'Malley's congressional plan released on October 13, 2011 is identical to the plan passed by the legislature and signed into law. The democratic performance of the Sixth Congressional District in this plan is 52.61%, increasing its Democratic performance yet further.

In summary, it is my opinion this analysis reveals that whoever was producing maps for Maryland Democrats relied upon election data, including democratic performance metrics, to create a Sixth Congressional District with the intention to disfavor Republicans residing within the district. The goal was to create a Democratic district, not a competitive district, as configurations that would have produced a competitive 50% democratic performant district were not explored further.

Data Analyzed in this Declaration

Plaintiffs' counsel provided me with data files that I have been represented to me to be a Maptitude database of redistricting information originating from Maryland Senate President Miller's office. Forensic analysis of these data reveals that this database contains at least the following information:

- Census Bureau population data of census blocks from the PL94-171 data release, commonly used for redistricting purposes.

- A file called "MD_BLOCK_DEMPERF_2012.txt"which contains a variable called "DEMPERFIDX", which appears to measure the Democratic performance of census blocks using an unknown composite of elections. When census blocks are assigned to districts, the overall Democratic performance of districts can be measured using these data.

- Fourteen distinct congressional redistricting plans, and backup files of these same plans. These plans have associated names and dates suggesting the origin of a plan and the date when the plan was loaded into President Miller's Maptitude system.

In addition to these Maptitude data files, Plaintiffs' counsel provided me with map images of plans that were represented to me as originating from President Miller's office. The plans represented by these map images can be corresponded with plans present in the Maptitude system. Sometimes the map images are given different names than plans as they are named within the Maptitude system.

These plans provide evidence of the information that Senate President Miller's staff was aware of during Maryland's redistricting process and evidence of the goals President Miller's office was internally pursuing. There are three important dates in Maryland's redistricting process that, when compared to the Maptitude file dates, reveal when information and actions were taken during the process.

- The Governor Redistricting Advisory Commission released its congressional plan on October 4, 2011.
- Governor O'Malley released his map on October 13, 2015.
- Senate Bill 1 (SB1) was introduced on October 17, 2011. The Senate amended and passed the bill on October 18, 2011. The House further amended and passed their version of the bill on October 18, 2011. The Senate agreed to the House amendments on October 20, 2011. Governor O'Malley signed the bill into law on October 20, 2011.[1]

A plan's file creation date indicates the time a plan was loaded into the Maptitude software or edits were made to a plan. For plans that were loaded into Senate President Miller's Maptitude system, we cannot know from these data when an external mapper created a plan or the intermediate steps that were taken by the mapper in formulating the plan.

Analysis of Plans

I discuss the plans chronologically with respect to the dates a plan was created in Senate President Miller's Maptitude system or when it was publicly released.

Benchmark District

The benchmark – i.e., pre-redistricting – Sixth Congressional District does not have a plan file present in President Miller's Maptitude software. However, it is identified in the PL94-171 redistricting population data provided by the Census Bureau. I present it in this supplemental report for comparison purposes.

In Figure 1, I illustrate the boundaries of the benchmark Sixth Congressional District, similar to the one presented in my first report (Initial Report, p.18).

I color the Sixth District in a transparent yellow in this map and subsequent maps to assist readers in identifying the territory assigned to the Sixth District.

Black Caucus Plans (September 15, 2011)

Two plans identified as "Black Caucus A" and "Black Caucus B" appear in President Miller's Maptitude software on September 15, 2011. These two plans have the same configuration of the Sixth Congressional District and Eighth Congressional District, and appear to be alternative explorations of the remainder of the state.

I present in Figure 2 the Black Caucus A plan's Sixth Congressional District. The district largely follows the benchmark Sixth District's boundaries, presented in Figure 1. The major changes are that this proposed Sixth Congressional district does not extend as far to the east, such that the district contains no portion of Harford County and a smaller portion of Baltimore County. To compensate for this lost population, the proposed district contains more of Montgomery County.

[1] See: http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2011s1%2fbillfile%2fsb0001.htm

This configuration of the Sixth Congressional District has a Democratic performance of 38.83%.

These plans show that, prior to the release of the GRAC map, Senate President Miller and his staff were aware that it was possible to redraw the boundaries of the district in a way that would not so dramatically dilute its Republican performance.

GOP Plan (September 15, 2011)

A plan identified as "GOP Plan" was appears in President Millers' Maptitude software on September 15, 2011.

I present in Figure 3 a map of the Sixth Congressional District for the GOP Plan. Like the Black Caucus maps, this configuration of the Sixth Congressional District largely follows the benchmark district. The differences are the district does not cross the Montgomery Country border, does not cross the Harford County border, and includes more of northern Baltimore County,

The Democratic performance of the Sixth Congressional District in the GOP Plan is 38.40%.

As with the Black Caucus plans, the GOP plan illustrates that Senate President Miller's office was reasonably aware that a Republican performant Sixth Congressional district could be drawn.

Congressional Option 1 and Congressional Option 2 (October 3, 2011)

Two plans called "Congressional Option 1" and "Congressional Option 2" (also labeled Plan Av2 and Plan A7, respectively in the files) appear in Senate President Miller's Maptitude software on October 3, 2011. These plans have two different approaches to create a majority-Democratic Sixth Congressional District.

Congressional Option 1 is presented in Figure 4. This is the configuration of the Sixth Congressional District that, apparently, did not merit further consideration. The district follows the northern Maryland state border, splitting Washington County while reaching out to incorporate Hagerstown. The district carves an arc out of Frederick County to include Westminster, Mount Airy, and Frederick. The district then splits Montgomery County, wrapping around to the northeast of Gaithersburg and Rockville. The Eighth District includes the remainder of Frederick County and much of the remainder of Montgomery County needed to balance population.

The Democratic performance of Congressional Option 1 is 50.50%.

Congressional Option 2 is presented in Figure 5. The Sixth Congressional District in this plan largely follows the Potomac River on the Maryland's southern border, all the way to the Maryland-DC border. This configuration of the Sixth Congressional District does not split Washington County. The district splits Frederick County, including all of Frederick and Walkersville in the district. In Montgomery County, the district splits Gaithersburg and Rockville. This approach is very similar to the enacted Sixth Congressional District.

The Democratic performance of Congressional Option 2 is 51.36%.

These plans are significant because they undermine Dr. Lichtman's argument that Democrats' goal was to create "a more competitive district" (Lichtman Report, p.48). The proposal with the higher democratic performance was the configuration of the Sixth Congressional District deemed worthy of further exploratory mapping, while the configuration with the lower Democratic performance (a more competitive district) was abandoned from further consideration, as no subsequent plan incorporates its boundary concepts.

Final GRAC Map (October 4, 2011)

The Final GRAC Map was officially released on October 4, 2011, but was not loaded in Senate President Miller's software until October 14, 2011. The plan is called "Congressional Option 3" and "congressional option 3-1" in Senate President Miller's software.

I present the Final GRAC Map in Figure 6. Congressional Option 2 appears to be the basis for plan development leading to the Final GRAC Map. Republican areas of Frederick County were cut from Congressional Proposal 2's Sixth Congressional District, leaving a cutout of Frederick within the district. The Sixth Congressional District was reconfigured so that it did not stretch to the DC border. To the naked eye, it no longer appears to split Gaithersburg or Rockville, instead included the whole of Gaithersburg and wrapped around Rockville to pick up more territory in the central-east portion of Montgomery County.

This plan development strategy is consistent with my prior redistricting work for redistricting authorities. Once a broad approach is approved, additional fine-tuning of a plan's districts is conducted until satisfactory districts are created.

The sum of the political effects of these changes was to increase the democratic performance of the Sixth District from 51.36% in Congressional Option 2 to 52.81% in the Final GRAC Map.

These changes again suggest that a goal of the GRAC was to maximize the democratic performance of the Sixth Congressional District, to the further detriment of Republican voters residing within the Sixth Congressional District. The goal was not to create a competitive Sixth Congressional District.

Options 1, 2, and 3 (October 12, 2011)

Following the formal adoption of the Final GRAC map on October 4, 2011 and the Governor's plan on October 15, 2011, a series of three plans with file dates of October 12, 2011 appear in President Miller's Maptitude software. These plans are labeled as Option 1, Option 2, and Option 3 in map images provided to me, so I will use these names. In the software they have the names "111012 Group", "111012 Group2", and "111012 Group Zeroed Out." Backup file data indicate someone, most likely Mr. Weissmann given his declaration, used President Miller's Maptitude

software to actively create redistricting plans on October 12, 2011, rather than passively importing redistricting plans from external sources.[2]

I present these two of these three options in Figure 7 and Figure 8. Figure 7 shows Option 1, which nearly identical to the Final GRAC Map. Figure 8 presents Option 3, which makes minor changes around the edges of Option 2. Consistent with this observation, the Maptitude names suggest that the primary difference between Option 2 and Option 3 is that the population was balanced to equality between the congressional districts. I do present a map of Option 2 for this reason.

Option 1 appears to be based on the Final GRAC Map. The Sixth Congressional District is identical, but there are other changes to other districts. This configuration thus appears to represent the configuration of the Sixth Congressional District acceptable to the person using Senate President Miller's software on October 11, 2011, as it was frozen into place while mapping occurred elsewhere.

Option 1 has a Democratic performance of 52.81%, which is identical to the Final GRAC Map.

Option 3 represents an alternative configuration of the Sixth Congressional District with the substantive changes from the Final GRAC Map being the swapping of the entirely of Rockville and Gaithersburg between the Sixth and Eighth Congressional Districts, no longer wrapping the Sixth District around Rockville, and extending the Sixth District to the Maryland/DC border.

Option 3 has a Democratic performance of 52.89%, slightly higher than the Final GRAC Map.

I do not know if Option 3 was shared with anyone outside of Senate President Miller's office.

Final Governor Map (October 13, 2011)

On October 15, 2011 Governor O'Malley publicly released his proposed redistricting plan. This plan was eventually adopted by the legislature and became the adopted plan. The plan appears two days earlier in Senate President Miller's Maptitude system on October 13, 2015, with the name "Congressional Option 4." I will refer to this plan as the "Final Governor Map," which is the name of the plan as it appears in the map images provided to me.

I provide a map of the Final Governor Plan's Sixth Congressional District in Figure 9. The Final Governor Map's Sixth Congressional District is substantially similar to the Final GRAC Map, except for some minor differences. The Sixth Congressional District in the Final Governor Map has an odd rabbit-eared extension of the Eighth Congressional District on the western portion of Rockville, crossing the Rockville boundary. This Final Governor's Plan also gives a small portion of the Sixth Congressional District along the southern-most portion along the Potomac River to the Eighth Congressional District. In exchange for losing population in these areas, the isthmus joining the northern and southern portions of the Eight Congressional District is made narrower, and a dagger-shaped sliver is sliced into the Eighth Congressional District just north of

[2] The plan names also suggest mapping activity on October 12, 2011 if in "111012" the first two digits represent the year, the next two digits represent the month, and the last two digits represent the day.

this narrowed isthmus. I have no information as to why these changes were made, but in my prior redistricting experience these changes are often a result of map drawers anticipating future candidates to offices and strategically placing their homes within desired districts. I understand that the parties have stipulated that these changes are not material to the issues being litigated in this case.

The Final Governor Map, which becomes the adopted plan, has a Democratic performance of 52.61%, 0.2 points lower than the Final GRAC Map and 1.25 points higher than Congressional Option 2.

Option 4 (October 16, 2011)

Following the release of the Final Governor's Plan on October 15, 2011, someone – most likely Mr. Weissmann – used Senate President Miller's Maptitude system to edit the Sixth Congressional District. This exploratory map appears based on the Final Governor's Plan, and was created on October 16, 2011. This plan is called "111016 Plan" in Senate President Miller's Maptitude software, and is identified as "Option 4" in the map images provided to me.

I provide a map of Option 4 in Figure 10. The Sixth Congressional District in this plan appears to cut a larger portion from the Sixth Congressional District around the rabbit-eared extension west of Rockville in the Final Governor's Map and begins to balance back the lost population by adding territory assigned to the Eighth District, such as the portion along the Potomac excised from the GRAC Final Map's Sixth Congressional District.

This plan's Sixth Congressional District is clearly an incomplete test map as its population is not balanced and it has noncontiguous holes.

The Democratic performance of this district is 51.58%.

Although I cannot know why this plan was abandoned, a plausible explanation is that further lowering of the Democratic performance of the Sixth Congressional District was deemed unacceptable.

Un-Named Plan (FLHPAC Plan, October 17, 2011)

A plan named "FLHPac Plan," an apparent reference to the Fannie Lou Hammer Political Action Committee, appears in President Miller's software on October 17, 2011. The plan has four Democratic and four Republican Congressional Districts. The Sixth Congressional District has a Democratic performance of 38.05%.[3]

This plan was apparently not considered by the Democrats nor was explored further in test mapping, so I do not provide a map or further analysis. The mapdrawers' evident refusal to consider a map with so low a federal DPI for the Sixth District is consistent with an intent to draw the Sixth District as a safe district for Democrats.

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[3] The district that includes the panhandle counties is labeled CD1 in this plan, and is most analogous to the Sixth Congressional District.

SB1 Map (October 18, 2011)

Senate Bill 1 is named "SB1 Map" in the map images provided to me and is named "SB1 Plan" in Senate President Miller's Maptitude software. Although the plan was introduced in the Maryland Senate on October 17, 2011, the creation date for the Maptitude plan and all backup files for this plan is two months later, on December 18, 2011. This suggests that Senate Bill 1 may have been developed by someone outside of Senate President Miller's office.

SB1 makes small changes to the Final Governor Map, primarily around Frederick.

The Democratic performance of the Sixth Congressional District is 52.62%.

Conclusion

In summary, it is my opinion, based on a forensic analysis of the Maptitude files provided to me and the analyses in my initial reports (Exhibits Q and BBB), that the drafters of Maryland's 2011 redistricting plan intended to draw the Sixth District so as to dilute Republican votes and ensure the election of Democratic candidates for office in the district.

Date: July 6, 2017

Prof. Michael P. McDonald, PhD

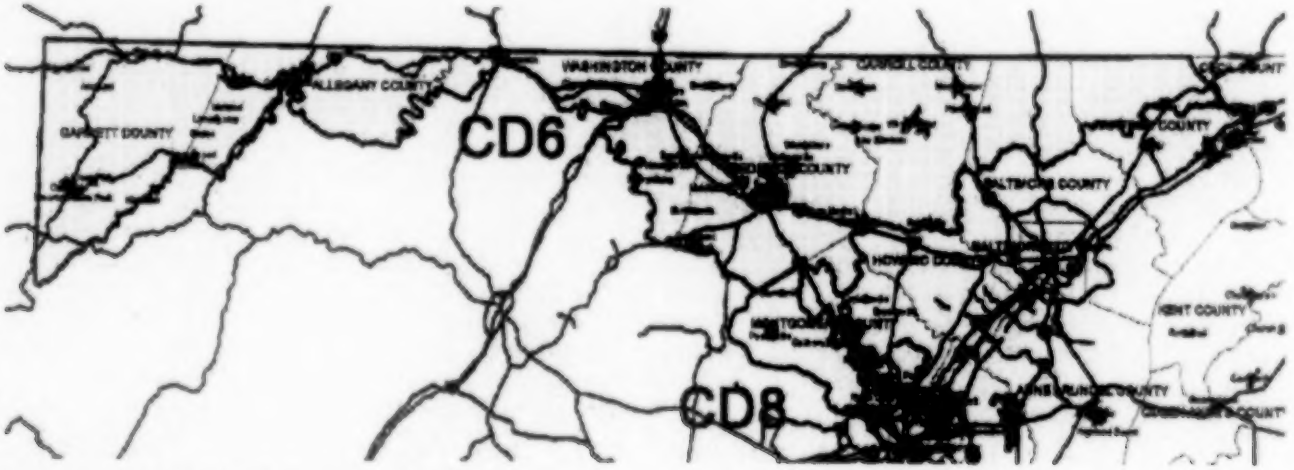


Figure 1. Benchmark Sixth Congressional District.

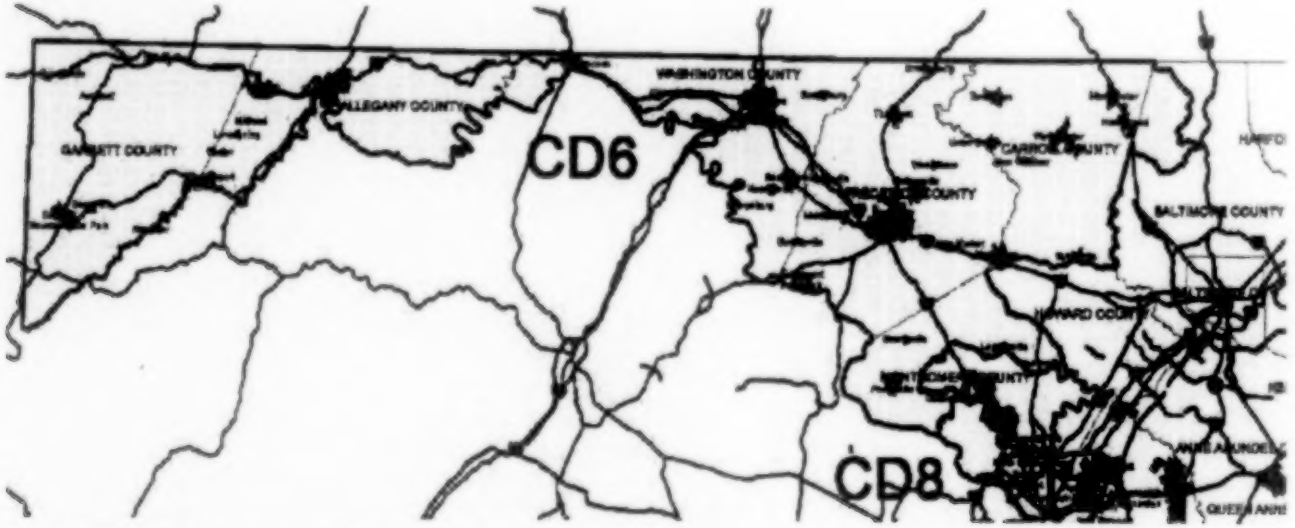


Figure 2. Black Caucus Plans (A& B) Proposed Sixth Congressional District.

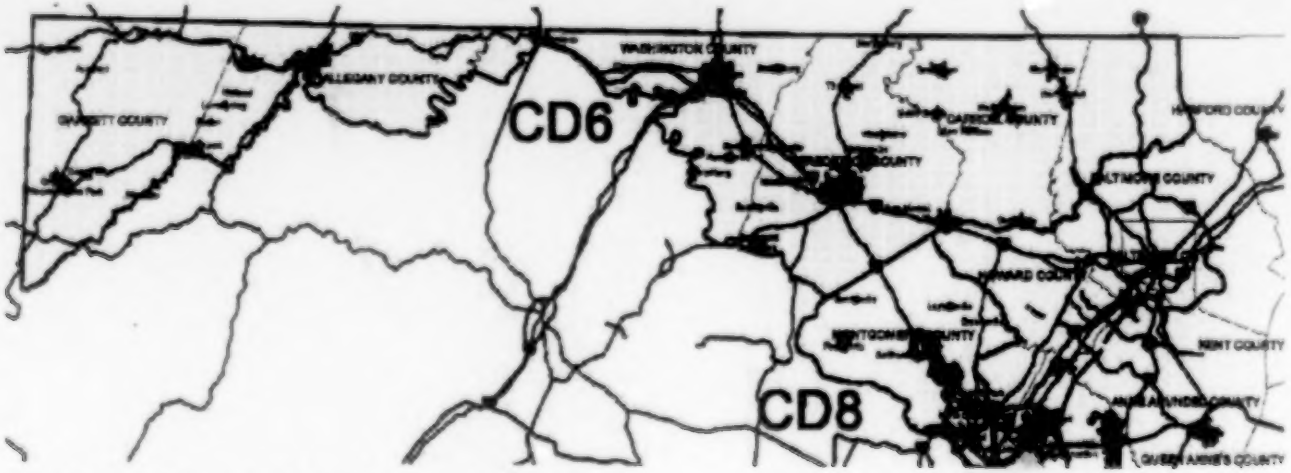


Figure 3. GOP Plan, Proposed Sixth Congressional District.

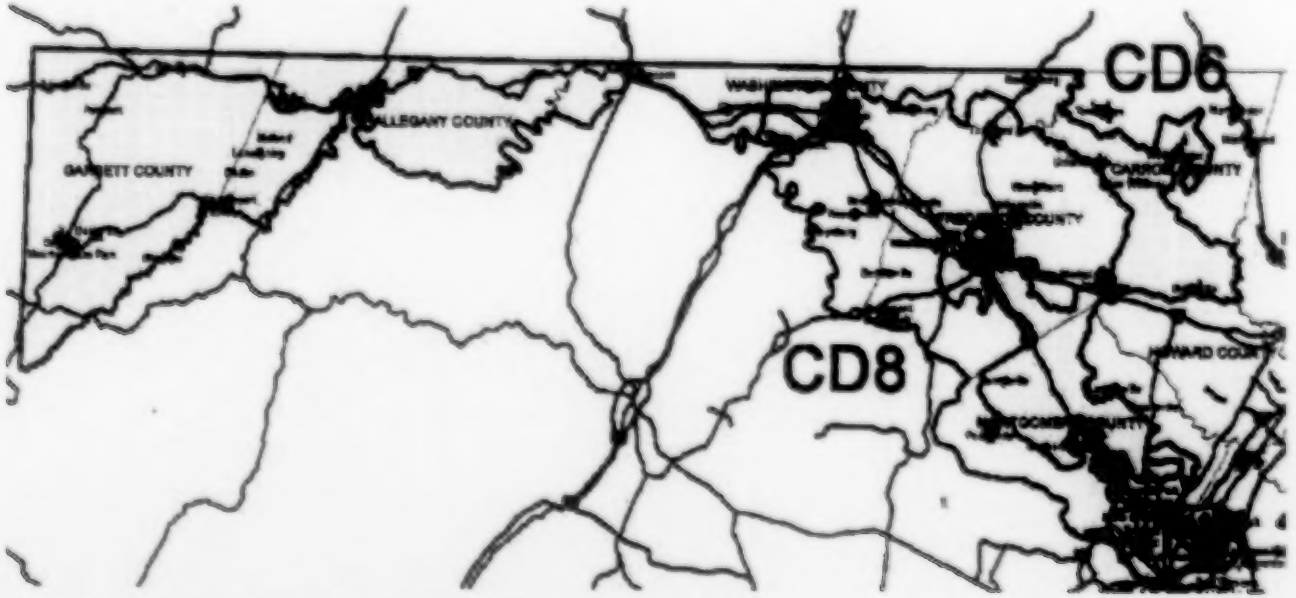


Figure 4. Congressional Proposal 1, Proposed Sixth Congressional District.

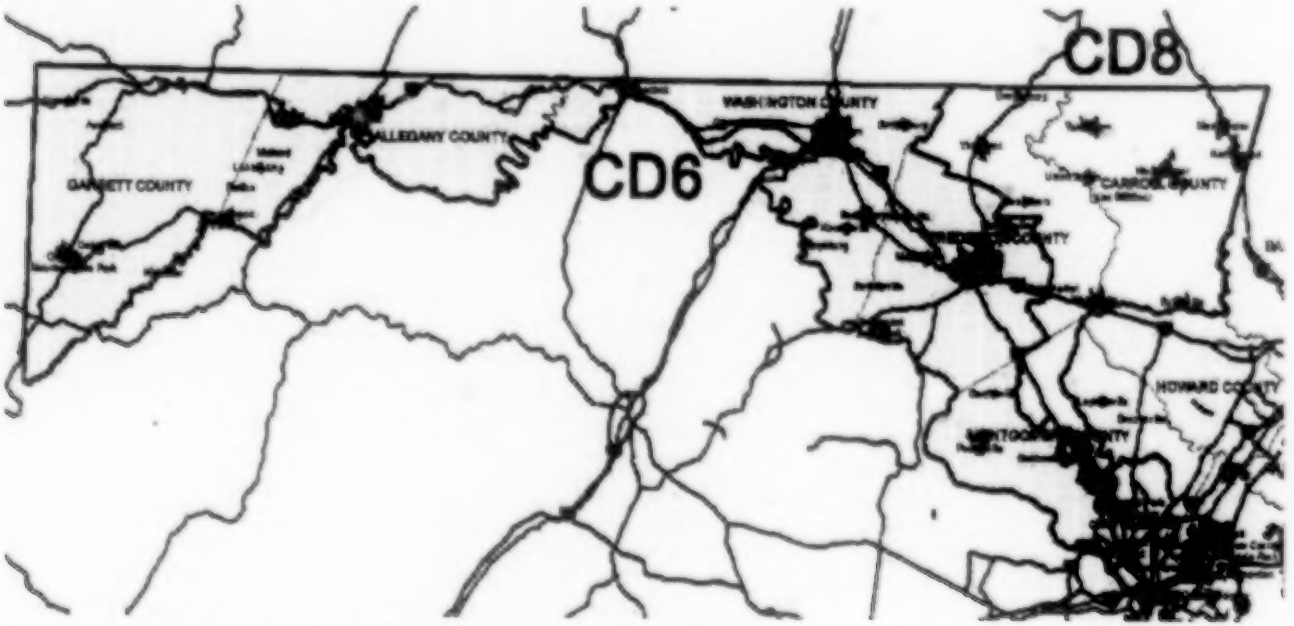


Figure 5. Congressional Proposal 2, Proposed Sixth Congressional District.

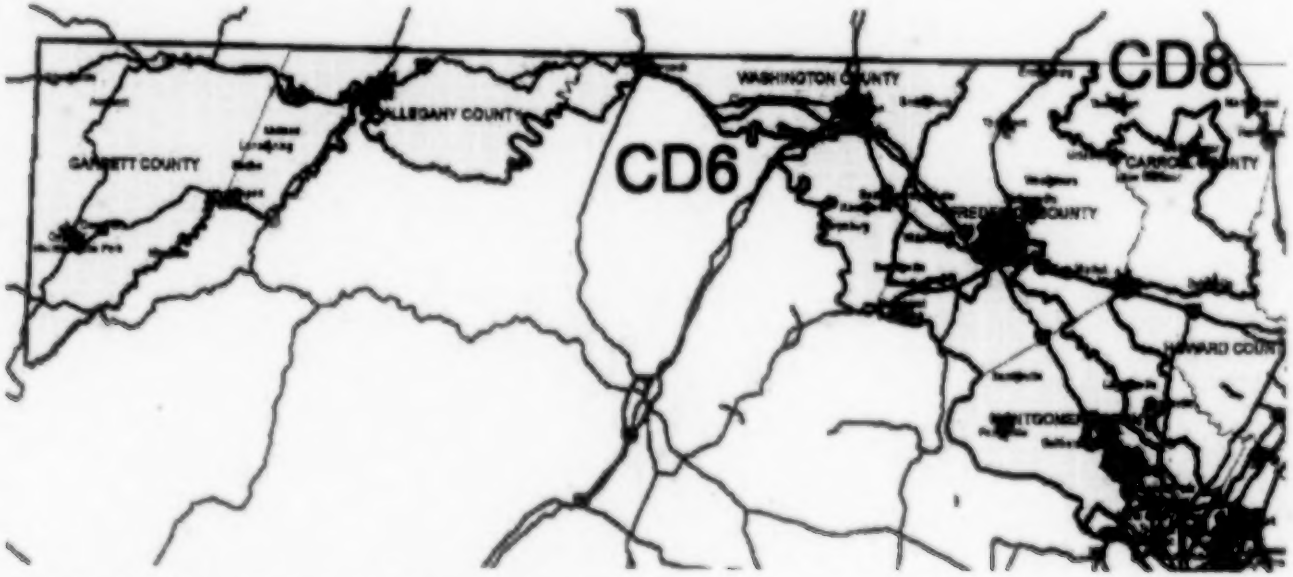


Figure 6. Final GRAC Map, Proposed Sixth Congressional District.

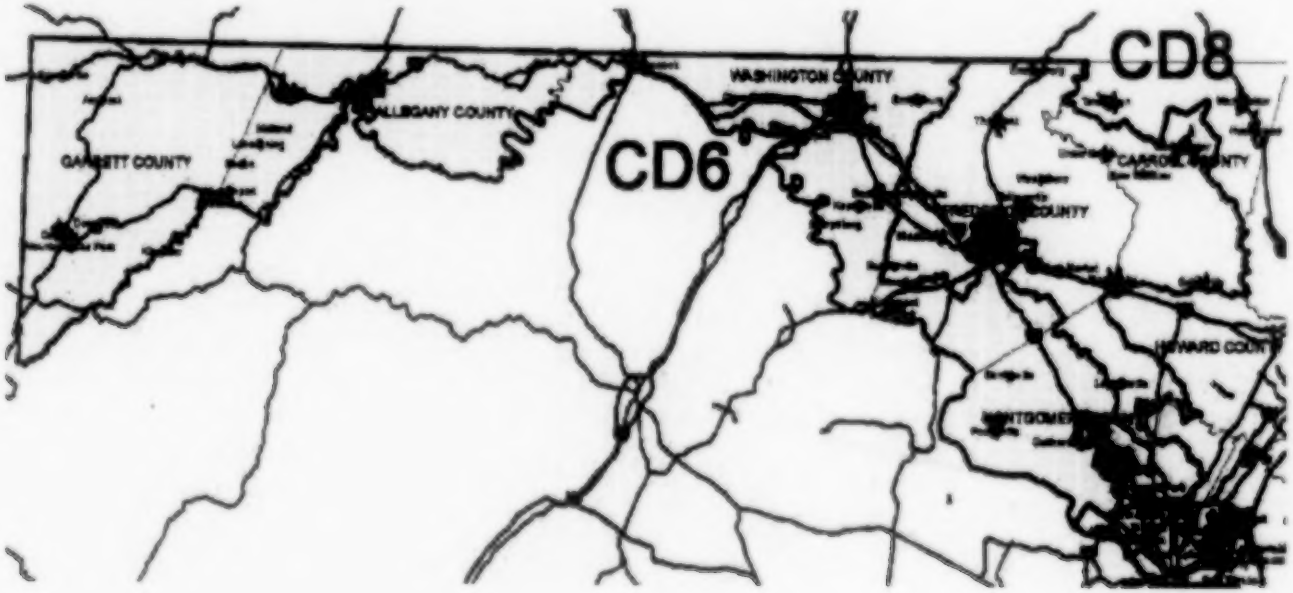


Figure 7. Option 1, Proposed Sixth Congressional District.

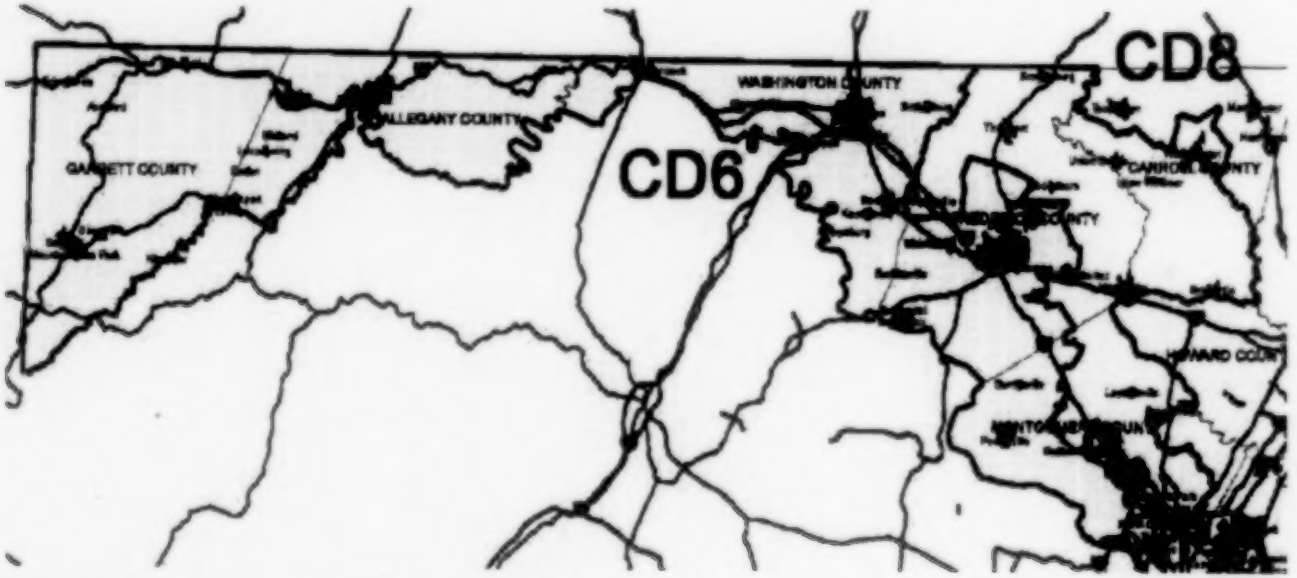


Figure 8. Option 3, Proposed Sixth Congressional District.

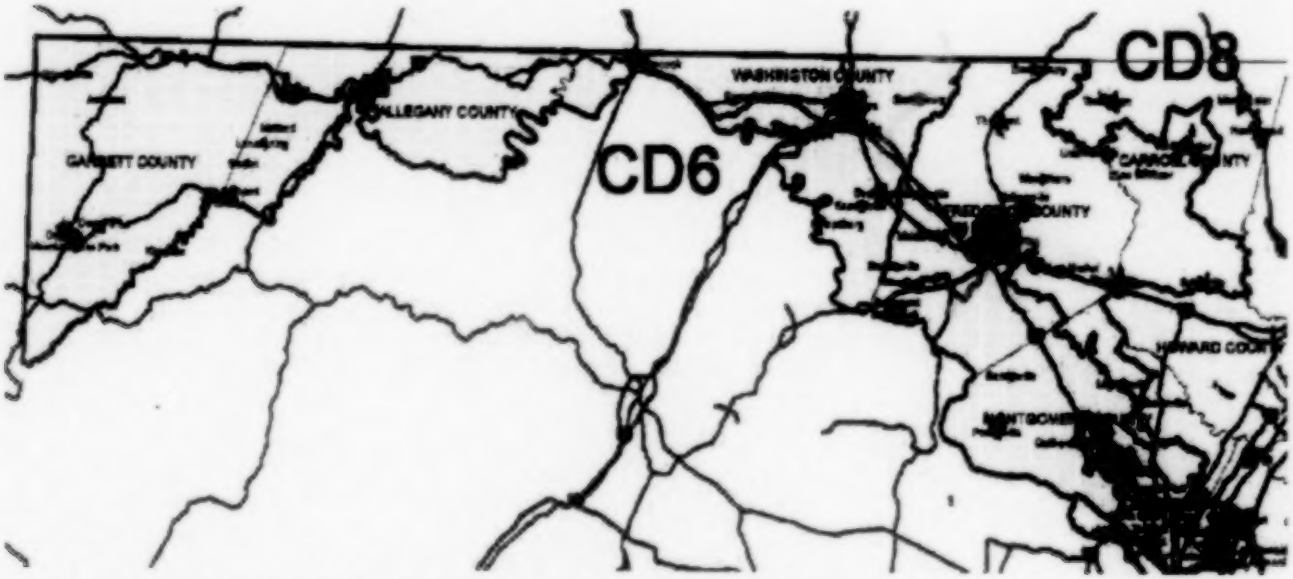


Figure 9. Final Governor Map (Adopted by Legislature), Adopted Sixth Congressional District.

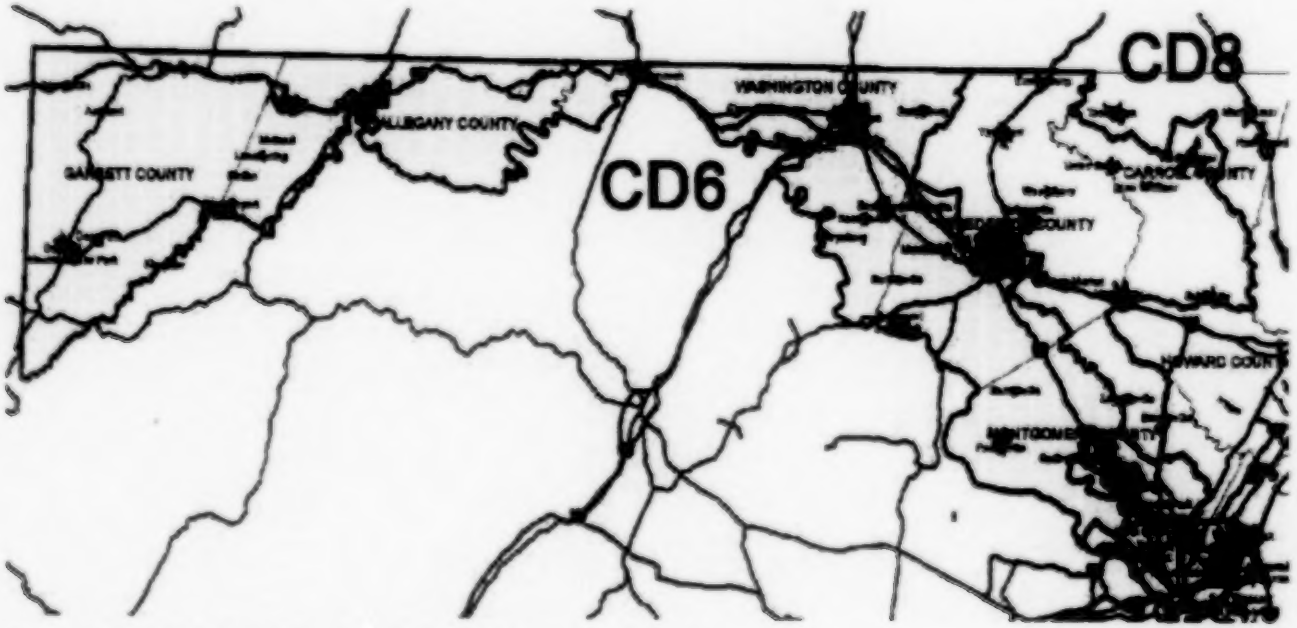


Figure 10. Option 4, Abandoned Plan for Sixth Congressional District.

Gmail

Jason Gleason <jason.gleason03@gmail.com>

Fwd: Fw: Map

1 message

Brian Romick <brianromick@gmail.com> Tue, Oct 18, 2011 at 9:59 AM
To: Jason Gleason <jason.gleason03@gmail.com>

——— Forwarded message ———
From: "Yaakov \"Jake\" Weissmann" <yweissm1@gmail.com>
Date: Tue, 18 Oct 2011 09:57:31 -0400
Subject: Re: Fw: Map
To: Brian Romick <brianromick@gmail.com>

14-004 in the 3rd is a couple of census blocks with no people in it (probably done to clean it up somewhere along the line by us or Eric). I sent it on to Pat, and let you know if he says anything.

On Mon, Oct 17, 2011 at 9:35 PM, Brian Romick <brianromick@gmail.com> wrote:

> Do you happen to know the answer to this? Thank you.
>
> ——— Forwarded message ———
> From: Eric Hawkins <ehawkins@ncecservices.com>
> Date: Mon, 17 Oct 2011 20:47:49 -0400
> Subject: RE: Fw: Map
> To: Brian Romick <brianromick@gmail.com>
>
> Not really sure what this is all about, but those precincts aren't
> included in the third district in the final plan I received from the
> state.
>
> Eric Hawkins
> NCEC Services, Inc.
> 202-459-2170
> ehawkins@ncecservices.com
>
> ——Original Message——
> From: Brian Romick [mailto:brianromick@gmail.com]
> Sent: 10/17/2011 8:37 PM
> To: Eric Hawkins
> Subject: Fwd: Fw: Map
>
> Is this something to worry about?
>
> ——— Forwarded message ———
> From: jason.gleason03@gmail.com
> Date: Tue, 18 Oct 2011 00:27:09 +0000
> Subject: Fw: Map
> To: Brian Romick <brianromick@gmail.com>
>
> See below. Not sure who we tell about this but it may throw population
> off unless I'm missing something. Bill appeared to add 2-018 in AAC
> and part of 14-004 in Balt Co from list Eric sent. .
> ——Original Message——
> From: Eric Hawkins
> To: Jason Gleason
> Subject: RE: Map
> Sent: Oct 17, 2011 8:12 PM
>
> Haven't received anything new and nothing that includes those changes.

> 02-018 has 2,591 persons and a 53.1% DPFM. 04-004 has 436 persons with
> a 44.3% DPFM.
>
> Eric Hawkins
> NCEC Services, Inc.
> 202-459-2170
> ehawkins@ncecservices.com
>
>
> -----Original Message-----
> From: jason.gleason03@gmail.com [mailto:jason.gleason03@gmail.com]
> Sent: 10/17/2011 7:29 PM
> To: Eric Hawkins
> Subject: Map
>
> Hey,
>
> Just went through the bill text in the General Assembly and it looks
> like a couple minor changes happened since the last spreadsheet you
> sent. Added to our district were 02-018 in AAC and 14-004 in balt co.
> Any idea what happened here and if something came out that I missed to
> accommodate the population. Finally is our performance still 58.36?
>
> Jason
> Sent from my Verizon Wireless BlackBerry
>
> Sent from my Verizon Wireless BlackBerry
>

The Seats in Trouble Forecast of the 2010 Elections to the U.S. House

James E. Campbell, *University at Buffalo, SUNY*

All indications are that 2010 will be a very good year for Republicans. After two election setbacks, they are poised for a comeback. Partisanship, ideology, the midterm decline from the prior presidential surge, the partisanship of districts being defended, and even President Obama's approval ratings have set the stage for significant seat gains by Republicans in the House.

THE CONTEXT OF THE 2010 MIDTERM

In terms of partisanship, the electorate is nearly evenly divided, certainly more so than the current House division of 257 Democrats to 178 Republicans (59% to 41%) left by the 2008 election. Democrats gained a few points in macropartisanship in 2008, offsetting Republican gains in 2004, but the slight edge for the Democrats left after the 1984 realignment of party identification remains pretty much intact (Campbell forthcoming; Norpoth 1987). An average of three Gallup polls conducted between May and mid-June of 2010 show an electorate that is 46% Democratic and 43% Republican (Gallup 2010).

In terms of ideology, self-described conservatives continue to outnumber self-described liberals by a substantial margin (Campbell 2007). In June 2010, 42% of respondents told Gallup that they were conservatives, while 20% claimed to be liberals, and 35% said they were moderates (Saad 2010). Not surprisingly, 49% of Americans thought that the Democratic Party was too liberal, and 48% found them to be either about right or even too conservative (Jones 2010a). The nearly even division in partisanship and the conservative tilt in ideology suggest that the current equilibrium in the electorate is far more Republican than the status quo in the House.

The results of the last two elections also boost Republican prospects. The midterm decline from the 2008 presidential surge should benefit the Republicans. A number of Democrats will be running without the help they received from President Obama's victory in 2008 (Campbell 1960; Campbell 1997). Democratic gains in 2006 (31 seats) and 2008 (24 seats) have left many House Democrats in the unenviable position of running in districts hospitable to Republicans. Democrats are defending 47 seats in districts that were carried by Bush in 2004 and McCain in 2008. In contrast, Republicans hold only six seats in districts carried by Kerry in 2004 and Obama in 2008. In the language of the exposure thesis, Democrats are overexposed going into the 2010 midterm (Oppenheimer, Stimson, and Waterman 1986). The number of seats they currently hold far exceeds their base or average holdings in the last 20 years. In the 10 elections since 1990, Democrats won an average of 226 seats, 31 fewer than in 2008.

The political climate as we enter the fall campaign season also favors Republicans. Partisan parity, political polarization, the departure of an unpopular Republican president, and his replacement with a very liberal Democratic president and Congress constitute a powerful political mix that may lead to a Republican resurgence. Having been on the defensive in 2006 and 2008 and then relegated to the sidelines as President Obama and the Democratic-controlled Congress passed liberal policies over the last two years, conservatives are energized for 2010. Polls, primary turnouts, the emergence of the Tea Party movement, and Republican victories in 2009 (including Scott Brown's Senate win in Massachusetts) are unmistakable stirrings of a revitalized right. In June, Gallup reported that 53% of Republicans were more enthusiastic than usual about voting. Only 35% of Democrats were similarly enthusiastic (Jones 2010b). And although President Obama is not unpopular at this point (his approval ratings stand in the mid 40s), he also does not have the strong approval ratings that would provide much help to his party in staving off significant midterm losses (Tufte 1978).

SEATS IN TROUBLE

While long-term factors are quite favorable for Republicans in 2010, they indicate only the election's potential and therefore provide only limited guidance in anticipating the results of the election. Greater forecast accuracy requires predictors that take into account the more localized, short-term, and prospective factors that are critical to congressional outcomes as well as the effects of national, long-term, and retrospective considerations. My strategy in devising an accurate and plausible forecasting equation was to build a model around a core predictor that would offer an accurate reading of where the election stood at the time of the forecast, and to then augment the model with contextual variables that would provide guidance on how things were likely to change between the time of the forecast and the election. This is the same strategy that was used in devising the trial-heat model of the presidential vote (Campbell and Wink 1990).

The model developed and used here for House elections is the "seats in trouble model." I also think of it as the "exposure-thesis-on-steroids model."[1] The exposure thesis suggests that an overexposed party holds more seats than usual, and that this might leave it with more seats in trouble or in danger of being lost. The exposure-thesis-on-steroids or seats in trouble model is based on estimates of the extent to which one party has more seats *actually* in trouble.

The core variable of this seat change forecasting model is based on the intensive political handicapping of congressional

doi:10.1017/S1049096510001095

elections conducted for the last 26 years by Charlie Cook and his colleagues at the *Cook Political Report*.[2] Beginning in 1984 and in each election since, Cook has made a comprehensive district-by-district assessment of the electoral prospects of each political party at various points before and during the election year. Each seat is scored as "solid" Democratic, "likely" Democratic, "leaning" Democratic, "toss-up," "leaning" Republican, "likely" Republican, or "solid" Republican. According to Cook, seats identified as likely for a party "are not considered competitive at this point, but have the potential to become politically engaged" (Cook 2010). Leaning districts are considered competitive, "but one party has an advantage." In toss-up districts, "either party has a good chance of winning." For forecasting purposes in both on-year and midterm elections, I used Cook's latest assessment, made between July and the first day of September in the year of the election being forecast. In most years, the assessment used was made in mid- to late August. Since assessments were not conducted during these months in 1986 and 1990, those years could not be included in constructing the forecasting equation. This leaves 11 usable elections.

the number of seats that Cook viewed as solid, likely, or leaning toward that party. The remainder is the number of seats [illegible] in trouble. This figure is slightly different from the number of toss-up districts, since it also counts districts currently held by a party but anticipated by Cook to be leaning, likely, or solidly in the opposing party's column. This algorithm also addresses the problem of how to count toss-up districts in redistricting years. The predictor variable is the difference between each party's number of seats in trouble. The logic of the indicator is that the more troubled seats a party holds relative to the opposing party, the more seats it should lose in the election.

An alternative measure that included leaning seats in the index as potentially troubled seats was also examined but did not strengthen the equation. This would seem to reflect both the generally high success rates that the parties have had in holding their leaning seats as well as the variance in that rate (the 2006 and 2008 Republican losses). Because of the generally high success rates for parties in their leaning districts and the occasional variance in this rate, the indicator counts as troubled only those districts that are toss-ups or worse.

Democratic gains in 2006 (31 seats) and 2008 (24 seats) have left many House Democrats in the unenviable position of running in districts hospitable to Republicans. Democrats are defending 47 seats in districts that were carried by Bush in 2004 and McCain in 2008. In contrast, Republicans hold only six seats in districts carried by Kerry in 2004 and Obama in 2008. In the language of the exposure thesis, Democrats are overexposed going into the 2010 midterm.

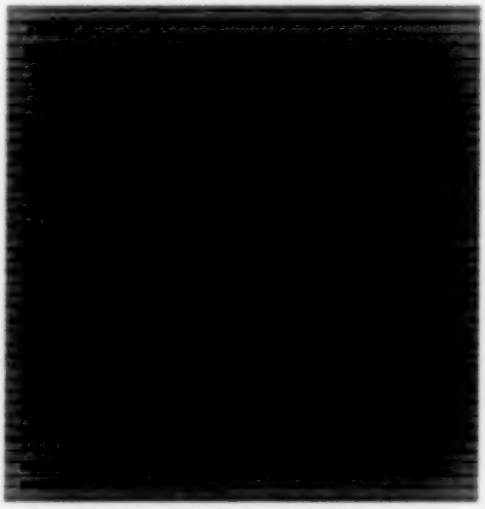
Cook's record of accuracy in handicapping individual district elections is impressive. Although the powers of incumbency and district partisanship play a role in predicting outcomes, there is clearly a great deal of value-added in these late summer assessments. In the 11 elections examined, districts rated as solidly in a party's column turned out to be nearly sure bets (99.8% for Democrats and 99.7% for Republicans). The parties were nearly as certain to hold their likely seats (94.0% for Democrats and 95.1% for Republicans) and were very successful in holding their leaning seats (88.2% for Democrats and 85.0% for Republicans)—although leaning districts were not quite so safe for Republicans in the last two election cycles. In 2006, Republicans held only 38% of the seats identified as leaning their way in late August. In 2008, they won only 55% of these leaners.[3]

The aggregate outcomes in toss-up districts were about as anticipated and generally quite different from the outcomes in leaning districts. When the previous party holding the seat could be determined (setting aside a number of seats affected by reapportionment and redistricting), Democrats held about 48% of their toss-up districts and Republicans about 55% of theirs.

From Cook's district data, I constructed an aggregate forecasting measure: seats in trouble. The measure takes the number of seats that a party won in the prior election and deducts

Table 1 presents the number of troubled seats for each party and the difference between them, as well as the Democratic seat change in these 11 elections. Note that it is possible to have a negative number of seats in trouble for a party if some seats currently held by the opposing party are seen as likely or sure wins for the other party in the next election, or if a party has gained seats in special elections since the previous national election. This was the case for the Democrats in 2006.[4]

The pattern of seats in trouble corresponds quite closely with the extent and direction of seat change. In most of this period, seat losses were small, as were the differences in the number of seats each party held that were in trouble. The three elections in which one of the parties registered significant seat gains were those in which the other party had many more seats in peril. In the Republican realignment year of 1994, the last act of the staggered realignment (Campbell 2006; Paulson 2006), the Democrats could count 47 seats in trouble—and they ended up losing even more. In 2006, with an unpopular president, late August estimates showed 19 Republican seats in trouble. Late-breaking congressional scandals increased this number and eventually led to Republican seat losses that were significant enough to cost them control of the House. In 2008, with 27 seats in trouble (compared to none for the Democrats), the Republicans lost another two dozen seats.



PRIOR SEATS HELD AND PRESIDENTIAL APPROVAL

With the principal "seats in trouble" predictor in place, the second component of the forecasting model was to determine whether any contextual variables improved the accuracy of the forecasting equation. I examined several variables, including the generic vote, but found only two that seemed plausible and added predictive value. The first was the number of seats a party won in the previous election. This takes note of the fact that a party cannot lose seats that it does not have and cannot gain seats that it already holds (Campbell 1997, 131). It also acknowledges the political fact that it becomes increasingly difficult to gain seats as a party's seat holdings increase. A party registers gains first where it is easiest for it to do so, and it becomes progressively more difficult for the party to pick up additional seats in areas that are more inclined to support the opposition party.

The second contextual variable was presidential approval. As the leader of the party, reactions to the president affect the party's fortunes both in on-years (Campbell 1997) and in midterms (Tufte 1978). While presidential approval ratings have long been used to reflect the referendum or retrospective nature of elections, especially midterm elections, not much attention has been given to determining the neutral value of approval—that is, the value of approval necessary for the president to neither help nor hurt the party's congressional fortunes. After examining the empirical evidence, it is clear that presidential approval ratings mean one thing in presidential elections in which two parties are contending for the office and quite another in midterms in which there is no presidential choice to be made. There is little evidence to support the commonly assumed (and rarely justified) 50% mark as being the neutral point in either case. In presidential elections, presidents with 50% approval always win. In midterms, the parties of presidents with 50% approval always lose seats. The on-year politically neutral point seems to be closer to 45%. Some voters who disapprove of the president still vote for him, believing him to be better than the alternative.

The neutral point is quite a bit higher in midterms, and recent midterm successes by both parties provide us with some bearings in its determination. Democratic in-party gains in the 1998 midterm and Republican in-party gains in the 2002 midterm suggest that the neutral point in midterms is around 65%. Between 1870 and 1994, the president's party gained seats in only one of the 32 midterm elections. That year was 1934, the first midterm election of the New Deal realignment. Then, in 1998, with President Clinton's approval ratings in Gallup sitting at 66% at the end of October, Democrats defied the odds and gained five seats. Four years later, after September 11 and with President Bush's approval ratings in Gallup at 63% just prior to the 2002 election, the Republicans also defied the midterm loss rule and gained eight seats. Without a partisan presidential choice on the table, the positivity inclination of most citizens seems to guide their approval ratings toward the high side in midterm elections. A 65% rating in the heat of a presidential year is astounding and a precursor to a landslide. A 65% rating in a midterm sounds great but, politically, is approximately neutral and only a precursor to holding the status quo.

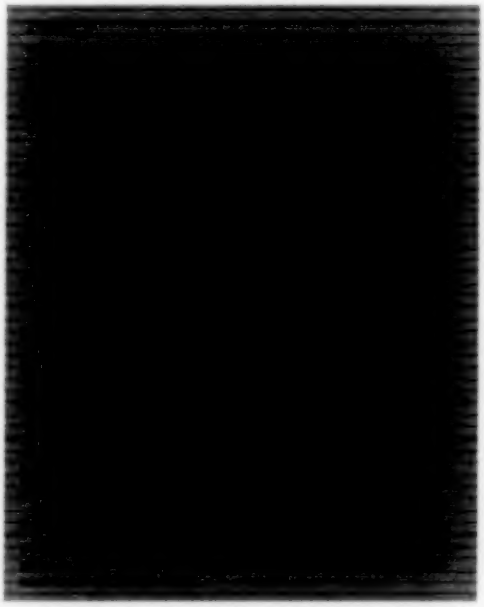
In this model, I calculated a presidential approval index by subtracting the neutral point (45% on-year or 65% midterm) from the Gallup measure of presidential approval near the end of August. The index was oriented by party by taking its negative value when a Republican was president. The index ranges from −21 in 1994, when President Clinton's approval rating stood at 44%, to 27 in 2006, when President Bush's approval rating was 38%. As one might expect, the approval index is highly correlated ($r = -.70$) with the seats in trouble variable.

THE FORECAST EQUATIONS

Table 2 presents the forecast equations. The predicted election outcome is seat change for the Democratic Party. Outcomes are calculated from the prior election rather than after special election results. The data for the number of seats held by each party are from the U.S. House of Representatives, Office of the Clerk (2010). For comparability, seats won by independent or third-party candidates are divided equally between the two major parties.

Equation 1 presents the simple bivariate relationship between Democratic seat change and the relative number of Democratic seats in trouble. This simple association is quite strong. A party should expect to lose slightly more than one seat for every net seat that is in trouble.

Equation 2 adds the initial number of seats held by the Democrats. A party loses about one seat for every one that is in trouble and one seat for every additional five that it holds at the outset. While the equation has a strong fit, a substantial envelope of uncertainty around any forecast remains. The median absolute error, based on out-of-sample estimates, is about 5.5 seats. There are numerous local factors that assessments of seats in trouble may have missed or that may have developed after the last summer forecasts.



In equation 3, the presidential approval index is added in lieu of the lagged seats variable. The overall fit of equation 3 is about the same as that of equation 2. This is reassuring in that two different contextual variables added to the seats in trouble consideration produce equations of approximately equal strength. Equation 3 indicates that a party should expect to lose just under one seat for every seat in trouble, and that a party should expect to lose about six seats for every 10 points that it falls short of the neutral level of presidential approval. Because of the small number of cases available for the estimation, an equation with both the lagged seats and the approval index along with the seats in trouble variable produced coefficients that were not significant at conventional levels for the lagged seats and approval index variables.

THE 2010 FORECAST

What does the seats-in-trouble model predict for 2010? First, as of the *Cook Political Report*'s assessment in late August 2010, Democrats have 42 seats in trouble and Republicans stand at negative two. The seats in trouble variable is thus 44, about as large as it was in the 1994 midterm and consistent with the Republican disposition of the election's fundamentals or context. The lagged number of Democratic seats held is 257. President Obama's approval rating in late August 2010 stood at 44%. With a neutral point at the midterm of 65%, the presidential approval index stands at negative 21.

Based on the seats in trouble indicator and the two contextual variables of equations 2 and 3, the forecast is that Democrats will lose about 51 or 52 seats, leaving them with a total of 205 or 206 seats. The odds appear to be quite favorable for the Republicans regaining the House majority that they lost in 2006. ■

NOTES

1. With due recognition to Bruce Oppenheimer, Jim Stimson, and Richard Waterman, the developers of the original exposure thesis (1986).
2. My thanks to Charlie Cook, Meredith Harman, Ben Naylor, and everybody at the *Cook Political Report* for so generously sharing their data. See Cook 2010.
3. Both the 2006 and 2008 elections may have been affected by unusual late-breaking events. The Mark Foley scandal broke in late September of 2006, and toss-up Republican districts increased from 18 to 26 in a couple of weeks. The Wall Street meltdown broke in mid-September of 2008, and the number of Republican toss-ups eventually rose from 19 to 30. There are indications that Cook underestimates a party's troubled seats in elections with strong political currents, which he refers to as "wave elections" (e.g., 1994, 2006, and 2008). Reflecting this tendency to underestimate, a squared troubled seats variable did perform somewhat better than the simple variable, but there are too few cases upon which to base this more complex specification.
4. In 2006, the Democrats started off with 202 seats and were credited with half of the independent seat. 183 seats were considered solid and 11 likely for 2006. Another 10 seats, including one previously Republican seat, were counted as leaning Democratic. Because there were no Democratic toss-up seats, their net number of seats in trouble was a negative 1.5 seats.

REFERENCES

Campbell, Angus. 1960. "Surge and Decline: A Study of Electoral Change." *Public Opinion Quarterly* 24 (3): 397–418

Campbell, James E. 1997. *The Presidential Pulse of Congressional Elections*. 2nd ed. Lexington: University Press of Kentucky.

———. 2006. "Party Systems and Realignments in the United States, 1868–2004." *Social Science History* 30 (3): 359–86.

———. 2007. "Polarization Runs Deep, Even by Yesterday's Standards." In *Red and Blue Nation? Characteristics and Causes of America's Polarized Politics*, ed. Pietro S. Nivola and David W. Brady, 106–16. Washington, DC: Brookings.

———. Forthcoming. "Explaining Politics, Not Polls: Examining Macropartisanship with Recalibrated NES Data." *Public Opinion Quarterly*.

Campbell, James E., and Kenneth A. Wink. 1990. "Trial-Heat Forecasts of the Presidential Vote." *American Politics Quarterly* 18 (3): 251–69.

Cook, Charlie. 2010. *The Cook Political Report*. http://www.cookpolitical.com/.

Gallup. 2010. "Party Affiliation" http://www.gallup.com/poll/15370/Party-Affiliation.aspx.

Jones, Jeffrey M. 2010a. "Near-Record 49% Say Democratic Party 'Too Liberal'." Gallup. http://www.gallup.com/poll/139877/Near-Record-Say-Democratic-Party-Liberal.aspx.

———. 2010b. "Republicans' Midterm Voting Enthusiasm Tops Prior Years." Gallup. http://www.gallup.com/poll/140819/Republicans-Midterm-Voting-Enthusiasm-Tops-Prior-Years.aspx.

Norpoth, Helmut. 1983. "Under Way and Here to Stay: Party Realignment in the 1980s?" *Public Opinion Quarterly* 51 (3): 376–91.

Oppenheimer, Bruce L., James A. Stimson, and Richard W. Waterman. 1986. "Interpreting U.S. Congressional Elections: The Exposure Thesis." *Legislative Studies Quarterly* 11: 227–47.

Paulson, Arthur. 2006. *Electoral Realignment and the Outlook for American Democracy*. Boston: Northeastern University Press.

Saad, Lydia. 2010. "In 2010, Conservatives Still Outnumber Moderates, Liberals." Gallup. http://www.gallup.com/poll/141032/2010-Conservatives-Outnumber-Moderates-Liberals.aspx.

Tufte, Edward R. 1978. *Political Control of the Economy*. Princeton, NJ: Princeton University Press.

U.S. House of Representatives, Office of the Clerk. 2010. "Party Divisions of the House of Representatives (1789 to Present)." http://clerk.house.gov/art_history/house_history/partyDiv.html.

THE COOK POLITICAL REPORT

Rep. Roscoe Bartlett (R)

In race 2010 House - MD-06

RACE OVERVIEW

RACE RATING

Initial Rating: 11/12/08

Solid R

MORE CANDIDATE INFO

Roscoe Bartlett's FEC data

Allegany	12,881	814	135	549	14,159	38,128	37.14%
Anne Arundel	67,052	6,590	1,449	1,962	79,053	264,150	29.93%
Baltimore City	61,359	7,235	1,877	2,270	72,741	319,342	22.78%
Baltimore County	110,652	12,875	1,908	3,347	128,782	416,139	30.95%
Calvert	11,185	925	217	386	12,713	55,811	22.78%
Caroline	3,838	637	99	104	4,678	14,837	31.53%
Carroll	24,596	1,770	210	771	27,347	86,883	31.48%
Cecil	11,851	1,285	129	281	13,546	59,337	22.83%
Charles	18,111	1,962	241	511	20,825	89,282	23.32%
Dorchester	5,247	854	90	510	6,501	17,310	37.56%
Frederick	30,681	1,611	300	737	33,329	136,477	24.42%
Garrett	5,701	732	81	282	6,776	16,256	41.68%
Harford	34,643	3,790	331	841	39,605	135,151	29.30%
Howard	33,197	4,628	607	1,009	39,441	176,602	22.33%
Kent	3,242	848	34	179	4,301	12,382	34.74%
Montgomery	98,619	7,585	1,740	5,735	113,679	569,234	19.97%
Prince George's	87,177	14,541	2,450	2,538	106,706	498,718	21.40%
Queen Anne's	7,869	1,006	207	242	9,324	24,775	37.63%
Saint Mary's	12,135	978	149	630	13,892	47,645	29.16%
Somerset	3,461	391	66	186	4,104	11,521	35.62%
Talbot	5,550	1,431	43	244	7,268	21,108	34.43%
Washington	19,089	833	115	856	20,893	82,729	25.25%
Wicomico	10,609	1,444	163	588	12,804	44,687	28.65%
Worcester	8,948	927	110	529	10,514	29,342	35.83%
Total Turnout By Party	687,673	77,290	12,731	25,287	802,981	3,167,846	
Total Voter Turnout	687,673	77,290	12,731	25,287	802,981	3,167,846	25.35%

DEMOCRAT	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	5,032	260	47	236	5,575	16,598	33.59%
Anne Arundel	32,050	4,796	553	961	38,360	144,792	26.51%
Baltimore City	57,391	6,885	1,344	2,043	67,663	287,660	23.52%
Baltimore County	75,455	10,059	851	2,216	88,581	289,193	30.63%
Calvert	5,096	488	85	169	5,818	23,050	25.24%
Caroline	1,467	314	24	49	1,854	7,452	24.88%
Carroll	6,519	591	55	268	7,433	33,211	22.38%
Cecil	5,348	665	65	153	6,229	24,387	25.54%

Charles	11,453	1,380	176	289	13,298	50,344	26.41%
Dorchester	2,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	10,375	34.03%
Frederick	11,130	761	105	345	12,341	51,932	23.76%
Garrett	1,120	177	6	56	1,359	5,003	27.16%
Harford	13,357	1,593	108	371	15,429	61,920	24.92%
Howard	18,615	3,149	339	593	22,696	85,350	26.59%
Kent	1,547	460	15	97	2,119	6,132	34.56%
Montgomery	72,267	6,067	1,180	4,273	83,827	321,759	26.05%
Prince George's	79,139	13,439	1,839	2,235	96,652	400,577	24.13%
Queen Anne's	2,882	454	57	110	3,503	11,013	31.81%
Saint Mary's	5,724	472	47	293	6,536	24,542	26.63%
Somerset	1,589	189	25	91	1,894	7,192	26.33%
Talbot	2,230	659	21	97	3,007	10,134	29.67%
Washington	5,993	272	36	329	6,630	31,233	21.23%
Wicomico	4,950	779	57	293	6,079	25,126	24.19%
Worcester	4,132	474	34	318	4,958	15,643	31.69%
Total Turnout By Party	427,187	54,762	7,123	16,320	505,392	1,944,620	25.99%

REPUBLICAN	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	7,677	337	65	308	8,387	19,610	42.77%
Anne Arundel	35,002	3,794	409	981	40,186	119,358	33.67%
Baltimore City	3,968	350	128	227	4,673	31,662	14.75%
Baltimore County	35,197	2,818	352	1,131	39,496	126,946	31.11%
Calvert	5,831	438	97	207	6,573	22,150	29.67%
Caroline	2,371	323	34	55	2,783	7,385	37.68%
Carroll	18,077	1,179	86	503	19,845	53,672	36.97%
Cecil	6,078	580	48	125	6,829	22,544	30.29%
Charles	5,936	537	55	197	6,725	24,484	27.47%
Dorchester	2,564	275	26	95	2,960	6,935	42.68%
Frederick	18,196	784	139	361	19,480	57,249	34.03%
Garrett	4,581	555	36	226	5,398	11,253	47.97%
Harford	20,804	2,153	160	462	23,579	62,259	37.87%
Howard	13,346	1,311	173	381	15,211	54,585	27.87%
Kent	1,578	365	17	80	2,030	4,423	45.90%
Montgomery	22,761	1,259	317	1,223	25,560	122,513	20.86%
Prince George's	6,719	924	171	258	8,072	46,360	17.41%
Queen Anne's	4,987	552	85	132	5,756	13,762	41.83%
Saint Mary's	6,411	506	57	337	7,311	23,103	31.65%
Somerset	1,872	202	31	95	2,200	4,329	50.82%
Talbot	3,320	772	16	147	4,255	10,974	38.77%
Washington	12,517	547	60	502	13,626	36,672	37.16%
Wicomico	5,659	665	58	295	6,677	19,559	34.14%
Worcester	4,816	453	41	211	5,521	13,699	40.30%

Total Turnout By Party	250,268	21,887	2,659	8,539	283,133	915,506	30.93%

GREEN	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	1	3	0	0	4	45	8.89%
Anne Arundel	0	0	7	0	7	0	
Baltimore City	0	0	11	0	11	0	
Baltimore County	0	0	9	0	9	0	
Calvert	5	0	1	1	7	119	5.88%
Caroline	0	0	1	0	1	0	
Carroll	0	0	0	0	0	0	
Cecil	6	0	0	0	6	141	4.26%
Charles	4	1	1	2	8	132	6.06%
Dorchester	0	0	0	0	0	0	
Frederick	15	2	1	0	18	356	5.06%
Garrett	0	0	1	0	1	0	
Harford	7	0	3	0	10	121	8.26%
Howard	17	2	1	1	21	442	4.75%
Kent	2	0	0	0	2	40	5.00%
Montgomery	66	5	2	4	77	1,426	5.40%
Prince George's	18	0	4	2	24	461	5.21%
Queen Anne's	0	0	0	0	0	0	
Saint Mary's	0	0	0	0	0	0	
Somerset	0	0	1	0	1	0	
Talbot	0	0	0	0	0	0	
Washington	8	1	0	0	9	220	4.09%
Wicomico	0	0	0	0	0	0	
Worcester	0	0	0	0	0	0	
Total Turnout By Party	149	14	43	10	216	3,503	6.17%

CONSTITUTION	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	1	0	0	0	1	2	50.00%
Anne Arundel	0	0	4	0	4	0	
Baltimore City	0	0	0	0	0	0	
Baltimore County	0	0	3	0	3	0	
Calvert	0	0	0	0	0	10	
Caroline	0	0	0	0	0	0	
Carroll	0	0	0	0	0	0	
Cecil	5	0	0	0	5	21	23.81%
Charles	5	0	0	0	5	17	29.41%
Dorchester	0	0	0	0	0	0	
Frederick	4	0	0	0	4	30	13.33%
Garrett	0	0	0	0	0	0	

Harford	0	0	0	0	0	13	
Howard	3	0	0	0	3	37	10.81%
Kent	1	0	0	0	1	2	50.00%
Montgomery	9	0	0	3	12	56	21.43%
Prince George's	2	0	0	0	2	37	5.41%
Queen Anne's	0	0	0	0	0	0	
Saint Mary's	0	0	0	0	0	0	
Somerset	0	0	0	0	0	0	
Talbot	0	0	0	0	0	0	
Washington	2	0	0	0	2	20	10.00%
Wicomico	0	0	0	0	0	0	
Worcester	0	0	0	0	0	0	
Total Turnout By Party	32	1	7	3	43	245	17.55%

LIBERTARIAN	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	5	2	0	1	8	48	16.67%
Anne Arundel	0	0	9	0	9	0	
Baltimore City	0	0	3	0	3	0	
Baltimore County	0	0	11	0	11	0	
Calvert	7	0	0	0	7	149	4.70%
Caroline	0	0	0	0	0	0	
Carroll	0	0	0	0	0	0	
Cecil	11	1	0	0	12	203	5.91%
Charles	8	1	1	1	11	193	5.70%
Dorchester	0	0	0	0	0	0	
Frederick	21	1	1	1	24	437	5.49%
Garrett	0	0	0	0	0	0	
Harford	14	1	0	0	15	233	6.44%
Howard	24	2	1	1	28	551	5.08%
Kent	2	1	0	0	3	34	8.82%
Montgomery	39	4	3	1	47	1,328	3.54%
Prince George's	19	5	8	1	33	510	6.47%
Queen Anne's	0	0	4	0	4	0	
Saint Mary's	0	0	1	0	1	0	
Somerset	0	0	0	0	0	0	
Talbot	0	0	0	0	0	0	
Washington	10	0	0	2	12	234	5.13%
Wicomico	0	0	1	0	1	0	
Worcester	0	0	0	0	0	0	
Total Turnout By Party	160	18	43	8	229	3,920	5.84%

UNAFFILIATED	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout

Allegany	125	9	22	3	159	1,672	9.51%
Anne Arundel	0	0	0	0	0	0	
Baltimore City	0	0	371	0	371	0	
Baltimore County	0	0	631	0	631	0	
Calvert	230	19	33	8	290	9,806	2.96%
Caroline	0	0	37	0	37	0	
Carroll	0	0	66	0	66	0	
Cecil	380	35	18	0	433	11,206	3.86%
Charles	671	41	8	21	741	13,526	5.48%
Dorchester	0	0	8	0	8	0	
Frederick	1,311	63	53	30	1,457	26,395	5.52%
Garrett	0	0	17	0	17	0	
Harford	444	39	56	8	547	10,292	5.31%
Howard	1,113	143	87	29	1,372	33,817	4.06%
Kent	99	23	2	2	126	1,618	7.79%
Montgomery	3,437	230	234	227	4,128	121,640	3.39%
Prince George's	972	137	323	36	1,468	32,564	4.51%
Queen Anne's	0	0	57	0	57	0	
Saint Mary's	0	0	42	0	42	0	
Somerset	0	0	8	0	8	0	
Talbot	0	0	3	0	3	0	
Washington	554	13	18	21	606	14,291	4.25%
Wicomico	0	0	42	0	42	0	
Worcester	0	0	32	0	32	0	
Total Turnout By Party	9,336	752	2,833	385	13,106	276,797	4.73%

OTHER PARTIES	Polls	EV	Prov	Abs	Total Voters	Eligible Voters	Turnout
Allegany	20	3	1	1	25	153	16.34%
Anne Arundel	0	0	2	0	2	0	
Baltimore City	0	0	20	0	20	0	
Baltimore County	0	0	51	0	51	0	
Calvert	16	0	1	1	18	527	3.42%
Caroline	0	0	3	0	3	0	

Carroll	0	0	3	0	3	0	
Cecil	31	0	0	0	31	835	3.83%
Charles	34	2	0	1	37	586	6.31%
Dorchester	0	0	2	0	2	0	
Frederick	4	0	1	0	5	78	6.41%
Garrett	0	0	1	0	1	0	
Harford	17	4	4	0	25	313	7.99%
Howard	79	20	6	4	109	1,820	5.99%
Kent	13	7	0	0	20	133	15.04%
Montgomery	20	0	4	4	28	512	5.47%
Prince George's	308	36	105	8	455	18,209	2.50%
Queen Anne's	0	0	4	0	4	0	
Saint Mary's	0	0	2	0	2	0	
Somerset	0	0	1	0	1	0	
Talbot	0	0	3	0	3	0	
Washington	5	0	1	2	8	89	8.99%
Wicomico	0	0	5	0	5	0	
Worcestar	0	0	3	0	3	0	
Total Turnout By Party	541	76	223	22	862	23,255	3.71%
Total Voter Turnout	667,673	77,290	12,731	25,287	802,981	3,167,846	25.35%

Statewide

County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	7,816	659	343	87	42,398	20.96%
Anne Arundel	50,434	14,922	1,741	1,768	269,671	25.54%
Baltimore City	54,620	15,873	2,302	2,428	325,643	23.10%
Baltimore County	82,887	22,270	2,928	2,250	426,062	25.90%
Calvert	9,685	1,896	312	205	60,133	20.12%
Caroline	2,935	687	89	46	14,986	25.07%
Carroll	23,666	4,397	759	202	114,358	25.38%
Cecil	9,029	2,227	221	81	47,699	24.23%
Charles	17,643	3,775	478	276	99,857	22.20%
Dorchester	4,255	882	375	38	17,717	31.33%
Frederick	29,991	4,848	950	296	149,393	24.15%
Garrett	4,369	745	170	35	19,163	27.76%
Harford	27,531	6,262	719	290	158,858	21.91%
Howard	29,727	9,274	763	609	197,348	20.46%
Kent	2,428	827	102	13	10,645	31.66%
Montgomery	84,160	18,875	5,729	2,467	630,255	17.65%
Prince George's	69,917	21,959	2,212	2,955	510,012	19.03%
Queen Anne's	6,956	2,342	154	81	32,620	29.05%
Saint Mary's	9,248	1,533	384	93	64,247	17.52%
Somerset	2,263	540	101	51	11,473	25.76%
Talbot	5,489	2,226	221	70	21,905	36.55%
Washington	13,378	1,387	733	99	89,243	17.48%
Wicomico	7,549	1,936	406	162	46,922	21.43%
Worcester	5,201	1,224	299	83	31,792	21.41%
Totals	561,177	141,566	22,493	14,665	3,392,600	21.81%

Democrat

County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	2,745	276	149	25	15,196	21.03%
Anne Arundel	24,640	8,825	949	596	146,577	23.89%
Baltimore City	51,728	15,430	2,135	1,539	295,302	23.99%
Baltimore County	59,983	18,411	2,224	870	295,796	27.55%

Calvert	4,449	956	120	92	23,431	23.97%
Caroline	1,015	300	44	9	7,147	19.14%
Carroll	6,306	1,181	245	42	31,797	24.45%
Cecil	3,508	899	113	21	23,170	19.60%
Charles	12,294	2,956	334	185	58,325	27.04%
Dorchester	1,952	439	292	17	10,443	25.85%
Frederick	11,198	2,357	438	129	54,121	26.09%
Garrett	789	169	36	6	4,612	21.66%
Harford	11,795	3,173	389	121	62,978	24.55%
Howard	19,185	6,973	547	351	94,222	28.72%
Kent	1,299	538	62	8	6,078	31.38%
Montgomery	68,172	16,437	4,679	1,758	354,078	25.71%
Prince George's	64,983	21,123	2,030	1,717	442,639	20.30%
Queen Anne's	2,302	841	80	17	10,967	29.54%
Saint Mary's	4,024	734	207	43	25,084	19.96%
Somerset	919	273	63	11	6,735	18.80%
Talbot	1,888	797	77	22	9,968	27.93%
Washington	4,432	570	326	33	31,668	16.93%
Wicomico	3,349	1,027	254	45	26,054	17.94%
Worcester	2,173	587	158	28	14,931	19.73%
Totals	365,128	105,272	15,931	7,685	2,051,319	24.06%

Republican County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	4,782	366	187	31	20,133	26.65%
Anne Arundel	25,794	6,087	792	434	123,094	26.90%
Baltimore City	2,892	443	167	105	30,341	11.89%
Baltimore County	22,904	3,859	704	252	130,266	21.28%
Calvert	4,762	862	182	91	23,922	24.65%
Caroline	1,920	387	45	11	7,839	30.14%
Carroll	16,411	3,097	491	135	59,483	33.85%
Cecil	5,521	1,328	108	37	24,529	28.51%
Charles	4,307	646	128	52	24,301	21.12%
Dorchester	2,303	443	83	11	7,274	39.04%

Frederick	17,082	2,235	480	126	80,670	32.84%
Garrett	3,456	552	130	26	11,955	34.83%
Harford	14,937	2,952	331	123	68,418	26.81%
Howard	8,962	1,834	172	108	56,213	19.70%
Kent	1,129	289	40	4	4,567	32.01%
Montgomery	12,512	1,785	803	292	121,851	12.63%
Prince George's	4,167	724	160	106	43,545	11.84%
Queen Anne's	4,417	1,437	70	42	15,628	38.18%
Saint Mary's	4,864	751	157	36	25,594	22.69%
Somerset	1,344	267	38	19	4,738	35.20%
Talbot	3,569	1,415	144	27	11,312	46.57%
Washington	8,340	777	376	59	38,869	24.57%
Wicomico	4,200	909	154	37	20,868	25.40%
Worcester	2,984	632	139	26	14,785	25.57%
Totals	183,559	34,087	6,081	2,190	950,195	23.78%

Libertarian						
County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	27	2	1	1	191	16.23%
Anne Arundel	0	0	0	4	0	0.00%
Baltimore City	0	0	0	30	0	0.00%
Baltimore County	0	0	0	71	0	0.00%
Calvert	21	5	0	0	249	10.44%
Caroline	0	0	0	2	0	0.00%
Carroll	46	6	0	0	581	8.95%
Cecil	0	0	0	3	0	0.00%
Charles	34	4	2	1	318	12.89%
Dorchester	0	0	0	0	0	0.00%
Frederick	16	1	3	0	745	2.68%
Garrett	11	4	1	0	74	21.62%
Harford	40	11	3	0	703	7.68%
Howard	87	41	7	8	886	16.14%
Kent	0	0	0	0	0	0.00%
Montgomery	116	24	31	13	2,127	8.65%

Prince George's	101	21	3	138	323	81.42%
Queen Anne's	8	2	0	1	147	7.48%
Saint Mary's	19	1	1	0	303	6.93%
Somerset	0	0	0	1	0	0.00%
Talbot	1	1	0	2	15	26.67%
Washington	24	3	3	0	405	7.41%
Wicomico	0	0	0	8	0	0.00%
Worcester	5	0	0	0	46	10.87%
Totals	556	126	55	283	7,113	14.34%

Green County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	4	0	0	0	111	3.60%
Anne Arundel	0	0	0	11	0	0.00%
Baltimore City	0	0	0	27	0	0.00%
Baltimore County	0	0	0	13	0	0.00%
Calvert	4	3	0	1	134	5.97%
Caroline	0	0	0	0	0	0.00%
Carroll	14	3	0	0	271	6.27%
Cecil	0	0	0	0	0	0.00%
Charles	10	2	0	0	121	9.92%
Dorchester	0	0	0	0	0	0.00%
Frederick	24	4	1	1	394	7.61%
Garrett	2	1	0	0	37	8.11%
Harford	9	3	0	1	283	4.59%
Howard	28	8	1	2	489	7.98%
Kent	0	0	0	0	0	0.00%
Montgomery	50	14	17	5	1,528	5.63%
Prince George's	8	1	0	17	234	11.11%
Queen Anne's	1	1	0	0	52	3.85%
Saint Mary's	11	1	0	0	136	8.82%
Somerset	0	0	0	1	0	0.00%
Talbot	0	0	0	0	5	0.00%
Washington	12	1	0	0	233	5.58%

Wicomico	0	0	0	0	0	0.00%
Worcester	0	0	0	0	24	0.00%
Totals	177	42	19	79	4,052	7.82%

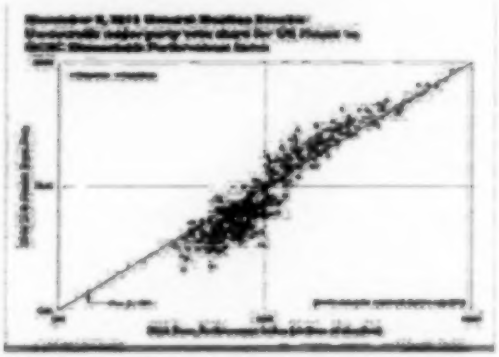
Unaffiliated						
County	Polls	EV	Abs	Prov	Eligible Voters	Turnout
Allegany	231	13	5	9	6,374	4.05%
Anne Arundel	0	0	0	719	0	0.00%
Baltimore City	0	0	0	697	0	0.00%
Baltimore County	0	0	0	973	0	0.00%
Calvert	428	65	10	21	11,912	4.40%
Caroline	0	0	0	22	0	0.00%
Carroll	843	104	23	25	21,278	4.68%
Cecil	0	0	0	17	0	0.00%
Charles	964	163	12	37	16,249	7.24%
Dorchester	0	0	0	10	0	0.00%
Frederick	1,655	250	25	40	33,286	5.92%
Garrett	100	15	2	3	2,297	5.22%
Harford	710	112	13	45	25,437	3.46%
Howard	1,378	377	29	132	43,243	4.43%
Kent	0	0	0	1	0	0.00%
Montgomery	3,194	591	168	386	147,038	2.95%
Prince George's	557	69	16	839	17,999	8.23%
Queen Anne's	220	59	4	20	5,837	5.19%
Saint Mary's	311	45	18	14	12,669	3.06%
Somerset	0	0	0	18	0	0.00%
Talbot	30	12	0	17	577	10.23%
Washington	546	33	25	7	17,744	3.44%
Wicomico	0	0	0	64	0	0.00%
Worcester	34	5	2	29	1,899	3.69%
Totals	11,201	1,913	352	4,145	383,859	4.84%

Other Parties						
County	Polls	EV	Abs	Prov	Eligible Voters	Turnout

Allegany	27	2	1	1	393	7.89%
Anne Arundel	0	0	0	4	0	0.00%
Baltimore City	0	0	0	30	0	0.00%
Baltimore County	0	0	0	71	0	0.00%
Calvert	21	5	0	0	485	5.36%
Caroline	0	0	0	2	0	0.00%
Carroll	46	6	0	0	948	5.49%
Cecil	0	0	0	3	0	0.00%
Charles	34	4	2	1	543	7.55%
Dorchester	0	0	0	0	0	0.00%
Frederick	16	1	3	0	177	11.30%
Garrett	11	4	1	0	188	8.51%
Harford	40	11	3	0	1,039	5.20%
Howard	87	41	7	8	2,295	6.23%
Kent	0	0	0	0	0	0.00%
Montgomery	116	24	31	13	3,633	5.06%
Prince George's	101	21	3	138	5,272	4.99%
Queen Anne's	8	2	0	1	189	5.82%
Saint Mary's	19	1	1	0	441	4.76%
Somerset	0	0	0	1	0	0.00%
Talbot	1	1	0	2	28	14.29%
Washington	24	3	3	0	324	9.26%
Wicomico	0	0	0	8	0	0.00%
Worcester	5	0	0	0	107	4.67%
Totals	556	126	55	283	16,062	6.35%

Monday Feb. 13, 2017

In 2016, Data Fundamentals Proved Accurate



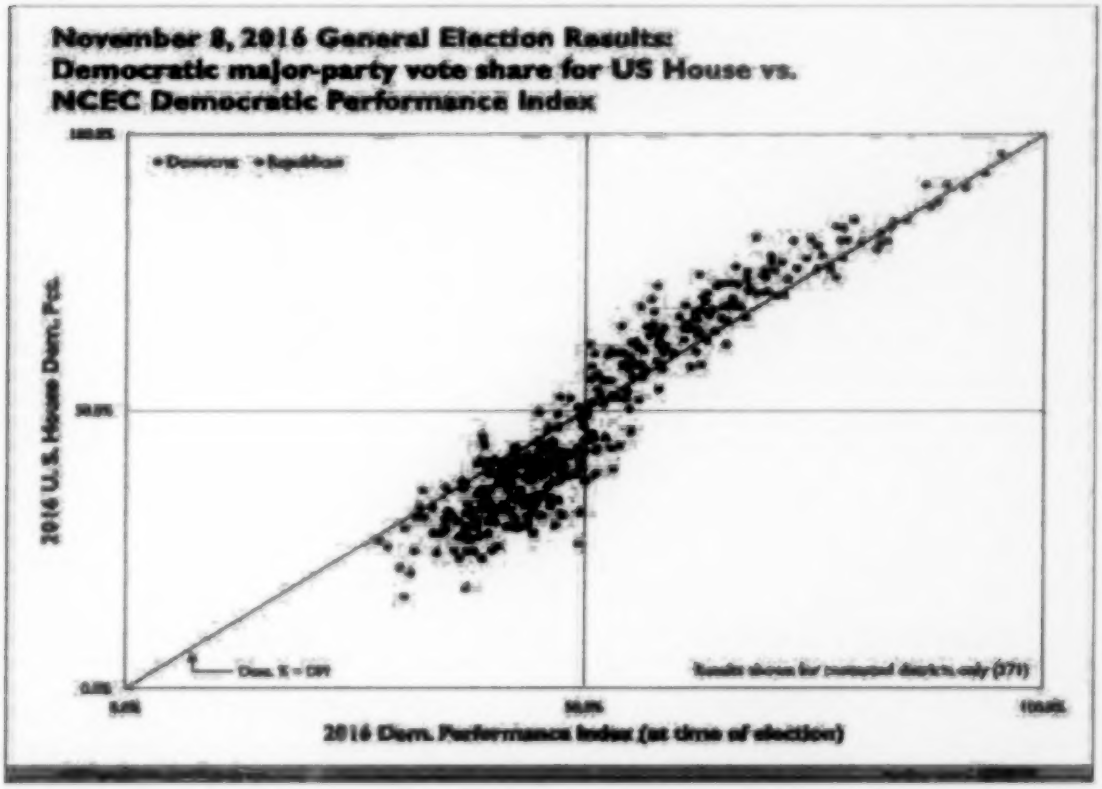
The NCEC's Democratic Performance Index is a granular, moving average of actual candidate performance. It should be no surprise that, on average, observed party performance correlates with future party performance more strongly than any other single measure.

According to CNN, Rep. Sean Patrick Maloney (D-N.Y.) has "...developed a new data model to replace the DPI, using 350 different data points." Models intended as leading indicators of candidate performance are regularly improved when they incorporate actual candidate performance. In fact, DPI itself commonly serves as a supporting data point for building the very types of sophisticated models Rep. Maloney refers to. Considering the diversity, educational attainment, and geography of an electorate is important and should be used, in combination, with a robust measure of the electorate's voting behavior—not in place of it.

The NCEC calculates DPI for every state at the precinct level—the most detailed level at which election results are recorded. DPI is not a speculative model trained on disparate data points nor should it be. The strength of DPI is that it is so closely anchored to direct measurement of what actually happened. It is most valuable as a measure of a district's relative partisanship. It is not intended to predict the outcome of an election, but rather to indicate competitiveness or lack thereof.

In the same article, Rep. Jim Himes (D-Conn.) disputed DPI's accurate measures of last year's congressional battleground. But nationally, Democrats won only four districts where DPI was below 50 percent. Two of these contests, MN-01 (DPI 49.9%) and MN-07 (DPI 47.3%), outperformed DPI as expected thanks to the long-time incumbency of the Democratic

candidates. And the other two districts correctly identified as close contests—NJ-05 (DPI 48.3%) and NV-03 (DPI 49.3%)—were subsequently targeted with well-resourced and well-run campaigns. Victories here demonstrate the successful identification of marginal contests and the judicious mobilization of campaign resources to effect change in favor of Democrats. And while DPI served as a good indicator for races where Democrats were more likely to lose, it correlated even more strongly in higher DPI areas where Democrats were more likely to win.



In the Washington Post, Paul Kane highlighted Minnesota's 2nd District as an area for scrutiny. The pre-election DPI for this district was 49.3 percent—an outstanding match to the major party performance of both Hillary Clinton (49.3%) and Angie Craig (49.0%) in the general election. Craig's 2-point loss narrowly trailed the Democratic Performance Index by 0.3 points. The race was competitive to the end, and choosing not to compete in a district like this in the future guarantees Democrats permanent minority status.

Stephanie Murphy's victory in Florida's 7th District was repeatedly heralded as a surprise Democratic win. But the Democratic Performance Index strongly suggested this was a toss-up district well within the reach of a competent campaign. Once the Florida redistricting lawsuit was finalized, DPI was re-tabulated for the new geography and increased from 45.6 to 50.8 percent under the reconfigured map. Again, this is where the Democratic Performance Index is most valuable—in measuring change and gauging the strengths of geographic units against one another. The DPI is not used by itself to make these decisions, but provides a grounded basis (grounded in actual candidate performance) from which to make informed judgements on voting behavior.

Pennsylvania's 8th District is another seat where the Democratic candidate underperformed. Democrat Steve Santarsiero lost by 9.0 points, but the baseline indicators were nevertheless sound. The pre-election DPI in this district was 50.6 percent which tracks closely with Hillary's 49.9 percent in the general election and President Obama 50.0 percent in 2012. Voters here are clearly open to supporting Democratic candidates in general, and this is exactly the type of suburban district that should be targeted if Democrats are ever going to regain control of the House.

It's true, Democrats underperformed in some rural districts last cycle, particularly in Iowa. But the rationale to compete there was sound, given that President Obama won three of the four districts in consecutive general elections. And in the case of Iowa's 1st District, every Democratic presidential candidate has carried it since 2000. President Obama won 56.9 percent of the vote there in 2012, surpassing average Democratic Performance by 1.9 points. This district clearly qualified as a top-tier target especially in an election year as volatile as 2016.

Some have suggested that the Democrats should focus less on rural districts, but any realistic look at the battleground shows that without winning some rural districts, there is virtually no way to build a coalition that reaches 218 seats. Considering the long odds presented by partisan gerrymandering, Democrats must continue to pursue an all-of-the-above strategy in districts where recent results suggest the possibility for success

Democratic Performance Index by itself tells only part of the story; it is always prudent to perform wider analysis. But in our search for better tools, we must always remain anchored in direct measures of reality.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v. Case No. 13-cv-3233

LINDA H. LAMONE, *et al.*,

Defendants.

Second Supplemental Expert Report of Allan J. Lichtman
July 12, 2017

In this second supplemental report I respond to the supplemental declarations of Dr. Peter A. Morrison and Dr. Michael P. McDonald. Nothing in these supplemental declarations of plaintiffs' experts leads me to revise any of the analyses and findings of my prior reports in this litigation.

I. Supplemental Declaration of Dr. Peter A. Morrison

In his supplemental declaration, Dr. Morrison responds to only one of my criticisms of his prior reports. In my first supplemental report of June 2, 2017 I found that Dr. Morrison in his opening report had presented fundamentally flawed data on the percentage of split Census Places in CD6 under the 2001 and 2011 plans. I found that based upon the correction of his data that the difference in split Census Places in prior CD6 under Maryland's 2001 plan compared to splits in CD6 under the state's 2011 plan was not 48 percentage points as Dr. Morrison previously claimed, but a ***de minimis*** 4 percentage points, a difference of 44 percentage points and 92 percent (44/48). He does not question the serious errors in his prior report, but offers an alleged correction of those errors in his supplemental declaration.

My analysis of Dr. Morrison's new analyses in his supplemental declaration results in the following findings:

- Even accepting at face value Dr. Morrison's alleged corrections, he fails to explain why his new findings still sustain the conclusions of his opening report

- Dr. Morrison does not provide in his supplemental declaration a minor correction of his prior data. Rather, his alleged corrected data differs fundamentally from the prior data on which he has relied.

- Dr. Morrison's alleged corrections create new errors that result in serious flaws in his supplemental declaration and an overstatement of the difference in split Census Places in CD6 under the two plans that he analyzes.

- Dr. Morrison's count of split Census Places under the 2011 plan fails to consider inconsequential splits with either no population or minimal population.

After presenting his alleged corrected data, Dr. Morrison concludes that the difference between split Census Places in the 2001 and 2011 congressional plans is not 48 percentage points, but only 8 percentage points, for a decline of 40 percentage points and 83 percent (40/48).[1] He does not explain why this drastic change in results still sustains his earlier finding of a "smoking gun" result indicative of intentional discrimination. Contrary to standard practice in social science, he provides no analyses of what level of difference in the two plans would be necessary to confirm this earlier conclusion.

As indicated below, Dr. Morrison in his supplemental report simply repeats without qualification or explanation the exact statement he made in his opening report linking differences in split Census Places to intent. The only change is that he now plugs in his new results indicating an 8-percentage point difference in split Census Places between the 2001 and 2011 plan, rather than the 48-percentage point difference from his opening report.

Morrison Opening Expert Report, paragraph 145, page 68

"The post-redistricting increase in non-intact Census places (from 11% to 59% of all places) is a "smoking gun" that exposes motives beyond simply rebalancing total population."

Morrison Opening Expert Report, paragraph 9, page 3

"The post-redistricting increase in non-intact census places (from 3% to 11% of all places) is a "smoking gun" that exposes motives beyond simply rebalancing the total population."

In addition, both statements falsely presume that the only legitimate motivation for a new redistricting plan is "rebalancing the total population," when many other considerations enter into the creation of any redistricting plan. For example, Dr. Morrison indicated in his Fletcher Declaration that one legitimate consideration would be the creation of communities of interest based on patterns of commuting and transportation.[2] The Fletcher Plan that Dr. Morrison defends does not simply "rebalance population," but drastically alters the configuration of Maryland's 2001 districts.

Dr. Morrison does not present minor corrections of his opening report in his supplemental declaration. Rather, as demonstrated in Table 1 (all tables are included in the

[1] Unnumbered Table on page 2 of Dr. Morrison's Supplemental Declaration.
[2] Morrison Declaration, *Fletcher v. Lamone*, 11-cv-03220 (D. Md. Dec. 7, 2011) (ECF No. 43-18).

Appendix to this report, below), the new data he presents on Census Places in CD6 under the 2001 and 2011 state congressional plans differs by many orders of magnitude from the data on which he relied for his conclusion in his opening report. As indicated in Table 1, in his supplemental declaration, Morrison identified 135 Census Places as falling wholly or partially within CD6 under the 2001 plan, compared to 35 Census Places that he identified in his opening report. This amounts to additional 100 Census Places, for *an increase of 286 percent*. In his supplemental declaration, Morrison identified 122 Census Places as falling wholly or partially within CD6 under the 2011 plan, compared to 22 Census Places that he identified in his opening report. This amounts again to an additional 100 Census Places, but it results in *a much larger percentage increase of 455 percent*.

As indicated in Table 2, these corrections account for the reduction in the difference in split Census Places under the two plans from 48 percentage points in his opening report to 8 percentage points in his supplemental declaration. His 286-percent correction in the number of Census Places in DC6 under the 2001 plan reduces the percentage of split precincts from 11 percent to 3 percent. His much larger 455 percent correction in the number of Census Places in CD6 under the 2011 plan, results in far more substantial reduction in the percentage of split Census Places *from 59 percent to 11 percent*. These two corrections explain the reduction in the difference in split Census Places from 48 percent to just 8 percent.

Dr. Morrison purports to have presented in his supplemental report the correct number of Census Places in CD6 under the two plans. Consistent with his opening report, however, he provides no citations or sources for his corrected counts. These counts are still erroneous based on the U.S. Census data that lists the number of Census Places in Maryland and identifies the congressional districts in which they are wholly or partially contained under the 2001 and 2011 Maryland congressional plans.

As indicated in the Table in his supplemental declaration, Dr. Morrison identified 135 Census Places as within CD6 under the 2001 plan, compared to the 75 according to Census data. Dr. Morrison does not identify the source of the data, but he purports to use data from the 111th Congress while the 108th Congress is the data available from the Census on its public website. Therefore, the source of his data for the 111th Congress is unclear and it is also unclear whether he is using the definitions of census designated places under the 2000 Census or whether he is using definitions of census designated places that would be used in the 2010 Census. The boundaries of census designated places change over time. *See* U.S. Census Bureau, "Geographic Boundary Change Notes, Maryland," https://www.census.gov/geo/reference/bndrychange/changenotedisplay.php (last accessed July 11, 2017). The 108th Congress is therefore the appropriate comparator as the version of the data that is publicly available, it contains the congressional district boundaries for the 2001 plan, and the census designated place definitions closest in time to the ones that would have been known to the 2001 map-drawers. Data from a later congress that Dr. Morrison purports to use may not match the Census Places at the time of the redistricting and therefore is misleading.

By using non-public information related to the 111th Congress without specifying the date of the census designated place definitions in his supplemental declaration, Dr. Morrison identified 135 Census places as within CD6, compared to 75 according to Census data. He thus overstates the number of 2001 Census Places in CD6 by 60, for *an increase of 80 percent.* In his supplemental declaration, Morrison identified 122 Census Places as within CD6 under the 2011 plan, compared to 148 according to Census data. Thus, for the 2011 plan he understates not overstates the number of Census Places by 26, *for a decrease of 18 percent.*

As indicated in Table 4, Dr. Morrison's *overstatement* of the number of Census Places in CD6 under the 2001 plan in his supplemental declaration, results in an *understatement* of the percentage of split Census Places of 3 percent, compared to a corrected 5 percent, for *an increase of 2 percent.* In contrast, Dr. Morrison's *understatement* of the number of Census Places in CD6 under the 2011 plan in his supplemental declaration, results in an *overstatement* of the percentage of split Census Places of 11 percent, compared to a corrected 9 percent, for *a decrease of 2 percent.* Thus, his opposite and compounding errors result in an overstatement of the difference in split precincts of 8 percentage points, compared to a correct de minimis difference of just 4 percentage points, the percentage difference that I previously calculated and report on page 3 of my June 2, 2017 supplemental report.

I have included as an addendum to this report a download of the U.S. Census reports on the Maryland Census Places identified with the congressional districts in the 2001 and 2011 plans in which they are wholly or partially included. I have marked on each page of the downloads, the Census Places wholly or partially included in CD6 and indicated on each page a running tally of the number of such Places.

Finally, Dr. Morrison includes in his count of split Census Places in the 2011 plan places that are not split in any consequential way. That is, no persons or a minimal number of persons are included in one side of the split. For example, the most important splits that he identified are the only cities split between CD6 and CD8 in the 2011 plan: Frederick and Rockville (no district other than CD8 borders CD6). However, the recent declaration of Shelly Aprill of the Planning Data Analysis Unit of the Maryland Department of Planning, indicates that the CD6 side of the Frederick City split contained no population and the CD8 side of the Rockville City split contained only 4 persons. [3] Just the elimination of these two splits from Dr. Morrison's tally of 13 split Census Places in CD6 under the 2011 plan would reduce the percentage of split Census Places from 9 percent to 7 percent, just 2 percentage points more than the percentage of CD6 splits under the 2001 plan.

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[3] Declaration of Shelly Aprill, June 29, 2017, p. 2.

II. Supplemental Declaration of Dr. Michael P. McDonald

There is little that is new in Dr. McDonald's supplemental declaration. In addition to examining possible alternative plans for Maryland's 2011 congressional districts, he references my report only to challenge my analysis that CD6 under the 2011 congressional plan is competitive district that tilts Democratic. Instead he argues that CD6 under the 2011 plan is a "safe" Democratic district. In analyzing Dr. McDonald's supplemental declaration, I have reached the following findings.

- Dr. McDonald continues to reason mechanically from effect to cause with no methodology for establishing the intent of Maryland's decision-makers.

- Dr. McDonald's own account of alternative plans considered or not considered by decision-makers contradicts his conclusions about intent.

- Dr. McDonald is incorrect in his claim that CD6 under the 2011 congressional plan is a safe Democratic district.

Dr. McDonald's report attempts to establish what is not in dispute, that Maryland's decision-makers sought to create a Sixth Congressional District that was more favorable to Democrats than in the prior plan. He then mechanically reasons from this fact that Maryland's decision-makers intended to retaliate against Republicans for their alleged political expression. However, Dr. McDonald continues to provide no methodology for assessing intent based on the *Arlington Heights* guidelines or any other framework. He simply stands de facto by his earlier claim that he was not asked to analyze the *Arlington Heights* factors.

Dr. McDonald fails to consider any other purposes behind the configuration of CD6 in 2011 other than partisanship. Many of those purposes are explained in my opening and supplemental reports and are not reexamined in Dr. McDonald's supplemental declaration. Rather than reiterating these purposes I instead analyze some examples from Dr. McDonald's supplemental declaration that contradict his conclusion about the discriminatory intent of Maryland's decision-makers.

Dr. McDonald notes on page 4 of his declaration that two plans, Congressional Option 1 and Congressional Option 2 appeared in Senate President Mike Miller's Maptitude software on October 3, 2011. Option 1 had a Democratic Performance Index of 50.5 percent and Option 2 Index of 51.36 percent, for a difference of 0.86 percentage points. Dr. McDonald presumes without analysis that Miller and the Democrats used Option 2 as the basis for their final plan because it had this slightly higher Democratic Performance Index. Examination of the two maps, however, provides alternative explanations that Dr. McDonald fails even to consider in his supplemental declaration. First, the maps demonstrate that Option 2 provides a far more compact CD6 than does Option 1. Second, Option 2 unlike Option 1 comports with the decision-makers objective of creating an I-270 Corridor district.

Dr. McDonald notes on page 5 of his supplemental declaration that initial fine-tuning of Option 2 raised the Democratic performance of CD6 from 51.36 percent to 52.81 percent. Much later in his report on page 7 he adds that the final map reduced the Democratic performance of

CD6 to 52.61 percent. Although this reduction of 0.20 percentage points may seem like a minimal reduction, Dr. McDonald relies on even lesser differences to sustain his claims about legislative intent. In discussing the abandonment of what he terms Option 4 on October 16, 2011, shortly before the General Assembly voted to approve the plan, Dr. McDonald states on page 7, "Although I cannot know why this plan was abandoned, a plausible explanation is that further lowering of the Democratic performance of the Sixth Congressional District was deemed unacceptable." In fact, as Dr. McDonald data indicates Option 4 reduced the Democratic performance from 51.61 to 51.58, a reduction of 0.03 percentage points.

Dr. McDonald chastises Maryland's decision-makers for failing to consider what he terms the "FLHPac Plan," that he says, "has four Democratic and four Republican Congressional Districts." McDonald Supplement at 7. Dr. McDonald claims that the failure to consider this plan is another indicium of intent to discriminate against Republicans.[4] Yet Dr. McDonald notes that this "appears in President Miller's software on October 17, 2011," which is after the governor has already released his plan and just 3 days before the final vote in the General Assembly. McDonald Supplement at 7. Moreover, a plan with 50 percent Republican districts in a state that is 60%+ Democratic would represent an extreme political gerrymander in favor of Republicans. As documented in my opening report, in 60%+ one-party dominant states of roughly comparable population to Maryland, the dominant party never once secured less than 75 percent of the congressional seats under either the 2001 or 2011 congressional plans. The average percent of seats won by the dominant party was 87 percent under the 2001 plans and 91 percent under the 2011 plans (Tables 17, 18, pp. 45-46, Lichtman Report, May 8, 2017).

Finally, Dr. McDonald omits from consideration a much more plausible alternative for Maryland decision-makers than a 4-4 plan: an 8-0 plan that gave Democrats an advantage in all 8 congressional districts. According to the declaration President Miller's plan drawer and analyst staffer, Yaakov "Jake" Weissmann, "At one point, our group considered a map that would have created the possibility that eight Democratic and zero Republican congressional representatives could be elected, but this map was not seriously considered for adoption."[5] Dr. McDonald includes no mention of this testimony in his supplemental report. If the Democrats' intent was to retaliate against Republicans, they easily have considered and drawn 8-0 Democratic plan as explained in my first supplemental report and the declaration of Bill Cooper.

With respect to the partisan performance of CD6, Dr. McDonald challenges my finding that the 2011 decision-makers in Maryland created a competitive CD6 that tilts Democratic. Instead he claims they created "a safe district for Democrats." He justifies this claim by asserting for the first time in his reports that a competitive district is not one with a range of political performance, but is a district that is 50/50 in its Democratic and Republican performance. In his words, a "competitive 50% democratic performant district."

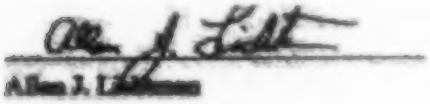
This new claim runs counter to how every independent rating organization such as the Rothenberg and Cook political reports and the *New York Times* define a competitive district, which includes a range of political performance. The Cook Political Report for 2012, for example, defines

[4] Dr. McDonald also presents several alternative plans drawn by various groups to demonstrate the undisputed point that CD6 could have been drawn more favorably for Republicans.
[5] Declaration of Yaakov "Jake" Weissmann, June 29, 2017, p. 12.

a strongly Democratic or Republican (e.g., relatively safe district) as one with a partisan voter index of +5 Democratic or + 5 Republican, respectively. It defines its most competitive category of districts ("Barely Democratic" or "Barely Republican") as districts with a partisan voter index that ranges from "Democratic Even to D+2" and "Republican Even to R+2," respectively. It rates CD6 in Maryland as Democratic +2 on its partisan voter index, placing in the category of the most competitive of districts.[6]

Dr. Morrison's most recent scholarship also contradicts his claim that a competitive district must be 50/50 Republican or Democratic. In an article just published on April 20, 2017 he explicitly embraces a 45 percent to 55 percent competitiveness range based on party performance in prior presidential elections: "We use a simple statistic to score competitive districts: the number of districts with a two-party 2008 presidential vote *within a .45 to .55 range*. This range is arbitrary but has foundation in prior research (McDonald, 2006b; Swain, Borrelli, & Reed, 1998)."[7]

Date: July 12, 2017



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[6] David Wasserman "Introducing the 2012 Cook Political Report Partisan Voter Index," October 11, 2012, pp. 2, 8.
[7] [7] Micah Altman and Michael P. McDonald, "Redistricting by Formula: An Ohio Reform Experiment," *American Politics Research* (2017), p. 10. See also, the analysis of competitiveness on page 7 of my first supplemental report of June 2, 2017.

APPENDIX: STATISTICAL TABLES

TABLE 1
DATA IN MORRISON OPENING REPORT AND COMPARED TO DATA IN SUPPLEMENTAL DECLARATION

Number of Census Places in CD6 in Maryland's 2001 Congressional Plan			
Morrison Supplemental Declaration	**Morrison Opening Report**	**Difference in Number**	**Difference in Percent**
100	35	100	+286%
Number of Census Places in CD6 in Maryland's 2011 Congressional Plan			
Morrison Supplemental Declaration	**Morrison Opening Report**	**Difference in Number**	**Difference in Percent**
122	22	100	+455%
Sources: Morrison Opening Report, Table 3, p. 67; Morrison Supplemental Declaration, Unnumbered Table, p 3.			

TABLE 2
THE PERCENTAGE OF SPLIT PRECINCTS IN THE 2001 AND 2011 CONGRESSIONAL PLANS, MORRISON SUPPLEMENTAL DECLARATION COMPARED TO CORRECT DATA

Morrison Opening Report						
# of Census Places 2001 Plan	# of Split Places 2001 Plan	% of Split Places 2001 Plan	# of Census Place 2011 Plan	# of Split Places 2011 Plan	% of Split Places 2011 Plan	Difference In Percentage Points
35	4	11%	22	13	59%	+48%
Morrison Supplemental Declaration						
# of Census Places 2011 Plan	# of Split Places 2001 Plan	% of Split Places 2001 Plan	# of Census Place 2011 Plan	# of Split Places 2011 Plan	% of Split Places 2011 Plan	Difference In Percentage Points
135	4	3%	122	13	11%	+8%

Sources: Morrison Opening Report, Table 3, p. 67; Morrison Supplemental Declaration, Unnumbered Table, p 3.

TABLE 3
DATA IN MORRISON SUPPLEMENTAL DECLARATION COMPARED TO CORRECTED DATA

Number of Census Places in CD6 in Maryland's 2001 Congressional Plan			
Data From Census Report	**Data in Morrison Supplemental Declaration**	**Difference in Number**	**Difference in Percent**
75	135	**60**	**+80%**
Number of Census Places in CD6 in Maryland's 2011 Congressional Plan			
Data From Census Report	**Data in Morrison Supplemental Declaration**	**Difference in Number**	**Difference in Percent**
148	122	**26**	**-18%**
Sources: Morrison Supplemental Declaration, Unnumbered Table, p 3; MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 108th Congress, https://www2.census.gov/geo/relfiles/cd108th/MD/plc_c8_24.txt; ; MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 113th Congress, https://www2.census.gov/geo/relfiles/cdsld13/24/pl_cd_24.txt.			

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TABLE 4
PERCENT OF SPLIT CENSUS PLACES: DATA IN MORRISON SUPPLEMENTAL DECLARATION COMPARED TO CORRECTED DATA

Data in Morrison Supp. Declaration 2001 Plan		Corrected Data 2001 Plan		Comparison
# of Census Places	**% of Split Census Places (4/135)**	**# of Census Places**	**% of Split Census Places (4/75)**	**Difference**
135	3%	75	5%	+2%
# of Census Places	**% of Split Census Places (13/122)**	**# of Census Places**	**% of Split Census Places (13/147)**	**Difference**
122	11%	147	9%	-2%
Sources: Morrison Supplemental Declaration, Unnumbered Table, p 3; MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 108th Congress, https://www2.census.gov/geo/relfiles/cd108th/MD/plc_c8_24.txt; ; MARYLAND CONGRESSIONAL DISTRICTS BY PLACE," 113th Congress, https://www2.census.gov/geo/relfiles/cuisld13/24/pl_cd_24.txt.				

ADDENDUM TO LICHTMAN SECOND SUPPLEMENTAL REPORT OF JULY 13, 2017

DOWNLOAD OF US CENSUS REPORTS ON MARYLAND CENSUS PLACES FOR THE 2001 AND 2011 CONGRESSIONAL PLANS INDICATING THE CONGRESSIONAL DISTRICTS IN WHICH PLACES ARE WHOLLY OR PARTIALLY INCLUDED.

PLACES WHOLLY OR PARTIALLY INCLUDED IN CD6 ARE MARKED WITH A BLACK LINE. EACH PAGE INCLUDES A RUNNING OF MARKED PLACES.

CENSUS REPORT FOR 2001 MARYLAND CONGRESSIONAL PLAN

MARYLAND CONGRESSIONAL DISTRICTS BY PLACES

Place	County	Congressional District
Aberdeen city	Harford	2
Aberdeen Proving Ground CDP	Harford	2
Accident town	Garrett	6
Accokeek CDP	Prince George's	5
Adelphi CDP	Prince George's	4,5,8
Algonquin CDP	Dorchester	1
Andrews AFB CDP	Prince George's	4,5
Annapolis city	Anne Arundel	3
Arbutus CDP	Baltimore	3
Arden-on-the-Severn CDP	Anne Arundel	1
Arnold CDP	Anne Arundel	1
Ashton-Sandy Spring CDP	Montgomery	4
Aspen Hill CDP	Montgomery	4,8
Ballenger Creek CDP	Frederick	6
Baltimore city	Baltimore city	2,3,7
Barclay town	Queen Anne's	1
Barnesville town	Montgomery	8
Barton town	Allegany	6
Bel Air town	Harford	1
Bel Air North CDP	Harford	1,6
Bel Air South CDP	Harford	1,2
Beltsville CDP	Prince George's	5
Bennsville CDP	Charles	5
Berlin town	Worcester	1
Berwyn Heights town	Prince George's	5
Bethesda CDP	Montgomery	8
Betterton town	Kent	1
Bladensburg town	Prince George's	4,8
Boonsboro town	Washington	6
Bowie city	Prince George's	4,5
Bowleys Quarters CDP	Baltimore	2
Braddock Heights CDP	Frederick	6
Brandywine CDP	Prince George's	5
Brentwood town	Prince George's	8
Brookeville town	Montgomery	4
Brooklyn Park CDP	Anne Arundel	2
Brookmont CDP	Montgomery	8
Brookview town	Dorchester	1
Brunswick city	Frederick	6
Bryans Road CDP	Charles	5
Burkittsville town	Frederick	6
Burtonsville CDP	Montgomery	4
Cabin John CDP	Montgomery	8
California CDP	St. Mary's	5
Calvert Beach-Long Beach CDP	Calvert	5
Calverton CDP	Montgomery	4
	Prince George's	5
Cambridge city	Dorchester	1
Camp Springs CDP	Prince George's	4,5
Cape St. Claire CDP	Anne Arundel	1
Capitol Heights town	Prince George's	4
Carmody Hills-Pepper Mill Village CDP	Prince George's	4
Carney CDP	Baltimore	1,2
Catonsville CDP	Baltimore	7
Cavetown CDP	Washington	6
Cecilton town	Cecil	1
Centreville town	Queen Anne's	1
Chance CDP	Somerset	1
Charlestown town	Cecil	1
Charlotte Hall CDP	St. Mary's	5

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Chesapeake Beach town	Calvert	5
Chesapeake City town	Cecil	1
Chesapeake Ranch Estates-Drum Point CDP	Calvert	5
Chester CDP	Queen Anne's	1
Chestertown town	Kent	1
Cheverly town	Prince George's	4
Chevy Chase town	Montgomery	8
Chevy Chase CDP	Montgomery	8
Chevy Chase Section Five village	Montgomery	8
Chevy Chase Section Three village	Montgomery	8
Chevy Chase View town	Montgomery	8
Chevy Chase Village town	Montgomery	8
Chewsville CDP	Washington	6
Chillum CDP	Prince George's	4,8
Church Creek town	Dorchester	1
Church Hill town	Queen Anne's	1
Clarksburg CDP	Montgomery	4
Clear Spring town	Washington	6
Clinton CDP	Prince George's	5
Clover Hill CDP	Frederick	6
Cloverly CDP	Montgomery	4,8
Cockeysville CDP	Baltimore	1,2,6
Colesville CDP	Montgomery	8
College Park city	Prince George's	5
Colmar Manor town	Prince George's	8
Columbia CDP	Howard	3,7
Coral Hills CDP	Prince George's	4
Cordova CDP	Talbot	1
Cottage City town	Prince George's	8
Cresaptown-Bel Air CDP	Allegany	6
Crisfield city	Somerset	1
Crofton CDP	Anne Arundel	3
Crownsville CDP	Anne Arundel	1,3
Cumberland city	Allegany	6
Damascus CDP	Montgomery	6
Dames Quarter CDP	Somerset	1
Darnestown CDP	Montgomery	8
Deale CDP	Anne Arundel	5
Deal Island CDP	Somerset	1
Deer Park town	Garrett	6
Delmar town	Wicomico	1
Denton town	Caroline	1
Discovery-Spring Garden CDP	Frederick	6
District Heights city	Prince George's	4
Dundalk CDP	Baltimore	2
Dunkirk CDP	Calvert	5
Eagle Harbor town	Prince George's	5
East New Market town	Dorchester	1
Easton town	Talbot	1
East Riverdale CDP	Prince George's	4,5
Eden CDP	Somerset	1
Edgemere CDP	Baltimore	2
Edgewood CDP	Harford	2
Edmonston town	Prince George's	4,5
Eldersburg CDP	Carroll	6
Eldorado town	Dorchester	1
Elkridge CDP	Howard	3
Elkton town	Cecil	1
Ellicott City CDP	Howard	3,7
Emmitsburg town	Frederick	6
Essex CDP	Baltimore	2
Fairland CDP	Montgomery	4
Fairmount CDP	Somerset	1
Fairmount Heights town	Prince George's	4
Fallston CDP	Harford	1

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Federalsburg town	Caroline	1
Ferndale CDP	Anne Arundel	2,3
Forest Glen CDP	Montgomery	8
Forest Heights town	Prince George's	4
Forestville CDP	Prince George's	4
Fort Meade CDP	Anne Arundel	2,3
Fort Ritchie CDP	Washington	6
Fort Washington CDP	Prince George's	4,5
Fountainhead-Orchard Hills CDP	Washington	6
Frederick city	Frederick	6
Frenchtown-Rumbly CDP	Somerset	1
Friendly CDP	Prince George's	4,5
Friendship Village CDP	Montgomery	8
Friendsville town	Garrett	6
Frostburg city	Allegany	6
Fruitland city	Wicomico	1
Funkstown town	Washington	6
Gaithersburg city	Montgomery	4,8
Galena town	Kent	1
Galestown town	Dorchester	1
Garrett Park town	Montgomery	8
Garrison CDP	Baltimore	3
Germantown CDP	Montgomery	4,8
Girdletree CDP	Worcester	1
Glenarden city	Prince George's	4
Glen Burnie CDP	Anne Arundel	2,3
Glen Echo town	Montgomery	8
Glenn Dale CDP	Prince George's	4,5
Goddard CDP	Prince George's	5
Golden Beach CDP	St. Mary's	5
Goldsboro town	Caroline	1
Grantsville town	Garrett	6
Grasonville CDP	Queen Anne's	1
Greater Landover CDP	Prince George's	4
Greater Upper Marlboro CDP	Prince George's	4,5
Greenbelt city	Prince George's	5
Green Haven CDP	Anne Arundel	2
Greensboro town	Caroline	1
Green Valley CDP	Frederick	6
Hagerstown city	Washington	6
Halfway CDP	Washington	6
Hampstead town	Baltimore	6
	Carroll	6
Hampton CDP	Baltimore	1,2
Hancock town	Washington	6
Havre de Grace city	Harford	2
Hebron town	Wicomico	1
Henderson town	Caroline	1
Herald Harbor CDP	Anne Arundel	3
Highfield-Cascade CDP	Washington	6
Highland Beach town	Anne Arundel	3
Hillandale CDP	Montgomery	4
	Prince George's	5
Hillcrest Heights CDP	Prince George's	4
Hillsboro town	Caroline	1
Hillsmere Shores CDP	Anne Arundel	3
Hughesville CDP	Charles	5
Huntingtown CDP	Calvert	5
Hurlock town	Dorchester	1
Hyattsville city	Prince George's	4,5,8
Indian Head town	Charles	5
Jarrettsville CDP	Harford	6
Jessup CDP	Anne Arundel	3
	Howard	3
Joppatowne CDP	Harford	1,2

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Keedysville town	Washington	6
Kemp Mill CDP	Montgomery	8
Kensington town	Montgomery	8
Kent Narrows CDP	Queen Anne's	1
Kettering CDP	Prince George's	4
Kingstown CDP	Queen Anne's	1
Kingsville CDP	Baltimore	1
Kitzmiller town	Garrett	6
Lake Arbor CDP	Prince George's	4
Lake Shore CDP	Anne Arundel	1,3
Landover Hills town	Prince George's	4
Langley Park CDP	Prince George's	4,8
Lanham-Seabrook CDP	Prince George's	4,5
Lansdowne-Baltimore Highlands CDP	Baltimore	3
La Plata town	Charles	5
Largo CDP	Prince George's	4
Laurel city	Prince George's	5
La Vale CDP	Allegany	6
Laytonsville town	Montgomery	4
Leitersburg CDP	Washington	6
Leonardtown town	St. Mary's	5
Lexington Park CDP	St. Mary's	5
Linganore-Bartonsville CDP	Frederick	6
Linthicum CDP	Anne Arundel	3
Lochearn CDP	Baltimore	2,3,7
Loch Lynn Heights town	Garrett	6
Lonaconing town	Allegany	6
Londontowne CDP	Anne Arundel	5
Luke town	Allegany	6
Lusby CDP	Calvert	5
Lutherville-Timonium CDP	Baltimore	2
Manchester town	Carroll	6
Mardela Springs town	Wicomico	1
Marlow Heights CDP	Prince George's	4
Marlton CDP	Prince George's	5
Martin's Additions village	Montgomery	8
Marydel town	Caroline	1
Maryland City CDP	Anne Arundel	3
Maugansville CDP	Washington	6
Mayo CDP	Anne Arundel	5
Mays Chapel CDP	Baltimore	1-3
Middle River CDP	Baltimore	2
Middletown town	Frederick	6
Midland town	Allegany	6
Milford Mill CDP	Baltimore	2,7
Millington town	Kent	1
	Queen Anne's	1
Mitchellville CDP	Prince George's	4
Montgomery Village CDP	Montgomery	4,8
Morningside town	Prince George's	4
Mount Aetna CDP	Washington	6
Mountain Lake Park town	Garrett	6
Mount Airy town	Carroll	6
	Frederick	6
Mount Lena CDP	Washington	6
Mount Rainier city	Prince George's	8
Mount Vernon CDP	Somerset	1
Myersville town	Frederick	6
Naval Academy CDP	Anne Arundel	3
Newark CDP	Worcester	1
New Carrollton city	Prince George's	4,5
New Market town	Frederick	6
New Windsor town	Carroll	6
North Beach town	Calvert	5
North Bethesda CDP	Montgomery	8

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North Brentwood town	Prince George's	6
North Chevy Chase village	Montgomery	8
North East town	Cecil	1
North Kensington CDP	Montgomery	8
North Laurel CDP	Howard	7
North Potomac CDP	Montgomery	8
Oakland town	Garrett	6
Ocean City town	Worcester	1
Ocean Pines CDP	Worcester	1
Odenton CDP	Anne Arundel	1-3
Olney CDP	Montgomery	4
Overlea CDP	Baltimore	2,3
Owings CDP	Calvert	5
Owings Mills CDP	Baltimore	2,3
Oxford town	Talbot	1
Oxon Hill-Glassmanor CDP	Prince George's	4
Paramount-Long Meadow CDP	Washington	6
Parkville CDP	Baltimore	2,3
Parole CDP	Anne Arundel	3
Pasadena CDP	Anne Arundel	1-3
Perry Hall CDP	Baltimore	1,2
Perryman CDP	Harford	2
Perryville town	Cecil	1
Pikesville CDP	Baltimore	2,3
Pittsville town	Wicomico	1
Pleasant Hills CDP	Harford	1
Pocomoke City city	Worcester	1
Poolesville town	Montgomery	8
Port Deposit town	Cecil	1
Port Tobacco Village town	Charles	5
Potomac CDP	Montgomery	8
Potomac Heights CDP	Charles	5
Preston town	Caroline	1
Prince Frederick CDP	Calvert	5
Princess Anne town	Somerset	1
Pumphrey CDP	Anne Arundel	2,3
Queen Anne town	Queen Anne's	1
	Talbot	1
Queenstown town	Queen Anne's	1
Randallstown CDP	Baltimore	2,3,7
Redland CDP	Montgomery	4,8
Reisterstown CDP	Baltimore	2,3,6
Ridgely town	Caroline	1
Rising Sun town	Cecil	1
Riva CDP	Anne Arundel	5
Riverdale Park town	Prince George's	4,5
Riverside CDP	Harford	2
Riviera Beach CDP	Anne Arundel	2
Robinwood CDP	Washington	6
Rock Hall town	Kent	1
Rockville city	Montgomery	4,8
Rohrersville CDP	Washington	6
Rosaryville CDP	Prince George's	5
Rosedale CDP	Baltimore	2,3
Rosemont village	Frederick	6
Rossmoor CDP	Montgomery	8
Rossville CDP	Baltimore	2,3
St. Charles CDP	Charles	5
St. James CDP	Washington	6
St. Leonard CDP	Calvert	5
St. Michaels town	Talbot	1
Salisbury city	Wicomico	1
San Mar CDP	Washington	6
Savage-Guilford CDP	Howard	3,7
Seat Pleasant city	Prince George's	4

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Secretary town	Dorchester	1
Selby-on-the-Bay CDP	Anne Arundel	5
Severn CDP	Anne Arundel	1-3
Severna Park CDP	Anne Arundel	1,3
Shady Side CDP	Anne Arundel	5
Sharpsburg town	Washington	6
Sharptown town	Wicomico	1
Silver Spring CDP	Montgomery	4,8
Smith Island CDP	Somerset	1
Smithsburg town	Washington	6
Snow Hill town	Worcester	1
Solomons CDP	Calvert	5
Somerset town	Montgomery	8
South Gate CDP	Anne Arundel	1,3
South Kensington CDP	Montgomery	8
South Laurel CDP	Prince George's	5
Springdale CDP	Prince George's	4
Stevensville CDP	Queen Anne's	1
Stockton CDP	Worcester	1
Sudlersville town	Queen Anne's	1
Suitland-Silver Hill CDP	Prince George's	4
Sykesville town	Carroll	6
Takoma Park city	Montgomery	8
Taneytown city	Carroll	6
Temple Hills CDP	Prince George's	4
Templeville town	Caroline	1
	Queen Anne's	1
Thurmont town	Frederick	6
Tilghman Island CDP	Talbot	1
Towson CDP	Baltimore	2,3
Trappe town	Talbot	1
Travilah CDP	Montgomery	8
Union Bridge town	Carroll	6
University Park town	Prince George's	5
Upper Marlboro town	Prince George's	5
Vienna town	Dorchester	1
Waldorf CDP	Charles	5
Walker Mill CDP	Prince George's	4
Walkersville town	Frederick	6
Washington Grove town	Montgomery	8
Westernport town	Allegany	6
West Laurel CDP	Prince George's	5
Westminster city	Carroll	6
West Ocean City CDP	Worcester	1
West Pocomoke CDP	Somerset	1
Whaleyville CDP	Worcester	1
Wheaton-Glenmont CDP	Montgomery	8
White Marsh CDP	Baltimore	1-3
White Oak CDP	Montgomery	4,8
Willards town	Wicomico	1
Williamsport town	Washington	6
Wilson-Conococheague CDP	Washington	6
Woodlawn CDP	Baltimore	7
Woodlawn CDP	Prince George's	4
Woodmore CDP	Prince George's	4,5
Woodsboro town	Frederick	6

12

CENSUS REPORT FOR 2011 MARYLAND CONGRESSIONAL PLAN

MARYLAND CONGRESSIONAL DISTRICTS BY PLACE

Place	County/Independent City
Congressional District	
Aberdeen Proving Ground CDP	Harford
2	
Aberdeen city	Harford
1,2	
Accident town	Garrett
6	
Accokeek CDP	Prince George's
5	
Adamstown CDP	Frederick
6	
Adelphi CDP	Prince George's
4,5	
Algonquin CDP	Dorchester
1	
Allen CDP	Wicomico
1	
Andrews AFB CDP	Prince George's
4,5	
Annapolis Neck CDP	Anne Arundel
3,4	
Annapolis city	Anne Arundel
3	
Antietam CDP	Washington
6	
Aquasco CDP	Prince George's
5	
Arbutus CDP	Baltimore
3,7	
Arden on the Severn CDP	Anne Arundel
4	
Arnold CDP	Anne Arundel
4	
Ashton-Sandy Spring CDP	Montgomery
3	
Aspen Hill CDP	Montgomery
3,6,8	
Baden CDP	Prince George's
5	
Bagtown CDP	Washington
6	
Bakersville CDP	Washington
6	
Ballenger Creek CDP	Frederick
6,8	
Baltimore Highlands CDP	Baltimore
2	
Baltimore city	Baltimore
2,3,7	
Barclay town	Queen Anne's
1	
Barnesville town	Montgomery
6	
Barrelville CDP	Allegany
6	
Barton town	Allegany
6	
Bartonsville CDP	Frederick
8	
Beaver Creek CDP	Washington

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6	
Bel Air CDP	Allegany
6	
Bel Air North CDP	Harford
1	
Bel Air South CDP	Harford
1,2	
Bel Air town	Harford
1	
Beltsville CDP	Prince George's
4,5	
Benedict CDP	Charles
5	
Bensville CDP	Charles
5	
Berlin town	Worcester
1	
Berwyn Heights town	Prince George's
5	
Bethesda CDP	Montgomery
8	
Betterton town	Kent
1	
Bier CDP	Allegany
6	
Big Pool CDP	Washington
6	
Big Spring CDP	Washington
6	
Bishopville CDP	Worcester
1	
Bivalve CDP	Wicomico
1	
Bladensburg town	Prince George's
4	
Bloomington CDP	Garrett
6	
Boonsboro town	Washington
6	
Bowie city	Prince George's
4,5	
Bowleys Quarters CDP	Baltimore
2	
Bowling Green CDP	Allegany
6	
Bowmans Addition CDP	Allegany
6	
Braddock Heights CDP	Frederick
8	
Brandywine CDP	Prince George's
5	
Breathedsville CDP	Washington
6	
Bruntwood town	Prince George's
4	
Brock Hall CDP	Prince George's
4,5	
Brookeville town	Montgomery
3	
Brooklyn Park CDP	Anne Arundel
2	
Brookmont CDP	Montgomery
8	
Brookview town	Dorchester
1	

10

Broomes Island CDP	Calvert
5	
Brownsville CDP	Washington
6	
Brunswick city	Frederick
6	
Bryans Road CDP	Charles
5	
Bryantown CDP	Charles
5	
Buckeystown CDP	Frederick
6	
Burkittsville town	Frederick
8	
Burtonsville CDP	Montgomery
3	
Butlertown CDP	Kent
1	
Cabin John CDP	Montgomery
8	
California CDP	St. Mary's
5	
Calvert Beach CDP	Calvert
5	
Calverton CDP	Montgomery
3	
	Prince George's
4	
Cambridge city	Dorchester
1	
Camp Springs CDP	Prince George's
4,5	
Cape St. Claire CDP	Anne Arundel
3,4	
Capitol Heights town	Prince George's
4	
Carlos CDP	Allegany
6	
Carney CDP	Baltimore
1-3	
Catonsville CDP	Baltimore
7	
Cavetown CDP	Washington
6	
Cearfoss CDP	Washington
6	
Cecilton town	Cecil
1	
Cedarville CDP	Prince George's
5	
Centreville town	Queen Anne's
1	
Chance CDP	Somerset
1	
Charlestown town	Cecil
1	
Charlotte Hall CDP	St. Mary's
5	
Charlton CDP	Washington
6	
Chesapeake Beach town	Calvert
5	
Chesapeake City town	Cecil
1	
Chesapeake Ranch Estates CDP	Calvert

7

5	
Chester CDP	Queen Anne's
1	
Chestertown town	Kent
1	
Cheverly town	Prince George's
4	
Chevy Chase CDP	Montgomery
8	
Chevy Chase Section Five village	Montgomery
8	
Chevy Chase Section Three village	Montgomery
8	
Chevy Chase View town	Montgomery
8	
Chevy Chase Village town	Montgomery
8	
Chevy Chase town	Montgomery
8	
Chewsville CDP	Washington
6	
Chillum CDP	Prince George's
4	
Choptank CDP	Caroline
1	
Church Creek town	Dorchester
1	
Church Hill town	Queen Anne's
1	
Clarksburg CDP	Montgomery
6	
Clarysville CDP	Allegany
6	
Clear Spring town	Washington
6	
Clinton CDP	Prince George's
5	
Cloverly CDP	Montgomery
3,8	
Cobb Island CDP	Charles
5	
Corkeysville CDP	Baltimore
1,2,7	
Colesville CDP	Montgomery
3,8	
College Park city	Prince George's
5	
Colmar Manor town	Prince George's
4	
Columbia CDP	Howard
3,7	
Coral Hills CDP	Prince George's
4	
Cordova CDP	Talbot
1	
Corriganville CDP	Allegany
6	
Cottage City town	Prince George's
4	
Crellin CDP	Garrett
6	
Cresaptown CDP	Allegany
6	
Crisfield city	Somerset
1	

7

Crofton CDP 4,5	Anne Arundel
Croom CDP 5	Prince George's
Crownsville CDP 4	Anne Arundel
Cumberland city 6	Allegany
Damascus CDP 6,8	Montgomery
Dames Quarter CDP 1	Somerset
Danville CDP 6	Allegany
Dargan CDP 6	Washington
Darlington CDP 1	Harford
Darnestown CDP 6	Montgomery
Dawson CDP 6	Allegany
Deal Island CDP 1	Somerset
Deale CDP 5	Anne Arundel
Deer Park town 6	Garrett
Delmar town 1	Wicomico
Denton town 1	Caroline
Derwood CDP 6	Montgomery
Detmold CDP 6	Allegany
District Heights city 4	Prince George's
Downsville CDP 6	Washington
Drum Point CDP 5	Calvert
Dundalk CDP 2	Baltimore
Dunkirk CDP 5	Calvert
Eagle Harbor town 5	Prince George's
Eakles Mill CDP 6	Washington
East New Market town 1	Dorchester
East Riverdale CDP 4,5	Prince George's
Easton town 1	Talbot
Eckhart Mines CDP 6	Allegany
Eden CDP 1	Somerset
Edesville CDP 1	Kent
Edgemere CDP 2	Baltimore
Edgemont CDP	Washington

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6	
Edgewater CDP	Anne Arundel
4,5	
Edgewood CDP	Harford
1,2	
Edmonston town	Prince George's
4	
Eldersburg CDP	Carroll
8	
Eldorado town	Dorchester
1	
Elkridge CDP	Howard
2,3,7	
Elkton town	Cecil
1	
Ellerslie CDP	Allegany
6	
Ellicott City CDP	Howard
7	
Elliott CDP	Dorchester
1	
Emmitsburg town	Frederick
8	
Ernstville CDP	Washington
6	
Essex CDP	Baltimore
2	
Fairland CDP	Montgomery
3	
Fairlee CDP	Kent
1	
Fairmount CDP	Somerset
1	
Fairmount Heights town	Prince George's
4	
Fairplay CDP	Washington
6	
Fairview CDP	Washington
6	
Fairwood CDP	Prince George's
4,5	
Fallston CDP	Harford
1	
Federalsburg town	Caroline
1	
Ferndale CDP	Anne Arundel
2,3	
Finzel CDP	Garrett
6	
Fishing Creek CDP	Dorchester
1	
Flintstone CDP	Allegany
6	
Forest Glen CDP	Montgomery
8	
Forest Heights town	Prince George's
4	
Forestville CDP	Prince George's
4	
Fort Meade CDP	Anne Arundel
2,3	
Fort Ritchie CDP	Washington
6	
Fort Washington CDP	Prince George's
4,5	

8

Fountainhead-Orchard Hills CDP	Washington
6	
Four Corners CDP	Montgomery
8	
Franklin CDP	Allegany
6	
Frederick city	Frederick
6,8	
Frenchtown-Rumbly CDP	Somerset
1	
Friendly CDP	Prince George's
5	
Friendship CDP	Anne Arundel
5	
Friendship Heights Village CDP	Montgomery
8	
Friendsville town	Garrett
6	
Frostburg city	Allegany
6	
Fruitland city	Wicomico
1	
Fulton CDP	Howard
3	
Funkstown town	Washington
6	
Gaithersburg city	Montgomery
6	
Galena town	Kent
1	
Galestown town	Dorchester
1	
Galesville CDP	Anne Arundel
5	
Gambrills CDP	Anne Arundel
4	
Gapland CDP	Washington
6	
Garrett Park town	Montgomery
8	
Garretts Mill CDP	Washington
6	
Garrison CDP	Baltimore
3	
Georgetown CDP	Kent
1	
Germantown CDP	Montgomery
6	
Gilmore CDP	Allegany
6	
Girdletree CDP	Worcester
1	
Glassmanor CDP	Prince George's
4	
Glen Burnie CDP	Anne Arundel
2-4	
Glen Echo town	Montgomery
8	
Glenarden city	Prince George's
4	
Glenmont CDP	Montgomery
8	
Glenn Dale CDP	Prince George's
4,5	
Golden Beach CDP	St. Mary's

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5	
Goldsboro town	Caroline
1	
Gorman CDP	Garrett
6	
Grahamtown CDP	Allegany
6	
Grantsville town	Garrett
6	
Grasonville CDP	Queen Anne's
1	
Greenbelt city	Prince George's
5	
Greensboro town	Caroline
1	
Greensburg CDP	Washington
6	
Hagerstown city	Washington
6	
Halfway CDP	Washington
6	
Hampstead town	Carroll
1	
Hampton CDP	Baltimore
1,2	
Hancock town	Washington
6	
Havre de Grace city	Harford
2	
Hebron town	Wicomico
1	
Henderson town	Caroline
1	
Herald Harbor CDP	Anne Arundel
4	
Highfield-Cascade CDP	Washington
6	
Highland Beach town	Anne Arundel
3	
Highland CDP	Howard
3,7	
Hillandale CDP	Montgomery
3	
	Prince George's
4	
Hillcrest Heights CDP	Prince George's
4	
Hillsboro town	Caroline
1	
Hughesville CDP	Charles
5	
Huntingtown CDP	Calvert
5	
Hurlock town	Dorchester
1	
Hutton CDP	Garrett
6	
Hyattsville city	Prince George's
4,5	
Ilchester CDP	Howard
2,3,7	
Indian Head town	Charles
5	
Indian Springs CDP	Washington
6	

10

Jarrettsville CDP	Harford
1	
Jefferson CDP	Frederick
6,8	
Jennings CDP	Garrett
6	
Jessup CDP	Anne Arundel
2	
	Howard
2	
Jesterville CDP	Wicomico
1	
Joppatowne CDP	Harford
1,2	
Jugtown CDP	Washington
6	
Keedysville town	Washington
6	
Kemp Mill CDP	Montgomery
8	
Kemps Mill CDP	Washington
6	
Kennedyville CDP	Kent
1	
Kensington town	Montgomery
8	
Kent Narrows CDP	Queen Anne's
1	
Kettering CDP	Prince George's
4	
Kingstown CDP	Queen Anne's
1	
Kingsville CDP	Baltimore
1	
Kitzmiller town	Garrett
6	
Klondike CDP	Allegany
6	
Konterra CDP	Prince George's
4,5	
La Plata town	Charles
5	
La Vale CDP	Allegany
6	
Lake Arbor CDP	Prince George's
4	
Lake Shore CDP	Anne Arundel
3,4	
Landover CDP	Prince George's
4	
Landover Hills town	Prince George's
4	
Langley Park CDP	Prince George's
4	
Lanham CDP	Prince George's
4,5	
Lansdowne CDP	Baltimore
3	
Largo CDP	Prince George's
4	
Laurel city	Prince George's
4	
Layhill CDP	Montgomery
8	
Laytonsville town	Montgomery

8

6,8	
Leisure World CDP	Montgomery
8	
Leitersburg CDP	Washington
6	
Leonardtown town	St. Mary's
5	
Lexington Park CDP	St. Mary's
5	
Libertytown CDP	Frederick
8	
Linganore CDP	Frederick
6,8	
Linthicum CDP	Anne Arundel
2,3	
Little Orleans CDP	Allegany
6	
Loch Lynn Heights town	Garrett
6	
Lochearn CDP	Baltimore
2,7	
Lonaconing town	Allegany
6	
Long Beach CDP	Calvert
5	
Luke town	Allegany
6	
Lusby CDP	Calvert
5	
Lutherville CDP	Baltimore
2	
Madison CDP	Dorchester
1	
Manchester town	Carroll
1	
Mapleville CDP	Washington
6	
Mardela Springs town	Wicomico
1	
Marlboro Meadows CDP	Prince George's
5	
Marlboro Village CDP	Prince George's
4,5	
Marlow Heights CDP	Prince George's
4	
Marlton CDP	Prince George's
5	
Martin's Additions village	Montgomery
8	
Marydel town	Caroline
1	
Maryland City CDP	Anne Arundel
2-4	
Maugansville CDP	Washington
6	
Mayo CDP	Anne Arundel
5	
Mays Chapel CDP	Baltimore
2,3,7	
McCoole CDP	Allegany
6	
Mechanicsville CDP	St. Mary's
5	
Melwood CDP	Prince George's
5	

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Mercersville CDP	[redacted]	Washington
6		
Middle River CDP		Baltimore
2		
Middleburg CDP	[redacted]	Washington
6		
Middletown town		Frederick
8		
Midland town	[redacted]	Allegany
6		
Midlothian CDP	[redacted]	Allegany
6		
Milford Mill CDP		Baltimore
2,7		
Millington town		Kent
1		
		Queen Anne's
1		
Mitchellville CDP		Prince George's
4		
Monrovia CDP		Frederick
8		
Montgomery Village CDP	[redacted]	Montgomery
6		
Morningside town		Prince George's
4		
Moscow CDP	[redacted]	Allegany
6		
Mount Aetna CDP	[redacted]	Washington
6		
Mount Airy town		Carroll
8		
		Frederick
8		
Mount Briar CDP	[redacted]	Washington
6		
Mount Lena CDP	[redacted]	Washington
6		
Mount Rainier city		Prince George's
4		
Mount Savage CDP	[redacted]	Allegany
6		
Mount Vernon CDP		Somerset
1		
Mountain Lake Park town	[redacted]	Garrett
6		
Myersville town		Frederick
8		
Nanticoke Acres CDP		Wicomico
1		
Nanticoke CDP		Wicomico
1		
National CDP	[redacted]	Allegany
6		
National Harbor CDP		Prince George's
4		
Naval Academy CDP		Anne Arundel
3		
New Carrollton city		Prince George's
4,5		
New Market town		Frederick
8		
New Windsor town		Carroll
8		
Newark CDP		Worcester

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1	
Rikep CDP	Allegany
6	
North Beach town	Calvert
5	
North Bethesda CDP	Montgomery
8	
North Brentwood town	Prince George's
4	
North Chevy Chase village	Montgomery
8	
North East town	Cecil
1	
North Kensington CDP	Montgomery
8	
North Laurel CDP	Howard
2	
North Potomac CDP	Montgomery
6,8	
Oakland town	Garrett
6	
Ocean CDP	Allegany
6	
Ocean City town	Worcester
1	
Ocean Pines CDP	Worcester
1	
Odenton CDP	Anne Arundel
2-4	
Oldtown CDP	Allegany
6	
Olney CDP	Montgomery
3,8	
Overlea CDP	Baltimore
2,3	
Owings CDP	Calvert
5	
Owings Mills CDP	Baltimore
2,3	
Oxford town	Talbot
1	
Oxon Hill CDP	Prince George's
4	
Paramount-Long Meadow CDP	Washington
6	
Parkville CDP	Baltimore
2,3	
Parole CDP	Anne Arundel
3,4	
Parsonsburg CDP	Wicomico
1	
Pasadena CDP	Anne Arundel
3,4	
Pecktonville CDP	Washington
6	
Peppermill Village CDP	Prince George's
4	
Perry Hall CDP	Baltimore
1-3	
Perryman CDP	Harford
2	
Perryville town	Cecil
1	
Pikesville CDP	Baltimore
2,3	

7

Pinesburg CDP	Washington
6	
Piney Point CDP	St. Mary's
5	
Pittsville town	Wicomico
1	
Pleasant Grove CDP	Allegany
6	
Pleasant Hills CDP	Harford
1	
Pocomoke City city	Worcester
1	
Point of Rocks CDP	Frederick
6	
Pomfret CDP	Charles
5	
Pondsville CDP	Washington
6	
Poolesville town	Montgomery
6	
Port Deposit town	Cecil
1	
Port Tobacco Village town	Charles
5	
Potomac CDP	Montgomery
6,8	
Potomac Heights CDP	Charles
5	
Potomac Park CDP	Allegany
6	
Powellville CDP	Wicomico
1	
Preston town	Caroline
1	
Prince Frederick CDP	Calvert
5	
Princess Anne town	Somerset
1	
Pylesville CDP	Harford
1	
Quantico CDP	Wicomico
1	
Queen Anne CDP	Prince George's
5	
Queen Anne town	Queen Anne's
1	
	Talbot
1	
Queenland CDP	Prince George's
5	
Queenstown town	Queen Anne's
1	
Randallstown CDP	Baltimore
2,3,7	
Rawlings CDP	Allegany
6	
Redland CDP	Montgomery
6,8	
Reid CDP	Washington
6	
Reisterstown CDP	Baltimore
2,7	
Ridgely town	Caroline
1	
Ringgold CDP	Washington

10

Rising Sun town	Cecil
1	
Riva CDP	Anne Arundel
4	
Riverdale Park town	Prince George's
4,5	
Riverside CDP	Harford
2	
Riviera Beach CDP	Anne Arundel
3,4	
Robinwood CDP	Washington
6	
Rock Hall town	Kent
1	
Rock Point CDP	Charles
5	
Rockville city	Montgomery
6,8	
Rohrersville CDP	Washington
6	
Rosaryville CDP	Prince George's
5	
Rosedale CDP	Baltimore
2,3	
Rosemont village	Frederick
6	
Rossville CDP	Baltimore
2,3	
Sabillasville CDP	Frederick
8	
Salisbury city	Wicomico
1	
San Mar CDP	Washington
6	
Sandy Hook CDP	Washington
6	
Savage CDP	Howard
2	
Scaggsville CDP	Howard
2,3	
Seabrook CDP	Prince George's
4,5	
Seat Pleasant city	Prince George's
4	
Secretary town	Dorchester
1	
Severn CDP	Anne Arundel
2-4	
Severna Park CDP	Anne Arundel
4	
Shady Side CDP	Anne Arundel
5	
Shaft CDP	Allegany
6	
Sharpsburg town	Washington
6	
Sharptown town	Wicomico
1	
Silver Hill CDP	Prince George's
4	
Silver Spring CDP	Montgomery
3,8	
Smith Island CDP	Somerset
1	

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Smithsburg town	Washington
6	
Snow Hill town	Worcester
1	
Solomons CDP	Calvert
5	
Somerset town	Montgomery
8	
South Kensington CDP	Montgomery
8	
South Laurel CDP	Prince George's
4,5	
Spencerville CDP	Montgomery
3	
Spring Gap CDP	Allegany
6	
Spring Ridge CDP	Frederick
8	
Springdale CDP	Prince George's
4	
St. George Island CDP	St. Mary's
5	
St. James CDP	Washington
6	
St. Leonard CDP	Calvert
5	
St. Michaels town	Talbot
1	
Stevensville CDP	Queen Anne's
1	
Stockton CDP	Worcester
1	
Sudlersville town	Queen Anne's
1	
Suitland CDP	Prince George's
4	
Summerfield CDP	Prince George's
4	
Swanton CDP	Garrett
6	
Sykesville town	Carroll
8	
Takoma Park city	Montgomery
8	
Tall Timbers CDP	St. Mary's
5	
Taneytown city	Carroll
1	
Taylors Island CDP	Dorchester
1	
Temple Hills CDP	Prince George's
4	
Templeville town	Caroline
1	
	Queen Anne's
1	
Thurmont town	Frederick
8	
Tilghman Island CDP	Talbot
1	
Tilghmanton CDP	Washington
6	
Timonium CDP	Baltimore
2,7	
Tolchester CDP	Kent

5

1 Towson CDP	Baltimore
2,3 Trappe town	Talbot
1 Travilah CDP	Montgomery
6,8 Trego-Rohrersville Station CDP	Washington
6 Tyaskin CDP	Wicomico
1 Union Bridge town	Carroll
8 University Park town	Prince George's
5 Upper Marlboro town	Prince George's
5 Urbana CDP	Frederick
6 Vale Summit CDP	Allegany
6 Vienna town	Dorchester
1 Waldorf CDP	Charles
5 Walker Mill CDP	Prince George's
4 Walkersville town	Frederick
8 Washington Grove town	Montgomery
6 Waterview CDP	Wicomico
1 West Denton CDP	Caroline
1 West Laurel CDP	Prince George's
4 West Ocean City CDP	Worcester
1 West Pocomoke CDP	Somerset
1 Westernport town	Allegany
6 Westminster city	Carroll
8 Westphalia CDP	Prince George's
4,5 Whaleyville CDP	Worcester
1 Wheaton CDP	Montgomery
6,8 White Marsh CDP	Baltimore
1-3 White Oak CDP	Montgomery
3,8 Whitehaven CDP	Wicomico
1 Willards town	Wicomico
1 Williamsport town	Washington
6 Williston CDP	Caroline
1 Wilson-Conococheague CDP	Washington
6	

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Woodland CDP	Allegany
6	
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Allegany	10,478	17,088	810	14
Baltimore	8,128	11,110	688	17
Carroll	28,162	51,008	2,484	98
Frederick	47,797	55,789	3,837	142
Garrett	3,883	8,446	254	2
Harford	5,008	10,186	685	25
Montgomery	4,884	5,024	201	11
Washington	24,277	32,278	2,333	37
Totals	128,207 (39.8%)	190,929 (57.9%)	11,080 (3.3%)	343 (.1%)

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

JOINT APPENDIX
VOLUME V OF V (JA1164 – JA1351)

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Appeal Docketed Dec. 6, 2018
Jurisdiction Postponed Jan. 4, 2019

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

O. JOHN BENISEK, ET AL.,

Plaintiffs,

v.

LINDA H. LAMONE, *Administrator, Maryland State Board of Elections, et al.*,
Defendants.

No. 1:13-cv-03233-JKB

NO.	DATE	DESCRIPTION
208	06/22/2018	OPINION of US Supreme Court (certified copy) "Affirming" the judgment of the District Court as to 205 Notice of Appeal, filed by Alonnie L. Ropp, Jeremiah DeWolf, O. John Benisek, Edmund Cueman, Sharon Strine, Kat O'Connor and Charles W. Eyler
209	06/29/2018	STATUS REPORT by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine
210	07/13/2018	Supplemental to *Motion for Summary Judgment (Dkt. 177)* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit C–1, # 5 Exhibit C–2, # 6 Exhibit C–3, # 7 Exhibit C–4,

NO.	DATE	DESCRIPTION
		# 8 Exhibit C–5, # 9 Exhibit C–6, # 10 Exhibit C–7, # 11 Exhibit C–8, # 12 Exhibit C–9, # 13 Exhibit C–10, # 14 Exhibit C–11)
211	07/13/2018	Supplemental to 186 Cross MOTION for Summary Judgment *and Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and, in the Alternative, for Summary Judgment*, 201 Reply to Response to Motion, filed by Linda H. Lamone, David J. McManus, Jr.
212	07/23/2018	ORDER of Supreme Court of the United States "Affirming" the District Court's order denying a preliminary injunction as to 205 Notice of Appeal, filed by Alonnie L. Ropp, Jeremiah DeWolf, O. John Benisek, Edmund Cueman, Sharon Strine, Kat O'Connor, Charles W. Eyler
213	08/30/2018	ORDER re: Setting Hearing. Signed by Chief Judge James K. Bredar on 8/29/2018
214	09/07/2018	ORDER LIFTING STAY. Signed by Chief Judge James K. Bredar on 9/7/2018

NO.	DATE	DESCRIPTION
215	09/11/2018	MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* by Linda H. Lamone, David J. McManus, Jr. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)
216	09/12/2018	PAPERLESS ORDER: Plaintiffs shall respond to Defendants' Motion to Exclude (etc.—refer to ECF 215) on or before September 24, 2018. Defendants' reply shall be filed on or before September 28, 2018. Signed by Chief Judge James K. Bredar on 9/12/2018
217	09/24/2018	RESPONSE in Opposition re 215 MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine. (Attachments: # 1 Exhibit A)
218	09/28/2018	REPLY to Response to Motion re 215 MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* filed by Linda H.

NO.	DATE	DESCRIPTION
		Lamone, David J. McManus, Jr. (Attachments: # 1 Exhibit 1)
219	10/02/2018	ORDER denying 215 Defendants' Motion to Exclude Portions of the Declaration of Micah D. Stein; Judge Russell joins in the Order; and Judge Niemeyer would defer ruling until during the hearing on 10/4/18. Signed by Chief Judge James K. Bredar on 10/2/2018
220	10/04/2018	Three–Judge Court Hearing held on 10/4/2018 before Chief Judge James K. Bredar, Judge Paul V. Neimeyer and Judge George Levi Russell, III
221	10/19/2018	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 10/4/2018, before Judge James K. Bredar. Court Reporter Christine T. Asif, Telephone number 410–962–4492. Total number of pages filed: 126. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER. Redaction

NO.	DATE	DESCRIPTION
		Request due 11/9/2018. Redacted Transcript Deadline set for 11/19/2018. Release of Transcript Restriction set for 1/17/2019
222	11/07/2018	MEMORANDUM OPINION
223	11/07/2018	JUDGMENT Granting plaintiffs' motion for summary judgment; Denying defendants' cross–motion for summary judgment. After the conclusion of the 2018 congressional election, the defendants are permanently enjoined from conducting any further election for members of the U.S. House of Representatives from Maryland under the 2011 plan and are directed to submit to the court a new congressional redistricting plan. In the event that the States [*sic*] does not submit a plan by the specified deadline or proposes a plan that is rejected, the court will give the redistricting task to a Congressional District Commission appointed by the court to produce and submit an appropriate plan by July 8, 2019, for approval by the court

NO.	DATE	DESCRIPTION
		The Commission shall consist of United States Magistrate Judge J. Mark Coulson, as chair, a person designated by the plaintiffs, and a person designated by the State. The Clerk shall assess the costs of this action against the State. Signed by Judge Paul V. Niemeyer, for the Court on 11/7/2018
224	11/13/2018	ORDER regarding Notice of Contemplated Appointment of Special Master; Directing in the event the State does not submit a compliant redistricting plan by the March 7, 2019 deadline, the Court hereby provides notice of its intent to designate the Commission's Chair, United States Magistrate Judge J. Mark Coulson, as a Special Master pursuant to Federal Rule of Procedure 53 and Local Rule 301(5)(c); No later than 15 days from the date of this Notice, the Special Master shall file the affidavit described in Rule 53(b)(3). Any party objecting to the appointment outlined in this Notice shall file such objection specifying the grounds no later than 30 days

NO.	DATE	DESCRIPTION
		from the date of this Notice. Signed by Chief Judge James K. Bredar on 11/13/2018
225	11/15/2018	NOTICE OF APPEAL as to 223 Judgment, 222 Memorandum Opinion by Linda H. Lamone, David J. McManus, Jr.
226	11/15/2018	Consent MOTION to Stay re 223 Judgment,,,, 222 Memorandum Opinion by Linda H. Lamone, David J. McManus, Jr. (Attachments: # 1 Text of Proposed Order)
227	11/15/2018	RESPONSE in Support re 226 Consent MOTION to Stay re 223 Judgment,,,, 222 Memorandum Opinion *(Plaintiffs' Statement of Conditional Consent to a Discretionary Stay Pending Appeal)* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine
228	11/15/2018	SPECIAL MASTER DISCLOSURE Pursuant to Rule 53(b)(3)(A). Signed by Magistrate Judge J. Mark Coulson on 11/15/2018

* * *

NO.	DATE	DESCRIPTION
230	11/16/2018	ORDER granting in part 226 Consent Motion to Stay. The Judgment previously entered is Stayed until the United States Supreme Court decides the appeal of this case or until the passage of the date of July 1, 2019, whichever first occurs. Signed by Chief Judge James K. Bredar on 11/16/2018
		* * *
232	12/11/2018	Supreme Court of the United States Case Number 18–726 for 225 Notice of Appeal, filed by Linda H. Lamone and David J. McManus, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

JOINT STATUS REPORT

Pursuant to this Court's August 24, 2017 Order Entering Stay (Dkt. 204), the parties have met and conferred regarding further proceedings in this case. The parties' positions are set forth below.

I. SUPPLEMENTAL BRIEFS ON SUMMARY JUDGMENT

The plaintiffs have filed a motion for summary judgment, and the State has filed a cross-motion for summary judgment. The motions are fully briefed and ripe for decision (Dkts. 177, 186, 191, 201), and the plaintiffs will not move to reopen discovery.

The parties agree that supplemental summary judgment briefs are warranted to allow the parties to address *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Supreme Court's disposition of the appeal in this case, and other subsequent relevant authority.

The parties agree to file simultaneous supplemental summary judgment briefs of 25 pages or less by or before **noon on Friday, July 13, 2018**.

II. PLAINTIFFS' POSITION REGARDING A TRIAL DATE

Plaintiffs respectfully submit that a trial date should be set at the earliest dates on which the judges of this Court are able to find overlapping time on their schedules, and in no event later than October 2018. This is so to ensure that plaintiffs' claims are not mooted by the passage of the 2020 elections.

To ensure that we are able to obtain a new congressional map in time for the 2020 elections if the Court enters a permanent injunction, there must be time for the Supreme Court to complete its appellate review of this Court's final judgment by January 2020 or earlier.[1] Working backward from there, the parties' jurisdictional briefs would have to be considered by the Supreme Court at one of its conferences in early April 2019 or before. Assuming that the parties complete their jurisdictional briefing over a significantly shortened 60-day period,[2] this Court would have to enter a

---

[1] If this Court were to enter a permanent injunction in favor of the plaintiffs, we anticipate that the State would move the Supreme Court for a stay of the injunction. Although we would oppose such relief, there is a significant possibility that the Supreme Court would enter a stay, as it did in *Gill* and the North Carolina case, *Common Cause v. Rucho*, No. 17-1295.

[2] Supreme Court rules allow for 90 days for the appellants' jurisdictional brief, 30 days for the appellees' response, and

final judgment in early January 2019—just five months from now.[3] We are concerned that waiting to set a trial date until after a decision on the summary judgment motions would make meeting that timeline substantially more difficult.

We therefore respectfully submit that, to ensure that the Court has adequate time to issue a final judgment while leaving time for appellate review and an orderly enactment of a new map, a trial on the earliest possible dates—and in no event later than October 2018—is necessary. We anticipate needing two or three days for trial if the Court grants partial summary judgment on the issue of intent; and otherwise, three or four days.

III. DEFENDANTS' POSITION REGARDING A TRIAL DATE

Defendants continue to believe that this matter is appropriate for resolution on summary judgment. Defendants therefore believe that it is premature to set trial preparation or trial dates. To the extent any possibility of mootness now threatens plaintiffs' claims, it

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between 14 and 20 days for a reply brief depending on the Court's case distribution schedule—for an ordinary total of 134-140 days for jurisdictional briefing assuming no extensions.

[3] We do not mean to suggest that absent a final judgment from this Court by January 2019, plaintiffs' claims will necessarily be mooted. Our point is only that a final judgment by or before January 2019 is necessary to ensure an orderly conclusion to this litigation and to avoid an inequitable risk that plaintiffs' claim is mooted by passage of time.

is due to their own litigation conduct including decisions about when to file and when to seek preliminary injunction. As plaintiffs set forth above, significant questions regarding scheduling, such as how many days should be set aside for trial, may be substantially clarified through resolution of the cross-motions for summary judgment. Indeed, the case may not even proceed to trial at all. However, Defendants do not object to the setting of a trial date and appropriate pre-trial deadlines as soon as practicable after the resolution of the pending and contemplated dispositive motions and anticipate working cooperatively with Plaintiffs' counsel to set an expeditious schedule at the appropriate time.[4]

* * *

[4] Due to pre-planned family vacations, Defendants' counsel are not available during the weeks beginning August 20 and August 27.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, v. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

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PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF

INTRODUCTION

According to the Court's decision on the motion to dismiss, the plaintiffs in this case must prove that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-97 (D. Md. 2016).

We demonstrated in our prior briefs (Dkt. 177, at 3-16; Dkt. 191, at 2-10) that there is no genuine dispute that those responsible for Maryland's 2011 redistricting specifically intended to dilute Republicans' votes

because of their past successful support for Representative Roscoe Bartlett. Thus, all three judges of this Court expressed an inclination, at the July 14, 2017 preliminary injunction hearing, to grant summary judgment to plaintiffs on that issue. *See* 7/14/17 Hr'g Tr. (Ex. A) 44:2-5 (Judge Bredar: "I think you've proven it, frankly, in this record without a further trial."); *id.* 32:6-10 (Judge Russell observing that "much of the evidence supports intent" and indicating that he had no "issue" with that element); *id.* 68:6 (Judge Niemeyer: "[T]he evidence [of intent] is overwhelming."). *See also* S. Ct. Oral Arg. Tr. (Ex. B) 40:15-16 (Justice Kagan: "I mean, how much more evidence of partisan intent could we need?").

We also demonstrated that those responsible for the redistricting plan achieved their specifically intended goal: There is no genuine dispute that Republican votes in the Sixth District were significantly diluted as a consequence of moving large majority-Democratic areas into, and majority-Republican areas out of, the district. *See* Dkt. 177-19 (PI Ex. Q), at 3 (Plaintiffs' expert Dr. Michael McDonald concluding that the redistricting "ha[d] the effect of diminishing the ability of registered Republican voters to elect candidates of their choice"); Dkt. 177-48 (PI Ex. TT), at 2 (State's expert Dr. Allan Lichtman describing the "obvious" conclusion "that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6"). The dilution of Republican votes was so severe that—according to the same metrics used by the mapdrawers

themselves to accomplish the gerrymander—it made a previously safe Republican seat essentially out of reach for Republican voters moving forward. As Justice Kagan observed, "the Maryland legislature got exactly what it intended, which was you took a Republican district, like a safe Republican district, and made it into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:13-18.[1]

Finally, we demonstrated that Republican votes in the Sixth District would not have been so badly diluted absent the specific intent to draw a "7-1 map" by flipping the Sixth District. There is no evidence that any of the other considerations in the redistricting necessitated the Sixth District's highly-targeted southward dip into Montgomery County, or that any other consideration otherwise would have resulted in such severe dilution of Republican votes.

Each of these conclusions now finds significant additional support in both the majority and concurring opinions in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The majority opinion confirmed in clear and certain terms that vote dilution is a cognizable injury in partisan gerrymandering cases like this, and it held that such

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[1] A plaintiff can also establish actionable vote dilution by "produc[ing] an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring). "The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote." *Id.* We have done just that. *See* Dkt. 177, at 21.

claims must be brought in exactly the kind of single-district challenge that we have brought here. And both the majority and concurring opinion lend additional support to our contention that plaintiffs' injury inheres not in changed electoral outcomes themselves, but in the gerrymander's burdening of their votes and associational rights, making it harder for them to achieve electoral success. There is strong—indeed, undisputed—evidence of such burdens and causation in this case.

The Supreme Court's disposition of the appeal in this case, moreover, demonstrates the need for a swift resolution to this litigation. If this Court does not enter a final judgment near the end of the year, there is a risk that plaintiffs' claim might be mooted by passage of the 2020 election before relief can be entered. The Court accordingly should enter summary judgment for plaintiffs as expeditiously as possible. Or, if it enters only partial summary judgment, it should set a trial date at the earliest possible time at which the judges of the Court have overlapping availability.

ARGUMENT

I. UNDER *GILL*, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON BURDEN AND CAUSATION

A. *Gill* confirms that a traditional vote dilution analysis is appropriate to demonstrate injury in partisan gerrymandering cases

Gill involved a statewide challenge to the partisan gerrymander of Wisconsin's 2011 legislative redistricting map. The plaintiffs in *Gill* "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." 138 S. Ct. at 1924 (quotation marks omitted). Because the legislative gerrymander was a statewide project that affected the composition of the entire state legislature, the plaintiffs argued (and the district court found) that "they should be permitted to bring a statewide claim." *Id.* (quotation marks omitted).

The Supreme Court disagreed, holding that the plaintiffs "ha[d] not shown standing under the theory upon which they based their claims for relief." *Gill*, 138 S. Ct. at 1929. "To the extent the plaintiffs' alleged harm is the dilution of their votes," the Court explained, "that injury is district specific." *Id.* at 1930. The Court went on:

> An individual voter in Wisconsin is placed in a single district. He votes for a single

> representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This disadvantage to the voter as an individual therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

Id. (quotation marks, alteration marks, and citations omitted).

In two respects, the Court's opinion in *Gill* supports plaintiffs' claim in this case. ***First***, it confirms that gerrymandering claims are best understood as *vote dilution* claims. The harm of vote dilution, according to *Gill*, "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." 138 S. Ct. at 1931. At the most basic level, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Bush v. Gore*, 531 U.S. 98, 107 (2000) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). The Court in *Gill* thus described vote dilution as a "burden on the plaintiffs' votes," which calls for a district-by-district analysis of how an alleged gerrymander "burdened [the plaintiffs'] individual vote[s]." 138 S. Ct. at 1932-33. That makes sense: "Where an

election district could be drawn in which minority voters form a majority but such a district is not drawn," there is a "denial of the opportunity to elect a candidate of choice," which is "a present and discernible wrong." *Bartlett v. Strickland*, 556 U.S. 1, 18-19 (2009). That is exactly the theory that we have pressed in this case.

Second, *Gill* describes the placement of an individual in a "cracked" district (like Republican voters in Maryland's Sixth District) as a "disadvantage to the voter as an individual." 138 S. Ct. at 1930 (quotation marks and alteration marks omitted). Of course, a state law that "places a particular burden on an identifiable segment of [the State's] voters" and "burdens the[ir] availability of political opportunity" based on their "political preferences" violates individual constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 792-94 (1983) (quotation marks omitted). That is just what a partisan gerrymander does, and—as we demonstrated in our prior briefs and reiterate below—it is just what Maryland lawmakers did in 2011 to Republican voters in the Sixth District.

B. Plaintiffs have undisputed evidence of traditional vote dilution, including causation

As we explained in the preliminary-injunction reply brief (Dkt. 191, at 11), vote dilution occurs when district lines are drawn so that the disfavored political party has "less opportunity . . . to elect candidates of

their choice." *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality opinion) (quotation marks omitted). As *Gill* confirms, vote dilution is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.'" *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

The most developed body of law on vote dilution arises in the context of racial vote dilution under Section 2 of the Voting Rights Act. To establish that vote dilution has "impeded the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 51), a Section 2 plaintiff must satisfy the so-called *Gingles* preconditions: ***First***, "[the] minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quotation marks omitted). ***Second***, "the minority group must be politically cohesive." *Id.* (quotation marks omitted). ***Third***, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id.* (quotation marks and alteration marks omitted).

Each of these three elements is directed toward the question of causation. If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably drawn] single-member district" in the area, then the drawing of the district's lines "cannot be

responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. Similarly, if the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51. And if the majority does not "vote[ ] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[ ] its ability to elect its chosen representatives." *Id.* (internal citations omitted). When these three conditions are satisfied, however, it follows that a denial of "equal electoral opportunity" is the but-for result of the lines that the legislature drew. *Johnson v. De Grandy*, 512 U.S. 997, 1012 (1994).[2]

As our redistricting expert, Dr. Michael McDonald, explained, this traditional Section 2 vote-dilution analysis fits naturally in partisan gerrymandering cases.

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[2] To be sure, *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to demonstrate the substance of a Section 2 vote dilution claim. 512 U.S. at 1011. The Court stressed that the inquiry does not focus on the three preconditions for their own sake, but on the deprivation of "equal electoral opportunity" in light of all "relevant facts." *Id.* at 1012. But in that regard, the Court expressly framed *Johnson* as an interpretation of Section 2 of the VRA. And *Bartlett* emphasized that the Supreme Court's opinions interpreting "the text of § 2" do "not apply to cases in which there is intentional discrimination" (556 U.S. at 19-20), which is this case. We therefore propose to rely on the *Gingles* preconditions only as a commonsense (and time-tested) guide for identifying causation in partisan gerrymandering cases involving intentional discrimination—certainly not as a standalone framework for establishing liability on the whole.

See Dkt. 177-19 (PI Ex. Q), at 3-4. And that analysis is readily satisfied here.

1. Numerosity and compactness

There is no dispute that historical Republican voters are sufficiently numerous and geographically compact to form the majority of a reasonably drawn district in northwest Maryland. As the State's own witness explained, the Sixth District has comprised a consistent core of territory in northwest Maryland since its creation in the Eighteenth Century. *See* Dkt. 186-17, at 7-14 (Willis report). And as recent history conclusively demonstrates, it is possible to draw a single-member district in that area in which voters who support Republican candidates are able to elect the representative of their choice. Between 1990 and 2010, they did just that. *See* Dkt. 177-5 (PI Ex. C), ¶ 8. The first precondition accordingly is satisfied.[3]

2. Political cohesion and bloc voting

There is also no dispute that historical Republican voters are politically cohesive and that both Republicans and Democrats both engage in bloc voting.

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[3] Focus on the ability of Republican voters to form the majority of a reasonably drawn district also clarifies that the benchmark for measuring vote dilution is not necessarily the immediately prior district; it is, instead, the full range of hypothetical districts that could be drawn in the area. It also clarifies that a deliberate perpetuation of a prior partisan gerrymander could also violate the First Amendment.

a. Using self-reported party registration data derived from the Cooperative Congressional Election Study, Dr. McDonald evaluated the Sixth District's congressional elections in 2012 and 2014, in addition to the presidential and senatorial elections in 2012 and the gubernatorial election in 2014. Dkt. 177-19 (PI Ex. Q), at 7-8. He concluded—no surprise—that self-reported registered members of the two major parties are politically cohesive. "Democrats and Republicans have distinct candidate preferences in that at least a majority of registered Democrats prefer the Democratic candidate and at least a majority of registered Republicans prefer the Republican candidate." *Id.* at 8-9. Dr. McDonald thus concluded that he is "confident within prevailing professional standards that registered Democrats in the Sixth Congressional District prefer Democratic candidates and registered Republicans prefer Republican candidates." *Id.* at 9.

The Democratic Performance Index and the Partisan Voter Index both offer further evidence of political cohesion and bloc voting among historical Democratic and Republican voters. Those metrics show that when a district's populace comprises a majority of Republican voters, the district is highly likely to elect the Republican candidate rather than the Democratic one; and when it comprises a majority of Democratic voters, it is highly likely to elect the Democratic candidate rather than the Republican one. *See* Dkt. 191, at 7-9; Dkt. 191-8 (PI Ex. KKK), at 628. This is a necessary premise of the practice of partisan gerrymandering. If voters' partisan identities were *not* stable from election to

election, so that Democrats did not generally vote for Democratic candidates and Republicans did not generally vote for Republican candidates, we would not see mapdrawers attempting to achieve partisan advantage by moving voters in and out of districts on the basis of their voting histories and party affiliations. But we do—and with great effect.

There is yet further evidence of generally stable political cohesion and bloc voting in this case: In the elections following the 2011 gerrymander, (1) those precincts that were *retained* in the Sixth District after the gerrymander continued to vote predominantly for Republican candidates for office; (2) those precincts that were *removed* from the district have continued to vote very strongly for Republican candidates for office, and (3) those districts that were *added* to the district have continued to vote strongly for Democratic candidates for office (*see* Stein Decl. ¶¶ 13-15 (Ex. C)):

	TABLE 1: Vote share for Republican candidate as a percentage of all election-night votes cast				
	2008	2010	2012	2014	2016
precincts **retained**	53.7%	57.8%	47.8%	59.5%	51.9%
precincts **removed**	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
precincts **added**	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

These data corroborate the relative stability of voters in the Sixth District over time, so that "dispersal of [Republican voters] into [surrounding] districts" ensured that "they constitute[d] an ineffective minority of voters." *Voinovich*, 507 U.S. at 154.

b. On the other side of the scales, there is not one iota of evidence to suggest that historical Republican voters and historical Democratic voters do not vote reliably as blocs from election to election. In saying this, we are mindful that Judges Bredar and Russell expressed some concern that proof of *past* political cohesion and bloc voting may not reliably show *future* political cohesion and bloc voting—which is to say that such proof may not show that the gerrymander has actually changed the outcome of an election. *E.g.*, 7/14/17 Hr'g Tr. (Ex. A) 37:10-12 (Judge Russell: "There were a number of factors that may or may not have contributed to [Representative Bartlett's] defeat."); *id.* 44:14-18 (Judge Bredar: "[H]ow can you make, with sufficient certainty, the causal link between all of this nefarious activity—and I'll use the word nefarious—that you have so expertly proven here, and the actual outcome when there [are other] force[s] at work [in the election]?"); *id.* 45:9-10 (Judge Russell: "[Y]ou can't group these individuals together and expert [*sic*] that individuals have the same mindset.").

Those concerns are answered by both the law and the facts.

Take first the *law*. The Supreme Court has instructed the lower courts to undertake bloc-voting

analyses in Section 2 cases, based on the same inference that we are asking the Court to make here: that political attitudes and predispositions are relatively stable from year to year, and therefore that "electoral history" provides an adequate legal basis for identifying actionable vote dilution, including the possibility that vote dilution has changed electoral outcomes. *Cooper*, 137 S. Ct. at 1470-71. Put another way, the Court's Section 2 vote dilution cases teach that an historical bloc-voting analysis is—*as a matter of law*—a sufficiently reliable predictor of future voting behavior to support a finding of vote dilution, and that the targeted minority has suffered the "discernible wrong" of having been denied an "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 & 19.

Take next the *facts*. Every bit of evidence bearing on this issue demonstrates that blocs of voters in the Sixth District behave consistently from election to election. *See supra*, pages 6-7. The contrary suggestion—that the Sixth District's dramatic swing in favor of Democratic candidates after 2011 may have been attributable to a massive and unprecedented change in voter attitude rather than the mapdrawers' calculated linedrawing—depends on the unsupported speculation that between 2010 and 2012, tens of thousands of Republican voters spontaneously abandoned their party and began supporting Democratic candidates instead.

Not only is the record devoid of any support for that concern, but contemporary social science literature uniformly refutes it. Academic literature shows that voters are "socialized" into a particular party at

relatively young ages, and partisan affiliation tends to harden in early adulthood. *See* Donald Green et al., *Partisan Hearts and Minds, Political Parties and the Social Identities of Voters* 10-11 (2002) (Stein Decl. Ex. C-2). Once formed, these "identities are enduring features of citizens' self-conceptions," and "remain intact during peaks and lulls in party competition." *Id.* at 4-5. In fact, partisan identity remains among the strongest predictors of voter preferences, even more so than gender, class, religion, and often race. *Id.* at 3. For these reasons, it is widely recognized that the distribution of partisan identities among the electorate "provides powerful clues as to how elections will be decided." *See* Donald P. Green et al., "Partisan Stability: Evidence from Aggregate Data," in *Controversies in Voting Behavior* 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001) (Stein Decl. Ex. C-3). This, again, is a necessary premise of partisan gerrymandering; without it, gerrymandering would not take place at all.

In recent years, moreover, the predictive power of partisan identity has increased as partisan behavior has become even more stable. Based on an analysis of the American National Election Studies' time-series data, for example, the "observed rate of Americans voting for a different party across successive presidential elections has never been lower." Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 365 (2017) (emphasis omitted) (Stein Decl. Ex. C-4). As a result, each party has a reliable and predictable "base of party support that is less responsive to short-term forces." *Id.*

(emphasis omitted). Recent increases in partisan "intensity" have further solidified these dynamics: A Pew Research Report notes that "[t]oday, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican," making crossover votes between the parties even fewer and farther between. *See* Pew Research Ctr., *Political Polarization in the American Public* 6 (2014) (Stein Decl. Ex. C-5).

It is no answer to say that many voters in the Sixth District are independent voters. "Most of those who identify as independents lean toward a party." Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015) (Stein Decl. Ex. C-6). And voters who identify as independents but who lean towards a party generally exhibit voting behavior highly similar to registered partisans. David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, The Forum, Oct. 2012, Article 6, at 1, 17 (Stein Decl. Ex. C-7). Because the DPI depends on past voter history rather than party registration, moreover, independent voters who generally vote for Republican candidates were treated indistinguishably from registered Republicans with the same voting histories. *Cf.* Dkt. 186-41, at 48:10-50:12 (Dr. McDonald explaining how his analysis accounted for independent voters by focusing on election returns rather than party affiliation).

To be clear, none of this is to suggest that individual voters do not think for themselves or meaningfully evaluate and respond to individual candidates. Nor

does it suggest that partisan identity is the only factor that influences voter behavior or that voter behavior can be predicted with absolute certainty. That is why we see modest fluctuations in election returns from election to election (*see* Table 1, *supra*, at 8) and why the DPI and PVI do not predict electoral outcomes with certitude. But the social science literature does conclusively corroborate what Dr. McDonald's analysis of the Sixth District demonstrates, what the DPI and PVI logically imply, and what the actual elections returns show: that partisan identity is stable over time, that it therefore can be used to predict voter behavior with a high degree of confidence, and that moving district lines as the State did in 2011 is a highly effective means of diminishing electoral opportunity, inflicting very concrete and practical effects. Indeed, that is the necessary premise of the Supreme Court's vote dilution cases under Section 2 of the VRA.

C. Vote dilution is an actionable injury independent of changed electoral outcomes

Plaintiffs' theory of injury has all along included unconstitutional vote dilution. Dkt. 44 ¶¶ 7b, 28, 93; Dkt. 68, at 1, 7-8, 15-16. We acknowledged from the outset, however, that vote dilution—even when intentionally inflicted—may not be sufficiently significant to make a practical difference in all cases. We therefore took the position that a partisan gerrymandering plaintiff must prove that intentionally inflicted dilution has resulted in a real and concrete adverse effect, not a de minimis one, before he will be entitled to relief.

E.g., Dkt. 68, at 15-16; Dkt. 85, at 4-5. This Court, in denying the State's motion to dismiss, agreed: "[T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference." *Shapiro*, 203 F. Supp. 3d at 597.

In light of the evidence in this case, we have consistently argued that the intentional dilution of plaintiffs' votes amounted to a practical injury *because* it has dictated the outcomes of subsequent elections. We confidently stand by that assertion: Because of the huge shifts in the political composition of the Sixth District's population—overwhelmingly from voters who had previously cast their ballots for Republicans to those who had cast them for Democrats—the *Cook* PVI showed that the chances of a Republican victory in the district dropped from 99.7% in 2010 to just 6% in 2012. Dkt. 191, at 7-9. The DPI—the metric employed by the mapdrawers themselves—similarly showed that the chances of a Republican victory fell from 100% in 2010 to 7.5% in 2012. *Id.* And, of course, these predictive metrics proved devastatingly reliable in this case: Democrat John Delaney defeated Rep. Bartlett in the 2012 election and has won reelection ever since. Dkt. 177-5 (PI Ex. C), ¶¶ 54-56. This is what gerrymandering is all about: denying the targeted minority a meaningful "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11.

But it does not follow from our factual contentions concerning the 2012, 2014, and 2016 elections that, to establish a cognizable burden in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must indispensably show that every electoral outcome is (and will continue to be) unquestionably attributable to the gerrymander. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 808 (D. Md. 2017). As Justice Kagan observed in *Gill*, only a "perfect" gerrymander would ensure that when "a voter resides in a packed district, her preferred candidate will win no matter what," and "when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing." 138 S. Ct. at 1936. But the law does not demand transcendent wrongdoing before a court may grant relief. The Supreme Court's vote-dilution cases recognize that vote dilution and the inability to win elections do not necessarily go hand-in-hand. *Gingles*, 478 U.S. at 31. To be sure, electoral outcomes are probative "evidence" bearing on the question of vote dilution. *Johnson*, 512 U.S. at 1011. But plaintiffs' injury inheres in their diminished electoral opportunity, not in the electoral outcomes themselves.

Thus, even if the Republicans in the Sixth District had won an election somewhere along the way, it would not necessarily refute our claim that the gerrymander has "disadvantage[d]" the plaintiffs "as . . . individual[s]" in the electoral process (*Gill*, 138 S. Ct. at 1930 (quotation marks omitted)) in a constitutionally significant manner. If, for example, the 2011 gerrymander had changed only two of the three congressional

elections between 2012 and 2016, that still would be a sufficiently serious burden upon plaintiffs' electoral opportunity to warrant relief—it would be no defense for the State to say that it had succeeded in rigging only two elections when it was really going for all three.

This much is confirmed by the Supreme Court's ballot access cases. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-88 (quotation marks omitted). The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of common-sense practicalities—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." *Id.* at 792. Because the deadline applied "unequally" among the political parties, in other words, it "burden[ed] the availability of political opportunity" based on the "political preferences" of voters and was therefore unlawful. *Id.* at 793-94 (quotation marks omitted). Thus, it could not stand.

Consider also *Cook v. Gralike*, 531 U.S. 510 (2001), where the Supreme Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id.* at 514-27. Although "the precise damage the

labels may exact on candidates [was] disputed" there, the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id.* at 525. In language that easily could be mistaken for a condemnation of partisan gerrymandering, the Court explained that the Elections Clause does not authorize the States to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 523 (quotation marks omitted).

In neither *Anderson* nor *Cook* did the Court require the plaintiffs to prove that the challenged regulations changed the outcome of the election as a precondition to relief. It was enough to show (just as in a vote dilution case like this one) that the regulation had put the plaintiffs at a concrete "political disadvantage." *Cook*, 531 U.S. at 525.

For the same reasons, it cannot be said that Maryland's 2011 gerrymander of the Sixth District did not inflict a concrete injury under the First Amendment simply because "Congressman Delaney nearly lost control of his seat in 2014." *Benisek*, 266 F. Supp. 3d at 813. Regardless whether the election in 2014 was a close one, the fact remains that the Sixth District was deliberately converted from "a safe Republican district . . . into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:14-18 (Justice Kagan). The gerrymander thus manifestly reduced the effectiveness of plaintiffs' votes and diminished their electoral opportunity, with concrete practical effects.

That is an actionable burden on plaintiffs' representational rights.

D. Justice Kagan's *Gill* concurrence confirms that plaintiffs' injury inheres in effects other than changed electoral outcomes

Although we are confident that we have proved beyond genuine dispute that the gerrymander dramatically diluted Republican votes in the district—so much so that it denied them a meaningful opportunity to win the elections in 2012, 2014 and 2016—we have not hitched our wagon to that horse alone. In fact, we have also consistently argued that the 2011 gerrymander has inflicted a more-than-de-minimis injury insofar as it has chilled and disrupted the associational and expressional activities of Republicans in the Sixth District. *E.g.*, Dkt. 44 ¶¶ 112-119; Dkt. 177, at 18-19.

Justice Kagan's concurring opinion in *Gill* lends substantial support to this additional way of conceptualizing plaintiffs' injury. In her view, partisan gerrymandering claims are properly litigated as vote dilution claims because gerrymandering directly "burden[s] individual votes" by diminishing electoral opportunity. 138 S. Ct. at 1934. "But," in Justice Kagan's view, "partisan gerrymanders inflict other kinds of constitutional harm as well." *Id* at 1938. "Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members." *Id*. "Members of the disfavored party in the State deprived of

their natural political strength by a partisan gerrymander, may," in particular, "face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Id.* (quotation marks omitted). This analysis reflects the same considerations that the Supreme Court found relevant in *Anderson*. *See* 460 U.S. at 792 (inhibition of campaigning, "organizing efforts," "recruit[ment] and ret[ention]" of volunteers, "media publicity," and fundraising are identifiable burdens).

There is clear evidence of just such burdens on plaintiffs' associational rights in this case. To begin, voter engagement in support of the Republican Party has dropped off significantly since the 2011 gerrymander. We submit that the best indicator of this effect is the falloff in turnout for the Republican primary elections in midterm years. Prior to the gerrymander, the Republican primary was the most important election for selecting the district's representative, given that the Republican nominee was highly likely to win the general election regardless of whom the Democrats selected in their own primary. And during the midterm elections, the congressional race was at the top of the federal ticket and thus most likely to drive primary voters to the polls.

Publicly-available primary election data certified by the defendants themselves shows that turnout for the Republican primary elections in midterm years has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary was a robust 42.8%. Dkt. 191-11 (PI Ex. NNN), at 3. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. *Id.* at 9. Allegany County is no outlier; participation in midterm Republican primary elections has dropped precipitously in all three counties that remained entirely in the Sixth District after the 2011 gerrymander:

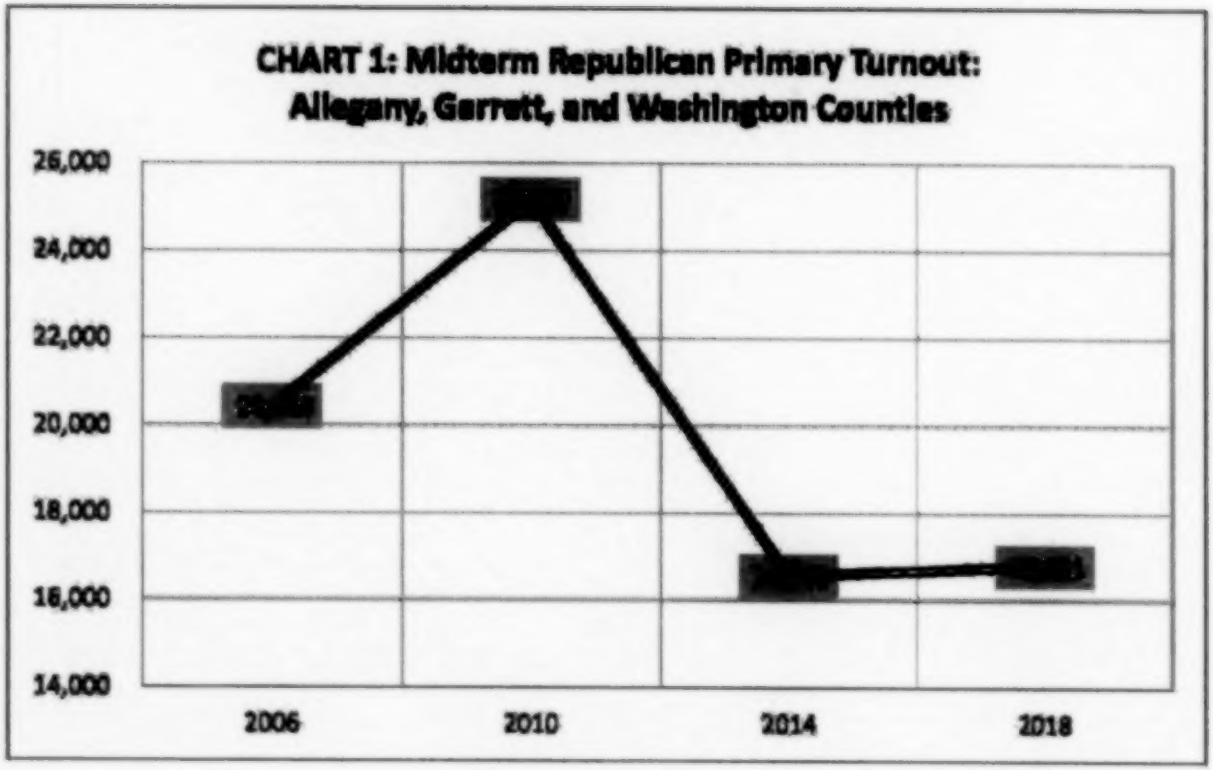
CHART 1: Midterm Republican Primary Turnout:
Allegany, Garrett, and Washington Counties
26,000
24,000
22,000
20,000
18,000
16,000
14,000
2006
2010
2014
2018

See Stein Decl. ¶¶ 18-22.[4]

Elections returns in the general elections corroborate the same chilling effect. In the 138 voter precincts that were in the Sixth District both before and after the gerrymander, turnout among Republican voters in 2008 stood at 74,299, comprising 53.7% of the total share of election-day votes cast. Stein Decl. ¶ 13. In the next presidential election year in 2012, Republican voter turnout plummeted to 60,969, comprising 47.8% of the total election-day votes cast. Stein Decl. ¶ 13.

Fundraising by the Republican Central Committees in the counties that remained entirely in the Sixth District has also fallen off noticeably since the 2011 gerrymander. According to Maryland State Board of Elections campaign finance filings by those committees, fundraising during midterm election years has fallen by more than 6%. *See* Stein Decl. ¶ 37, Ex. C-11. Fundraising during presidential election years has suffered as well, dropping by over 12%. *Id.* The following graph (*see id.*) shows the effect:

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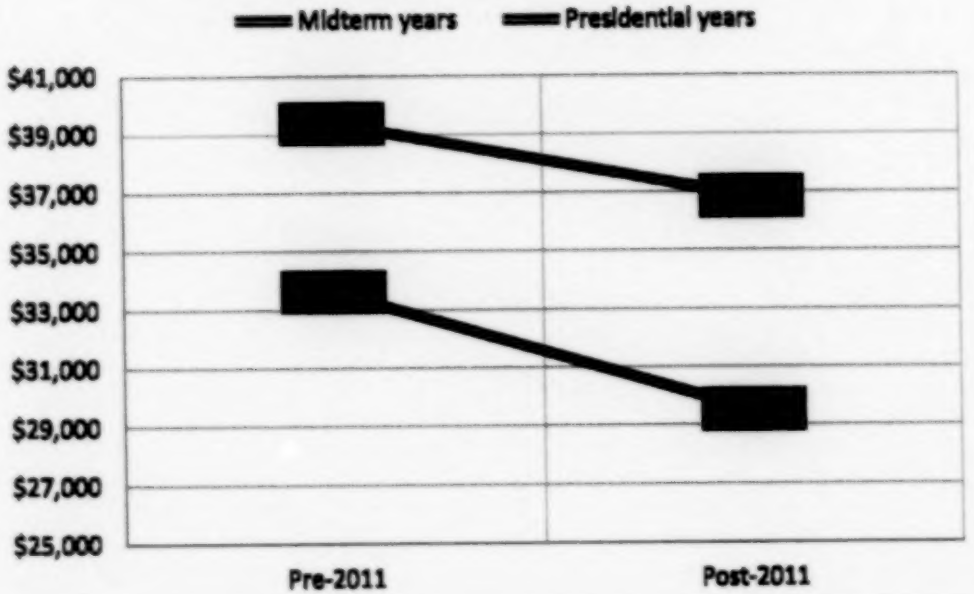
[4] Republican primary turnout fell district-wide as well (Stein Decl. ¶¶ 18-22), but that is expected regardless of chilling, given that so many Republican voters were moved out of the district and replaced with Democratic voters.

CHART 2: Fundraising by the Republican Central Committees in Allegany, Garrett, and Washington Counties



As we explained in our prior briefing, moreover, all of this hard data is corroborated by the plaintiffs' on-the-ground experiences. *See* Dkt. 177-1, at 18-19.

This evidence, taken as a whole, substantiates precisely the kind of associational injury that Justice Kagan described in her concurring opinion. Voter support—expressed in terms of both voter turnout and financial support—has been chilled by the gerrymander. As she observed in the same opinion, "[c]ourts have a critical role to play in curbing partisan gerrymandering," and it is especially in circumstances like these, with clear evidence of substantial burdens on representational and associational rights, that "the need for judicial review is at its most urgent." *Gill*, 138 S. Ct. at 1941.

II. IF THE COURT DENIES SUMMARY JUDGMENT IN WHOLE OR PART, THE SUPREME COURT'S DISPOSITION OF THE APPEAL IN THIS CASE CONFIRMS THE NEED FOR A SPEEDY RESOLUTION OF THE CASE

The record in this case irrefutably demonstrates (1) a specific intent to dilute Republican votes in for [*sic*] the former Sixth District, (2) success in bringing that goal about, leading to real and identifiable burdens on plaintiffs' representational and associational rights, and (3) no neutral justification to refute but-for causation. Against this backdrop, the Court should enter summary judgment for the plaintiffs. That is

particularly so because the standard at the final judgment stage requires a less robust showing that [*sic*] it does at the preliminary stage. *See* 7/14/17 Hr'g. Tr. (Ex. A) 98:11-16 (Judge Bredar observing that "51 percent probably carries the day [when] . . . seeking a final permanent injunction" but "probably doesn't carry the day when you're in a preliminary proceeding seeking a PI.").

But if the Court disagrees, and it determines instead that a trial is necessary to resolve genuine disputes in the evidence, we respectfully submit that a trial at the earliest possible date is imperative. As the Supreme Court's disposition of the appeal in this case shows, relief (if any) must be entered sufficiently far in advance of the 2020 elections to ensure that it will not risk undermining "due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). For the reasons given in plaintiffs' statement in the joint status report (Dkt. 209), we respectfully request that the Court schedule a trial at the earliest time during which the judges of this Court are able to find overlapping dates on their schedules, and in no event later than October 2018.

CONCLUSION

The Court should enter summary judgment for plaintiffs. If it denies summary judgment, it should alternatively set a trial date at the earliest possible time.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, v. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

Declaration of Micah Stein in Support of Plaintiffs' Supplemental Summary Judgment Brief

I, Micah Stein, hereby declare and state:

1. I am over 18 years of age and am competent to testify to the matters stated in this declaration.

2. I am an associate at the law firm of Mayer Brown LLP, a member of the Bar of the State of New York and the Bar of the District of Columbia, admitted *pro hac vice* to this action, and counsel for Plaintiffs in the above-captioned litigation. I submit this declaration in support of Plaintiffs' Supplemental Summary Judgment Brief. I have personal knowledge of the facts stated herein.

A. *General Election Results by Precinct*

3. The Maryland State Board of Elections website (https://elections.maryland.gov/elections/) posts data files for each election cycle containing general election-day

results broken down by county and precinct. These data files are publicly available for download in Excel-format spreadsheets.

4. As described by the Board of Elections website, the precinct-level data files contain the following rows of information: (a) County, (b) Election District, (c) Election Precinct, (d) Candidate Name, (e) Party, (f) Office Name, (g) Office District, (h) Winner (a Y for contest winners), (i) Write-In (a Y for write-in candidates), (j) Election Night Votes For, and (k) Election Night Votes Against.

5. The precinct-level voting data were downloaded for the 2008 through 2016 election cycles for all precincts that are part of the current (post-2011) or former (pre-2011) Maryland Sixth Congressional District. All votes cast were then recorded in a separate spreadsheet for each Congressional election for Democratic candidates, Republican candidates, and an amalgamation of all third party/write-in candidates for each precinct.

6. The data files for the 2008 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2008/election_data/index.html.

7. The data files for the 201[illegible] election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2010/election_data/index.html.

8. The data files for the 2012 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2012/election_data/index.html.

9. The data files for the 2014 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2014/election_data/index.html.

10. The data files for the 2016 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2016/election_data/index.html.

11. To identify the voting precincts impacted by the 2011 Redistricting, publicly available data files were downloaded from the Board of Elections website. The files list all voting precincts for each election cycle, sorted by county. The following data files were downloaded: https://elections.maryland.gov/elections/2010/election_data/State_Precinct_Reference_2010_General.csv and https://elections.maryland.gov/elections/2012/election_data/state_precinct_reference_2012_general.xls.

12. A spreadsheet was created showing the vote tallies for the 2008 through 2016 Congressional elections on a precinct-level for all precincts that are part of the current (post-2011) or former (pre-2011) Maryland Sixth Congressional District. The share of Republican votes in each precinct for each Congressional election from 2008 through 2016 was calculated by dividing the number of votes cast for the Republican candidate by the total number of votes cast in the precinct.

A true and correct copy of this spreadsheet is attached as Exhibit C-1.

13. In those precincts that remained in the Sixth Congressional District before and after the 2011 redistricting, the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 53.7%

b. 2010: 57.8%

c. 2012: 47.8%

d. 2014: 59.5%

e. 2016: 51.9%

14. In those precincts that were removed from the Sixth Congressional District during the 2011 redistricting, the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 61.6%

b. 2010: 65.7%

c. 2012: 64.2%

d. 2014: 71.5%

e. 2016: 69.3%

15. In those precincts that were added to the Sixth Congressional District during the 2011 Redistricting, including newly-created and/or split precincts

– the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 28.7%

b. 2010: 34.7%

c. 2012: 30.3%

d. 2014: 37.1%

e. 2016: 32.1%

16. The same data compiled in Exhibit C-1 reveals the total turnout of Republican voters in the precincts that were in the Sixth District both before and after the 2011 Redistricting. In these retained precincts, a total of 74,299 votes were cast in the 2008 general election for the Republican candidate, out of 138,461 total votes cast in these precincts, comprising 53.7% of the total votes cast.

17. In the 2012 election, a total of 60,969 votes were cast for the Republican candidate in the precincts that were in the Sixth District both before and after the 2011 Redistricting. A total of 127,624 votes were cast in these precincts in the 2012 Congressional election; thus, Republican votes comprised 47.8% of the total votes cast.

B. *Sixth District Republican Primary Voter Turnout*

18. The Maryland State Board of Elections website (which is available at https://elections.maryland.gov/elections/) posts publicly the official election results

for each congressional election cycle containing official primary election-day results broken down by congressional district and county. The information posted by the Board of Elections includes the total number of votes received by each congressional primary candidate district-wide, along with the total votes received in each county.

19. According to the "Official 2006 Gubernatorial Primary Election Results for Congressional District 6" posted on the Board of Elections website, a total of 20,425 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2006 Republican primary in the Sixth Congressional District. District-wide, a total of 57,363 votes were cast in the 2006 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2006/results/primary/congressional_district_06.html.

20. According to the "Official 2010 Gubernatorial Primary Election Results for Representative in Congress – Congressional District 6" posted on the Board of Elections website, a total of 25,167 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2010 Republican primary in the Sixth Congressional District. District-wide, a total of 70,241 votes were cast in the 2010 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2010/results/Primary/gen_detail_results_2010_1_REP00806.html.

21. According to the "Official 2014 Gubernatorial Primary Election Results for Representative in Congress

– Congressional District 6" posted on the Board of Elections website, a total of 16,563 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2014 Republican primary in the Sixth Congressional District. District-wide, a total of 28,651 votes were cast in the 2014 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2014/results/primary/gen_detail_results_2014_1_REP00806.html.

22. According to the "Unofficial 2018 Gubernatorial Primary Election Results for Representative in Congress – Congressional District 6" posted on the Board of Elections website, a total of 16,801 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2018 Republican primary in the Sixth Congressional District. Districtwide, a total of 28,882 votes were cast in the 2018 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2018/results/primary/gen_detail_results_2018_1_REP00806.html.

C. *Attached Exhibits*

23. Attached as Exhibit C-2 is a true and correct copy of excerpts from Donald Green et al., *Partisan Hearts and Minds, Political Parties and the Social Identities of Voters* (2002).

24. Attached as Exhibit C-3 is a true and correct copy of Donald P. Green et al., "Partisan Stability: Evidence from Aggregate Data," in *Controversies in Voting*

Behavior 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001).

25. Attached as Exhibit C-4 is a true and correct copy of Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365 (2017), *available at* perma.cc/M4J4-V5RM.

26. Attached as Exhibit C-5 is a true and correct copy of Pew Research Ctr., *Political Polarization in the American Public* (2014), *available at* perma.cc/XN2Z-BR8H.

27. Attached as Exhibit C-6 is a true and correct copy of Pew Research Ctr., *A Deep Dive into Party Affiliation* (2015), *available at* perma.cc/ZG3X-C8FM.

28. Attached as Exhibit C-7 is a true and correct copy of David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, The Forum, Oct. 2012, *available at* perma.cc/KX7C-7BKG.

D. *County Republican Central Committee Campaign Donations*

29. Political committees in the state of Maryland are required to file periodic campaign finance reports, detailing all contributions received and expenditures made by the entity. *See* Md. State Bd. of Elections, *Summary Guide: Maryland Candidacy & Campaign Finance Laws* 63-70 (Mar. 2017), *available at* perma.cc/UY6Y-DFBN. The Republican Central Committees for each Maryland county file such reports.

30. The Maryland State Board of Elections maintains a public "Campaign Finance Database" that allows members of the public to, among other things, "(1) Review information about campaign committees," (2) Review filed reports submitted by Campaign Finance Entities," [*sic*] and (3) "Search contributions and expenditures reported by Campaign Finance Entities." This information is publicly available through the Board of Elections website, https://elections.maryland.gov/campaign_finance/index.html.

31. Members of the public seeking to review filed reports by campaign entities are directed to the Maryland Campaign Reporting Information System website, which maintains a searchable Campaign Finance Database, which is available at https://campaignfinancemd.us/Public/ViewFiledReportsMain.

32. Using the Maryland Campaign Reporting Information System website, I located and downloaded the Campaign Finance Report Summary Sheets filed by the County Republican Central Committees for Washington, Allegany, and Garrett counties covering the years 2008, 2010, 2012, and 2014.

33. Attached as Exhibit C-8 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Washington County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System

website (https://campaignfinancemd.us/Public/ViewFiled Reports).

34. Attached as Exhibit C-9 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Garrett County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System website (https://campaignfinancemd.us/Public/ViewFiled Reports).

35. Attached as Exhibit C-10 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Allegany County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System website (https://campaignfinancemd.us/Public/ViewFiled Reports).

36. Part 3 of the Summary Sheets filed by each County Republican Central Committee contains a summary of the total "receipts" by the Committee during the filing period, which represents financial contributions received by the Committee from members of the public, state political committees, and candidate committees, among others. After downloading the Campaign Finance Report Summary Sheets for each County Republican Central Committee, the total financial contributions received by each committee were

calculated for each of the years 2008, 2010, 2012, and 2014. Attached as Exhibit C-11 is a true and correct copy of the document tabulating the annual receipts for the Washington, Allegany, and Garrett County Republican Central Committees.

37. According to the Campaign Finance Report Summary Sheets filed by the County Republican Central Committees, the three county committees combined reported "receipts" in the following amounts for the years 2008, 2010, 2012, and 2014:

a. 2008: $33,604.20

b. 2010: $39,386.34

c. 2012: $29,516.67

d. 2014: $36,829.00

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

07/13/2018	/s/ Micah D. Stein
Date	Micah D. Stein

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

* * * * * * *

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Although *Gill v. Whitford*, 138 S. Ct. 1916 (2018), did not resolve the justiciability of partisan gerrymandering claims or clarify the applicable legal standard, it provided instructive guidance on the substantial burden of production plaintiffs in partisan gerrymandering cases must satisfy to establish standing. The Supreme Court's disposition of the appeal in this case, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) ("*Benisek II*"), is also instructive, because it sets forth the reasons why plaintiffs have not satisfied the requirements for an injunction, including requirements that apply equally to "any injunctive relief, preliminary or permanent," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Finally, the Supreme Court's decision in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), supports this Court's legal conclusion that

Mt. Healthy burden-shifting should not be applied to cases involving complex causal chains, like this one. Together, these three new precedents, combined with the arguments set forth in earlier briefing on defendants' cross-motion for summary judgment, call for granting summary judgment in favor of defendants.

I. PLAINTIFFS CANNOT SATISFY THE INJURY-IN-FACT REQUIREMENTS FOR ARTICLE III STANDING AS SET FORTH IN *GILL V. WHITFORD*.

In partisan gerrymandering cases, like all other cases, "a plaintiff may not invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy.'" *Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). That personal stake must be "distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923 (citation omitted). Although plaintiffs here have framed their claim as a challenge "specifically to the 'cracking' of Maryland's 6th Congressional District," ECF 44 ¶ 1, and not a statewide claim, the regional specificity of their claim does not absolve them from the requirement to demonstrate individual standing. Like the plaintiffs in *Gill*, plaintiffs here have identified "vote dilution" as their injury. Accordingly, to establish Article III standing, the plaintiffs here, again like the plaintiffs in *Gill*, must "prove concrete and particularized injuries using evidence . . . that would tend to demonstrate a burden on their individual votes." *Gill*, 138 S. Ct. at 1934. Plaintiffs here have failed to produce evidence sufficient to establish that they

suffered legally cognizable individual harm, and, having represented to this Court that they will not be seeking additional discovery, ECF 209 at 1, their claims must now be dismissed. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine issue for trial") (citation omitted).

Because standing is an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at" the relevant stage of litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On summary judgment, "the plaintiff can no longer rest on" the "'mere allegations'" in her complaint, "but must 'set forth' by affidavit or other evidence 'specific facts'" to demonstrate the standing elements. *Id.* (quoting Fed. R. Civ. P. 56(e)). Plaintiffs have never offered evidence that their inclusion in either the Sixth or Eighth District resulted in "vote dilution," but have stated to this Court that they "recognize full well that vote dilution, in some form, is inevitable in every redistricting, and that it occurs for wide ranges of reasons, including geography and political calculi that have nothing to do with reprisals for prior electoral success." ECF 191 at 16-17. And plaintiffs have never made any attempt to explain how the evidence they have provided demonstrates any "burden

on their individual votes," *Gill*, 138 S. Ct. at 1934, when what they have shown is nothing more than their preferred political party's diminished success in electing its candidate. That showing does not suffice to establish a redressable injury under the Supreme Court's redistricting precedents. *See League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 428 (2006) (plurality op.) ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."); *Davis v. Bandemer*, 478 U.S. 109 (1986) ("[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult."); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77 (1980) ("[T]he right to equal participation in the electoral process does not protect any 'political group,' however defined, against electoral defeat.").

Plaintiffs have never explained how any individual experienced "reprisals for prior electoral success" or how such a reprisal impacted the individual's vote. ECF 191 at 16-17. Plaintiffs have not demonstrated that *they themselves*—Mr. Benisek, Ms. Ropp, Ms. Strine, Ms. O'Connor, Mr. Eyler, Mr. Cueman, and Mr. DeWolfe—were singled out for inappropriate retaliatory treatment by the government. Plaintiffs have offered no evidence, and have not even claimed, that decisionmakers examined the voting history of any of these individuals. Nor is it possible for plaintiffs to offer such proof. That is, the statistical measures Democratic Performance Index ("DPI"), Partisan Voting Index ("PVI"), and any other metric built with voting history,

cannot shed light on any individual's voting experience. Instead, they can be only as specific as the precinct level, because we maintain a secret ballot in this country. *See* Md. Code Ann., Elec. Law §§ 11-402(a), (d)(1); 9-203(4). Even if that were not the case, Mr. Benisek, the only plaintiff remaining from the claims originally filed in 2013, *see Benisek II*, 138 S. Ct. at 1944, could not have been individually identified by decisionmakers as a Republican, because he was an unaffiliated voter at the time redistricting data was prepared. ECF 186-1 at 36. Plaintiffs therefore have not shown that any government official examined their voting conduct. Consequently, they cannot claim to have suffered an injury-in-fact due to any First Amendment retaliation attributable to any government official.

As this Court recognized in its earlier disposition of the preliminary injunction motion, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 811 (D. Md. 2017) ("*Benisek I*"), *aff'd*, 138 S. Ct. 1942 (2018). If a candidate's loss is "a consequence of voter choice, that is not an *injury*. It is *democracy*." *Id.* at 812. At summary judgment, plaintiffs have the burden of producing evidence that their individual vote was burdened in some manner independent of election results. They have not done so.

A. Plaintiffs Have Not Shown the Existence of Any Burden on Their Individual Vote.

1. Voting History Metrics Cannot Establish Individual Burden.

Plaintiffs' prior assertion that "[t]he DPI and PVI are proof enough of" a concrete injury, ECF 191 at 15, does not withstand scrutiny under *Gill*'s clarification that there must be evidence of added burden to an individual's vote. As explained previously, both the DPI and PVI are averages of past election results. ECF 186-7 (Hawkins Dep.) at 24:12-16; ECF 177-51 (Pls. Ex. WW). *Gill* precludes reliance on "average measure[s]" of "the effect that a gerrymander has on the fortunes of political parties" as a substitute for proof that "address[es] the effect that a gerrymander has on the votes of particular citizens." *Gill*, 138 S. Ct. at 1933. Indeed, similar metrics were available in the *Gill* record for all the districts in which the named plaintiffs resided, but the Supreme Court deemed those measures unacceptable as proof of individual injury-in-fact. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 849-50 (2016) (discussing the "district-by-district partisanship scores" and spreadsheets "comparing the partisan performance of the draft plan to the prior map"). Similarly, under *Gill*, the mere fact that a Democratic candidate prevailed in the 2012, 2014, and 2016 elections, *see* ECF 177-1 at 22, does not establish plaintiffs' injury-in-fact as individual voters, because it is merely evidence of "the fortunes of political parties." *Gill*, 138 S. Ct. at 1933. Election results were also available in the record

in *Gill*. *Whitford*, 218 F. Supp. 3d at 899. Yet the *Gill* plaintiffs' claims were nevertheless remanded because they had not offered sufficient proof of individualized injury to establish standing.

Even more closely analogous to plaintiffs' attempted showing in this case is the evidence offered by plaintiffs in North Carolina's partisan gerrymandering case, which resulted in the Supreme Court's vacatur of a three judge court's judgment in favor of plaintiffs. The three judge court in *Common Cause v. Rucho* concluded that "the 2016 Plan diluted the votes of those Plaintiffs who supported non-Republican candidates and reside in the ten districts that the General Assembly drew to elect Republican candidates. That dilution constitutes a legally cognizable injury-in-fact." 279 F. Supp. 3d 587, 615 (2018); *see also* 279 F. Supp. 3d at 615 n.9 (stating that plaintiffs "have standing to assert district-by-district challenges to the Plan as a whole"). That is exactly the theory of injury-in-fact plaintiffs have alleged in this case. ECF 177-1 at 32. In their attempt to establish injury-in-fact, the *Rucho* plaintiffs used the same types of evidence that plaintiffs identify here, namely predictive statistics, electoral results, and comparative maps, and that evidence was available in the record on a district-by-district basis. Supplemental Br. of League of Women Voters of N.C. 5-13, *Rucho v. Common Cause*, No. 17-1295 (U.S. June 20, 2018).[1] Yet, even with the three-judge court's findings,

[1] Available at https://www.supremecourt.gov/DocketPDF/17/17-1295/50714/20180620124033768_Rucho%20v.%20Common%20

and with briefing outlining the available district-by-district evidence, the Supreme Court nonetheless vacated and remanded the three-judge court's decision for reconsideration in light of *Gill*. *Rucho v. Common Cause*, No. 17-1295, 2018 WL 1335403, at *1 (U. S. June 25, 2018). Given the Court's direction to the three-judge court in *Rucho*, plaintiffs here cannot be correct in suggesting that "[t]he numbers" indicated by predictive statistical measures and electoral results "speak for themselves," ECF 177-1 at 22, when it comes to articulating injury-in-fact.

2. Plaintiffs Have Not Produced Evidence of Additional Factors That Establish A Burden on Their Individual Vote.

The result in *Rucho* should not be surprising, because longstanding Supreme Court precedent prevents plaintiffs from using their preferred candidate's lack of success to establish individual injury-in-fact. The right to "'have an equally effective voice' in the election of representatives" does not bestow on any individual "an independent constitutional claim to representation" based on one's status as a group member, even if that group is, as the plaintiffs contend, composed exclusively of Bartlett voters. *Bolden*, 446 U.S. at 78 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). The plaintiffs cannot avoid this conclusion by claiming

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to assert individual rights. Each plaintiff's individual vote for Congressman Bartlett had the weight of all other votes cast in Maryland in 2012, just as in 2002, because Maryland created equally populous districts. It is only when the plaintiffs' votes are aggregated with those of other Bartlett supporters or Republican voters that it becomes possible to assert that the *group*'s votes have lost "strength" or have been "diluted" in the current Sixth District compared to its predecessor.

But the plaintiffs offered none of the familiar evidence that usually accompanies claims of vote dilution, such as actual election results showing that Democrats and Republicans in the Sixth District are polarized in their voting habits. ECF 177-19 at 8-11. Instead, the record contains evidence of extensive crossover voting. *E.g.*, *Benisek I*, 266 F. Supp. 3d at 810 (finding Senator Cardin underperformed in the Sixth District while Governor Hogan over-performed as compared to statewide results). Similarly, nothing in the plaintiffs' showing considers the voting preferences of the 20.8% of registered voters who were affiliated with neither political party. *Id.* at 809; ECF 186-41 at 48:5-6. The inability of the Republican candidate to attract enough unaffiliated voters to prevail in the Sixth District congressional races in 2012, 2014, and 2016 does not necessarily mean that the result would have been the same if the Republicans had fielded a different candidate or if the same Republican candidates had faced a less attractive candidate in the general election. In all three of the elections under the 2011 redistricting plan, the Democratic nominee was John Delaney, a

well-financed, well-organized candidate, whose moderate views appealed to independent voters and even some Republicans. ECF 186-8 (Lichtman) at 37; ECF 186-2 (O'Malley Dep.) at 26:7-11, 29:11-16, 8311-20. His success could have occurred because Democrats, Republicans, and unaffiliated voters alike preferred his policy positions to those of his opponent, and plaintiffs have presented no proof or analysis to the contrary.

What the plaintiffs have presented here falls well short of the historic crossover and polarization analyses usually consulted in cases brought under Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Those analyses provide statistical evidence of electoral possibilities in certain geographic areas, including the residences of plaintiffs, which is, as *Gill* has recapitulated, a central requirement for any gerrymandering claim. It is only through establishing the local political conditions that any alleged burden can be evaluated. For example, if a Republican candidate is capable of succeeding in the Sixth District (as gubernatorial candidate Larry Hogan was), that ability to succeed bears directly on whether or not plaintiffs have suffered any individual burden to their vote different from the circumstance of any other individual who resides in a district where the views of her neighbors render it difficult for her to elect her candidate of choice. Plaintiffs have simply not produced any analysis that would yield answers to these questions and therefore their claim may not proceed further.

3. Plaintiffs Have Not Established That Their Alternative Map Is a Neutral Alternative.

Plaintiffs' remaining evidence about the political composition of the Sixth District is similarly not probative of any identifiable burden on an individual's vote. Plaintiffs' expert, Dr. Michael McDonald, opined that the new Sixth District map "'has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district.'" ECF 177-1 at 21 (quoting ECF 177-19, Ex. Q). But that statement does not to [*sic*] establish standing because it is equally applicable to any voter reassigned from a district in which she supports the successful candidate to one in which she supports the unsuccessful candidate. As Dr. McDonald went on to explain, the "concrete impact" plaintiffs have alleged and sought to prove is merely that Republican voters have "been unable to elect a candidate of their choice." ECF 177-1 at 21-22 (quoting ECF 177-19, Ex. Q). But many other voters throughout Maryland are also unable to elect a candidate of their choice, and in some instances that inability newly arose after the adoption of the 2011 plan. Notable examples include Republicans moved out of the First District and Democrats moved into the First District. Plaintiffs have proposed no threshold, given no mathematical explanation, nor even proffered qualitative reasoning for why the type of dilutive injury they assert is anything other than a "generally available grievance about government," *Gill*, 138 S. Ct. at 1923, one that occurs to

many people in every redistricting undertaken by a state with two-party representation in Congress.

Gill recognized these difficulties in establishing the burden on an individual vote, and offered that the vote dilution "harm arises from the particular composition of the voter's own district, which causes his vote . . . to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931. Justice Kagan, in her concurrence, clarified that such a comparison district must be "neutrally drawn." *Id.* at 1936. The need to provide both such a neutral comparator and a standard for measuring deviation is especially acute in addressing partisan gerrymandering claims where, as here, the alleged injury-in-fact is vote dilution, because there is no actual numerical dilution in absolute terms as was present in *Baker v. Carr* and its progeny. Some extra factor is needed to establish that there has been an injury.

The need for a neutral comparator and some standard for deviating from that comparator distinguishes the level of proof necessary in a partisan gerrymandering claim from what is deemed sufficient to establish standing in racial gerrymandering cases. Modern gerrymandering cases articulate the injury-in-fact as "being 'personally . . . subjected to [a] racial classification,'" *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) (principal opinion of O'Connor, J.)), and "being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Id.*

(quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*)). In those cases, the harm is not relational; rather, the placement of the district lines *is* the harm and the necessary proof consists of evidence about that placement. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267. There, the Court found sufficient plaintiff's evidence on standing when they "referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence," *id.*, which included the historic and specific electoral circumstances related to specific districts and comparisons with plans that would not have inflicted the same stigmatic harm on plaintiffs. Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law, Doc. 194 at 30-36, *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. Aug. 8, 2013) (No. 12-1081).

Plaintiffs here have not produced nearly the level of district-specific evidence produced by plaintiffs in *Alabama Legislative Black Caucus*. For example, the *Benisek* plaintiffs have produced no evidence and offered no explanation for the placement of any specific boundary of the Sixth District, or what consequence that had for any individual's right to vote. The incompleteness of plaintiffs' showing is clear from their presentation of a singular alternative Sixth District. Dr. McDonald, the expert who opined on the alternative district, could not testify that his aid [*sic*] did not use political history or voter registration data in drawing the alternative District. ECF 186-41 at 59:18-60:18.

Instead, Dr. McDonald highlights the fact that the alternative District packs Montgomery County Democrats into the alternative Eighth District by assigning all the major urban areas in Montgomery County to the alternative Eighth District. ECF 186-19 at 27 (Figure 9). Dr. McDonald even admitted that, under his proposed alternative map "[t]he Democratic voters that were formerly within the Eighth District would have their ability to elect a candidate of their choice diminished[.]" ECF 186-41 (Michael McDonald Dep.) at 62:21-63:2. And Dr. McDonald did not include any information about the alternative Eighth District, and thus did not explain splits in voting tabulation districts or census places. ECF 186-19 at 16-17; 186-41 at 61:10-13. Therefore, plaintiffs have failed to produce evidence sufficient to prove that their alternative district would conform to traditional redistricting principles even as well as the district it seeks to replace. Plaintiffs have provided no evidence that their alternative district is "neutrally drawn." *Id.* at 1936 (Kagan, J., concurring). Even if neutrality of the hypothetical district were not required to establish injury-in-fact, the generalized nature of the plaintiffs' grievance is made obvious by their admission that their proposed alternative district affects many other non-plaintiff individuals in a manner indistinguishable from the plaintiffs' alleged injury.

B. Plaintiffs Have Not Produced Evidence of Any Non-Dilution Injury.

Throughout this litigation, including the briefing on cross-motions for summary judgment, plaintiffs have eschewed any need to establish any injury-in-fact to their First Amendment rights, other than vote dilution. ECF 177-1 at 23; ECF 191 at 18-19. Indeed, this Court may proceed to resolve the cross-motions for summary judgment on the understanding that plaintiffs' asserted injury-in-fact is vote dilution, in light of plaintiffs' representation in the recently-filed joint status report that "[t]he motions are fully briefed and ripe for decision." ECF 209 at 1.

Plaintiffs should not be permitted to change their tack now, at this late juncture in litigation that the Supreme Court has found to be plagued by "plaintiffs' unnecessary, years-long delay. . . ." *Benisek II*, 138 S. Ct. at 1944. For example, plaintiffs might be tempted to alter their arguments to take advantage of Justice Kagan's *Gill* concurrence suggesting that an "associational harm" could potentially occur as the result of a partisan gerrymander, a harm that is "distinct from vote dilution." *Gill*, 138 S. Ct. at 1938 (Kagan J., concurring). That attempt would be unsuccessful because plaintiffs have failed to point to any burden on their *individual* expressive rights. Plaintiffs have produced no evidence of any non-dilution injuries to their associational rights, like those at issue in *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983). There the Court found an election law caused an injury when it made "[v]olunteers . . . more difficult to recruit and retain, media

publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign." *Id.* The plaintiffs' evidence here falls far short of that showing.

Plaintiffs principally rely on two plaintiffs' testimony about what other residents of the Sixth District told them when they were canvassing, ECF 177-1 at 23-24. Such anecdotal, hearsay testimony cannot be admitted at trial and, therefore, may not be considered on a summary judgment motion. *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *see also Whittaker v. Morgan State Univ.*, 524 F. App'x 58, 60 (4th Cir. 2013) (unpublished) (material in the record cannot be used to support summary judgment if it "cannot be presented in a form that would be admissible in evidence") (quoting Fed. R. Civ. P. 56(c)(2)). The only direct testimony plaintiffs have identified on this subject is that of Ned Cueman, who stated only that he was "disoriented or felt disconnected" and that he had "no connection" with parts of the district that were outside his own county, ECF 177-1 at 24 (quoting ECF 177-55 at 36:14-37:2). But those subjective feelings demonstrate no burden on objective expressive rights, especially when viewed in light of the most telling indicator of political engagement: Mr. Cueman continued to vote regularly after the redistricting. ECF 186-25 (Cueman) at 15:10-16. The objective evidence demonstrates that Republican engagement in the five counties included in their entirety within the former Sixth District has increased since formation of the newly competitive Sixth District.

From 2010 to 2016, Republican voter registration increased in each year in Allegany, Carroll, Frederick, Garrett, and Washington Counties. ECF 186-50 at 2-6. In each of these counties, turnout among Republicans also increased in absolute terms between the presidential election year of 2008 and the presidential election year of 2012. ECF 186-51 at 2. And, although turnout was down across-the-board in the 2014 gubernatorial election compared to the 2010 election, Republican turnout in the Sixth District outpaced Democratic turnout. ECF 186-51 at 3. Consistent with the objective general election data showing Republican voter engagement, all of the plaintiffs voted regularly after the 2011 redistricting. ECF 186-20 (Strine) at 11:22-12:10; 186-43 (DeWolf) at 10:16-18; ECF 186-44 (O'Connor) at 13:15-17; ECF 186-25 (Cueman) at 15:10-16; ECF 186-24 (Eyler) at 11:6-12; ECF 186-45 (Ropp) at 18:12-18; ECF 186-36 (Benisek) at 12:15-17. It is true that these unimpeded efforts to vote failed to secure victory for plaintiffs' preferred candidates, but that lack of success reflected the voting preferences of their fellow citizens, not only as to the winning candidates but also as to the district map itself. That is, the 2011 redistricting plan won voters' approval in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, *see* ECF 104, ¶ 39, including three counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties, ECF 186-50 at 4. Only Carroll and Garrett Counties voted to reject the map. ECF 104 at ¶ 39.

Common Cause v. Rucho once again supplies an interesting point of contrast and comparison. There the three-judge court made findings of fact with regard to multiple first-hand accounts establishing the types of associational injuries at issue in *Anderson v. Celebrezze*. 279 F. Supp. 3d at 615-16. Nevertheless, the Court instructed the three-judge court to reconsider the issue of standing in light of *Gill*. Therefore, in the wake of *Gill*, it is unclear whether, when vote dilution is the asserted injury, evidence of associational harm could serve as a substitute for the requisite demonstration that dilution has burdened an individual vote.

II. The Reasoning in *Benisek II* Bars Plaintiffs' Claims for Permanent Injunctive and Declaratory Relief.

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). This is as true for permanent injunctions as it is for preliminary injunctions. Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). To satisfy that test, a plaintiff must show that (1) "it has suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "the public interest would not be

disserved by a permanent injunction." *Id.* at 391. "Satisfying these four factors is a high bar, as it should be." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017).

In considering this Court's opinion denying plaintiffs' request for preliminary injunction, the Supreme Court, in a per curiam opinion, emphasized that "[a]s a matter of equitable discretion," success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek II*, 138 S. Ct. at 1943. "Rather, a court must also consider" the equitable factors at issue when injunctive relief is requested: (1) irreparable harm; (2) balance of the equities; and (3) that the requested injunctive relief is in the public interest. *Id.* at 1943-44. As the Supreme Court concluded, "Plaintiffs made no such showing below." *Id.* at 1944. Plaintiffs not only failed to make such a showing in relation to their request for preliminary relief; they have also failed to do so in support of their request for permanent injunctive relief.

A. Plaintiffs Have Demonstrated No Irreparable Harm Because the Sixth District Remains Competitive and Electoral Circumstances Have Changed.

As for the first factor, irreparable harm is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see also Raub v. Campbell*, 785

F.3d 876, 885-86 (4th Cir. 2015). Here, the harm asserted by plaintiffs is an ill-defined vote-dilution injury, which is not a concrete injury-in-fact under this Court's previous holding absent proof of actual impact on real election results. ECF 202 at 17-21. The Court has found that the record, and most particularly Congressman Delaney's near defeat in 2014, "raises serious doubts about whether Plaintiffs' alleged injury is likely to recur." *Benisek I*, 266 F. Supp. 3d at 813. The potential for recurrence has grown ever more doubtful in light of Congressman Delaney's decision not to seek reelection and the Maryland Republican Party chair's pronouncement that the Sixth District "is a winnable race" for the Republican candidate in 2018.[2] Under these circumstances, the Court should exercise extreme caution in considering plaintiffs' request for permanent injunctive relief. "Injunctions by their nature attempt to anticipate the future, but the future sometimes declines stubbornly to be prophesied." *SAS Inst., Inc.*, 874 F.3d at 385.

The "serious doubts" the Court has expressed about plaintiffs' claim of injury, *Benisek I*, 266 F. Supp. 3d at 813, are warranted not only because "Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations," *id.*, but also in light of other electoral results in the Sixth District. For example, "Democrat Ben Cardin carried the Sixth

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[2] Josh Hicks, *Maryland Politics: Republican Outside Groups Take a Rare Interest in Deep-Blue Maryland*, Wash. Post, Jan. 12, 2018.

District by just 50% of the vote, despite winning 56% of the vote statewide" and "in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." *Id.* at 810.

The 2018 general election will pit newcomer Democratic candidate David Trone against Republican candidate Amie Hoeber. Plaintiffs have put forward no evidence about their own preferences in that race, nor have they offered any evidence that those preferences will be frustrated. Such evidence is particularly important where several of the plaintiffs have expressed support for Democratic candidates in the past. ECF 186-24 (Charles Eyler Dep.) at 15-17; *see also* ECF 186-25 (Ned Cueman Dep.) at 17; ECF 186-20 (Strine Dep.) at 14. Even Ms. Hoeber, the Republican nominee, has described herself as "independent" and "not an automatic partisan."[3]

Because irreparable injury is an element of plaintiffs' claim for injunctive relief, plaintiffs bear the burden of production on this element. *See Ricci*, 557 U.S. at 586. They have failed to carry that burden with the evidence they have produced, and they have declined the Court's invitation to reopen discovery. *See* ECF 209

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[3] Jeff Barker, *Republican Amie Hoeber and Democrat David Trone to face off for Maryland's only open House seat,"* Balt. Sun, June 26, 2018, available at http://www.baltimoresun.com/news/maryland/politics/bs-md-congress-20180626-story.html (last visited July 12, 2018).

at 1. Therefore, summary judgment should be granted in defendants' favor.

B. Plaintiffs' "Unnecessary, Years-Long Delay" Precludes Any Remedy in Equity, Not Just Preliminary Injunction.

A permanent injunction may not issue unless a court concludes, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *eBay Inc.*, 547 U.S. at 391. "[R]easonable diligence" is a precondition "to call into action the powers of the court." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *McKnight v. Taylor*, 1 How. 161, 168 (1843). Before equitable relief may be granted, the court must answer "whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Id.* Lack of diligence "exists where 'the plaintiff delayed inexcusably or unreasonably in filing suit.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987)).

The plaintiffs here did not "show reasonable diligence" in requesting a preliminary injunction. *Benisek II*, 138 S. Ct. at 1944. The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second,

the "newly presented claims" required, beginning in 2016 and at plaintiffs' own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, plaintiffs currently press their claim for permanent injunctive relief seven years, and three general and one primary election, after the 2011 map was adopted and nearly five years since the original complaint was filed. Because any deadline to "ensure the timely completion of a new districting scheme in advance of the 2018 election season" has "long since passed," *id.* at 1945, plaintiffs now are seeking permanent court intervention with only the 2020 election remaining in the redistricting cycle.

"[A] challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White*, 909 F.2d at 103. In *White*, the Fourth Circuit looked back at two of its cases where, in holding injunctive relief unavailable, the Court had "found significant the nearness to the next census and resulting reapportionment." *White*, 909 F.2d at 103 (examining *Maryland Citizens for a Representative Gen. Assembly v. Governor*, 429 F.2d 606 (4th Cir. 1970), and *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980)). The significance of impending reapportionment is partly that "there is large potential

for disruption in reapportioning with undue frequency." *Id.* at 104. Because the 2020 Census results likely will require significant population-based reapportionment, any injunctive relief here would require two successive reapportionments in two successive years. As *White* concluded, "two reapportionments within a short period of two years would greatly prejudice . . . citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens." 909 F.2d at 104.

Plaintiffs' "unnecessary, years-long delay," *Benisek II*, 138 S. Ct. at 1945, has also prejudiced the defendants within this litigation. The plaintiffs' "newly presented claims . . . required discovery into the motives of the officials who produced the 2011 map," *id.*, many of whom could not recall the events of nearly six years ago or the sources of data they considered. *See, e.g.*, ECF 186-13 (Miller) at 20-21, 115-17, 136-37; 186-46 (Busch) at 146:12-16; 186-5 (Hitchcock) at 123:16-20. And plaintiffs have sought to turn those fading memories to their advantage. ECF 177-1 at 5. Moreover, because plaintiffs' delay allowed a new gubernatorial administration to take office before they asserted their motive-based claims, neither the prior administration nor the incoming administration had notice of a need to institute a litigation hold to preserve records during the transition. As a result of the administration turnover, many State officials and employees involved in redistricting left State service prior to plaintiffs' filing of their second amended complaint in March 2016, and long before anyone could perceive that documents

other than the 2011 Plan might be relevant. These intervening events prejudiced the State's ability to defend this lawsuit, prejudice that has been exacerbated by plaintiffs' pursuit of frivolous spoliation claims and accusations of discovery misconduct. ECF 153-1.

"[E]quity ministers to the vigilant, not to those who sleep upon their rights." *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) (unpublished) (quoting *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995). This is as true in cases alleging First Amendment injury as in others. *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012) (laches can serve as a defense to First Amendment claims). Where "delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for . . . relief until 2016," *Benisek II*, 138 S. Ct. 1944, resulting in the risk of substantial disruption of back-to-back reapportionments, the equities tip in favor of denying injunctive relief.

C. The Public Interest Would Be Harmed by Replacing a Voter-Approved Plan with a Court-Ordered Plan That Comes Too Late for Referendum Vote.

"'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v.*

Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Here that injury is acute because it would countermand a choice made directly by the people of Maryland. Although some time remains before the 2020 elections, as discussed above, too-frequent redistricting undermines "the need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583. And in states like Maryland that allow voters to approve or reject redistricting plans, reapportionment too near the end of a decennial census period risks depriving the people of an opportunity to ensure that politicians do not "entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring). The Maryland redistricting process cannot play itself out in full in the remaining time before decennial redistricting because a referendum could not appear on the ballot until the 2020 general election, the only election to occur under any new plan. Thus, any reapportionment ordered by this Court would replace a redistricting plan the people of Maryland have already overwhelmingly approved (majorities in 22 of Maryland's 24 counties, including a majority of voters in Allegany, Washington, and Frederick Counties, all of which were within the former Sixth District, ECF 186-8 at 31) with one that the people will have no effective opportunity to approve or reject directly.

"'[T]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015) (citation

omitted). Direct voter participation through referendum serves "to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'" *Id.* To replace a plan that was endorsed by 64.1% of Marylanders who voted on the question, after opportunity for public debate, with a court-ordered map with no opportunity for the people to directly approve may pose "serious First Amendment implications" of its own. *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J., plurality op.). Though plaintiffs have sought to denigrate the legitimacy of the referendum, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.*

Here, the public has voted overwhelmingly in favor of the 2011 redistricting plan. Replacing the plan without an effective opportunity for the public to approve or disapprove the plan is against the public interest.

III. *Mt. Healthy* Applies Only Where the Causal Chain Is One Actor Long.

During the pendency of the appeal in this case, the Supreme Court decided a case presenting the question of the proper standard for causation in a retaliatory arrest case. *Lozman*, 138 S. Ct. 1945. In holding that

"*Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim" for Mr. Lozman's claim only, the Court emphasized the particular factual circumstances of Mr. Lozman's arrest and the nature of his claims. *Id.* at 1955. The Court pointed out that he alleged that "the City, through its legislators, formed a premeditated plan" of retaliation *and* "the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting." *Id.* The Court noted that Mr. Lozman had not sued the officer who had made the arrest, and further noted that he "likely could not have maintained a retaliation claim against the arresting officer in these circumstances," namely, that "the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities." *Id.* The facts and allegations in *Lozman* stand in stark contrast to plaintiffs' claims in this case.

Lozman supports this Court's decision not "to import into the political gerrymandering context the [*Mt. Healthy*] burden-shifting framework." *Benisek I*, 266 F. Supp. 3d at 811 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). "[P]roving the link between the" non-defendant actor's "retaliatory animus and the plaintiff's injury" is "'more complex than'" it is "'in other retaliation cases.'" *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman v. Moore*, 547 U.S. 250, 261 (2006)). Here, "the causal connection required . . . is not merely between the retaliatory animus of one

person and that person's own injurious action," or even "between the retaliatory animus of one person and the action of another," as in *Hartman*. *Id.* at 262. Instead, the plaintiffs' claim presents the far more complex and "particularly attenuated causation," *Reichle v. Howards*, 566 U.S. 658, 667 (2012), between retaliatory *animus* attributed to multiple actors involved in the redistricting process, and the separate *actions* (plural) of the legislators who enacted the legislation and the more than 1.5 million voters who approved the legislation in the referendum, as well as, ultimately, the thousands of Sixth District voters who voted for congressional candidates. Moreover, the defendants sued here are not the actors alleged to have made the allegedly retaliatory decision. Those actors, most notably Governor O'Malley and the legislators, are entitled to absolute legislative immunity from suit for their legislative acts. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299, 300-01 (D. Md. 1992) (three judge court) (holding that governor and legislators were entitled to absolute legislative immunity for their roles in redistricting). And, as *Lozman* reiterated, "*Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by 'the presumption of regularity accorded to prosecutorial decisionmaking.'" *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman*, 547 U.S. at 263). Here, the challenged redistricting legislation is subject to another "long-standing presumption": the general "presumption of validity" accorded a State's legislation, absent "invidious discrimination" based on

"racial criteria" or "other immutable human attributes," which this case does not involve. *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807, 808 (1969) (applying presumption of validity in equal protection challenge to a State's absentee voting law involving alleged infringement of "fundamental right" to vote).

Lozman clarifies that *Mt. Healthy* is meant to apply only to retaliation cases where the asserted retaliation and injury are closely connected and stem from a single actor. Redistricting, with its multiple actors, does not present that scenario. Here, the approval of the 2011 plan by 1.5 million Marylanders even further attenuates the causal chain.

CONCLUSION

Defendants' cross-motion for summary judgment should be granted and judgment entered in favor of the defendants on all counts.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

O. JOHN BENISEK *et al.*,	*	
Plaintiffs	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
LINDA H. LAMONE *et al.*,	*	
Defendants	*	

* *

ORDER

(Filed Aug. 30, 2018)

Pending before the Court are Plaintiffs' motion for summary judgment[1] (ECF No. 177) and Defendants' cross-motion for summary judgment (ECF No. 186). These matters will come before the Court during a hearing on **October 4, 2018**, beginning at **10:00 a.m.** and concluding that same day (with appropriate recesses), all in **Courtroom 7C**, United States Courthouse, Baltimore. Maryland, at which time and place the parties may present oral argument.

Judges Niemeyer and Russell join in the entry of this order.

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[1] The portion of that motion requesting preliminary injunctive relief and expedited trial on the merits was denied in an earlier order. (ECF Nos. 202, 208.)

DATED this 29 day of August, 2018.

BY THE COURT:

/s/ James K. Bredar
James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

MOTION TO EXCLUDE PORTIONS OF THE DECLARATION OF MICAH D. STEIN IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF AND RELATED MATERIAL

For the reasons stated in the accompanying memorandum, the Defendants, Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chair, State Board of Elections, move under Federal Rules of Civil Procedure 7(b) and 56(c)(2), (4), to exclude from the Court's consideration portions of the declaration of plaintiffs' attorney Micah D. Stein, ECF 210-3, to the extent it contains (1) facts not otherwise in the record that are not subject to judicial notice under Rule 201 of the Federal Rules of Evidence and (2) Mr. Stein's own analyses of data, which constitute lay opinions that would be inadmissible under Rule 702. The Court should similarly exclude references to those same facts and opinions in plaintiffs' supplemental

memorandum in support of their motion for summary judgment, ECF 210.

A proposed order is attached.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK et al.,	*	
	*	
Plaintiffs,	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
	*	
LINDA H. LAMONE et al.,	*	
	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

ORDER

(Filed Oct. 2, 2018)

Defendants move, ECF No. 215, to exclude portions of the Declaration of Micah Stein in Support of Plaintiffs' Supplemental Summary Judgment Brief, claiming that (1) the attached campaign finance reports are not capable of being admitted at trial, *see* Fed. R. Civ. P. 56 (c)(2), and (2) Mr. Stein's collective analysis constitutes inadmissible lay opinions, *see* Fed. R. Evid. 702. We note that, in a bench trial, certain rules of evidence are relaxed because the rules assume that a trial judge is able to weigh the evidence, avoid improper inferences, and, if it becomes necessary, strike any inadmissible evidence. *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994); *see United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) ("[B]ecause the district court was also the trier of facts, the district court's evidentiary gatekeeping function was relaxed, and the district court was in the best position to decide the proper weight to give the expert opinions."); *see also In re*

Salem, 465 F.3d 767, 777 (7th Cir. 2006) ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702."); *United States v. Brown*, 415 F.3d 1257, 1268–69 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (noting that judges must determine the admissibility of expert testimony to avoid "dumping a barrage of questionable scientific evidence on a jury"). Because a panel of judges will hear the issues in this case, there is no need to exclude the declaration at this point. If determined to be problematic, the Court can simply strike the evidence later.

For the reasons set forth above, it is hereby ORDERED:

Defendants' Motion to Exclude Portions of the Declaration of Micah D. Stein is DENIED.

Judge Russell joins in this Order.

Judge Niemeyer would defer ruling until during the hearing on October 4, 2018.

DATED this 2 day of October, 2018.

BY THE COURT:

/s/ James K. Bredar
James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

O. JOHN BENISEK, et al.	)	
Plaintiff [*sic*],	)	
vs.	)	CIVIL NO.: JKB-13-3233
LINDA H. LAMONE, et al,	)	
Defendant [*sic*].	)	

Transcript of Proceedings
Before the Honorable Paul V. Niemeyer
the Honorable James K. Bredar the Honorable
George Levi Russell, III
Thursday, October 4th, 2018
Baltimore, Maryland

* * *

[2] PROCEEDINGS

JUDGE NIEMEYER: Be seated, please. All right. This morning we've got the case of Benisek versus Lamone. And we're on cross motions for summary judgment. And I think it best that we start out with the plaintiffs. They filed a motion for summary judgment. And then the State has filed a cross motion for summary judgment. And we've received your papers. We've read your papers, studied them. And so we're ready to hear you out now.

Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor. It's good to be back. So I think –

JUDGE BREDAR: Mr. Kimberly, have you tried to settle this case?

MR. KIMBERLY: No, Your Honor. We have not attempted to settle.

JUDGE BREDAR: If the plaintiffs were able to achieve, through a settlement, the creation of a non-partisan commission in Maryland that would be responsible for drawing the lines going forward, that would meet all of the requirements and complaints that your clients have presented to the Court; wouldn't it?

MR. KIMBERLY: Well, it certainly would, Your Honor. There's certainly no impediment from our perspective to a willingness to settle. We've simply read into the fairly [3] steadfast opposition to our position on the part of the office of the Attorney General that that's not something that's on the table from their perspective, but you'll have to ask them.

JUDGE BREDAR: And the United States Supreme Court has endorsed the lawfulness of such commissions, they did so expressly in the Arizona case; true?

MR. KIMBERLY: True. We would be very pleased to see that development. Unfortunately, because it's a development that requires legislation, it's not one that I think we can compel by settlement. So it's something that I think would fall to the State to undertake. I think if such a commission were formed

and it redrew the present map, that's a process we'd be happy to be involved in and it may well moot our case, but we haven't certainly been given any suggestion that that's something that the State Legislature or the Governor's Office is considering.

JUDGE BREDAR: So you're completely open to it, but you need to see some indication from your opponent, the State of Maryland, that they would similarly be open to at least a dialogue around the possibility of a settlement. Of course, it's not for the Court to dictate what those terms would be, but that's one possibility.

MR. KIMBERLY: I guess the way that I view it, Your Honor, is that I'm doubtful, in fact, that it could be [4] accomplished via a settlement, I think what it might be is intervening conduct that ends the conduct complained of. But our settlement, at least vis-a-vis this lawsuit, would have to be with the State Board of Elections and its leaders.

JUDGE NIEMEYER: Why couldn't it be a consent order by the Court?

MR. KIMBERLY: It could be a consent order or much like the sort –

JUDGE NIEMEYER: I mean, to take it out of the political process. In other words, the commission would be an adjunct of the Court, and the parties would participate and it would be done by consent order in the context of this case, as opposed to having to

go back to the legislature. That's just a thought, spontaneous.

MR. KIMBERLY: I appreciate that, Your Honor. And if there were such a consent order that indicated that the State would not enforce the map as drawn, and instead would enact or promulgate a map neutrally drawn –

JUDGE NIEMEYER: We might make findings in the consent order and have the agreed upon – the commission lines, if they were changed, adopted as part of the Court's order directing that it govern the next election.

MR. KIMBERLY: I think that would – presuming the lines of that map were consistent with our legal theory, and I gather –

[5] JUDGE NIEMEYER: Well, that would be something for that little commission and you guys to work out if that were the course that we were going on. But probably you have a lot more flexibility than the state. The State would have to consider something like that too, at some length. And I think these inquiries or suggestions are not efforts to push one direction or the other, these are just ideas to get around hurdles.

MR. KIMBERLY: I appreciate that and I would say we are indifferent to – our goal is reaching an end result where we have a neutrally drafted map. We're indifferent to the means of getting there. If it's a permanent injunction, that would be great. If it's a consent order or some settlement by which the State

agrees to conduct elections under a neutrally drawn map, we would be perfectly happy with that outcome as well. Judge Niemeyer, as you suggest, I think the real question as it concerns any of those alternative approaches rests with my friends on the other side. And the State –

JUDGE NIEMEYER: Well, it takes two to tango. It just means one may have to take the lead.

MR. KIMBERLY: Well, and I leave them to make the argument. I think it is also a question of whether it would have to be done by legislation or not, but maybe through something like a consent –

JUDGE NIEMEYER: Why would that be done by [6] legislation if it's before the Court now on a constitutional issue? In other words, it's a political question initially. The requirements are shared by the State and the Congress in drawing these lines. But the Courts are involved through arguments that the lines that that process yielded violated the Constitution. So there would have to be some basis for the Court to keep something like that. And we recognize that too.

The difficulty of saying the legislature has to pass it, we can't dictate how the legislature would vote, number one. And No. 2 the process probably becomes indeterminate and we might find ourselves back at this –

MR. KIMBERLY: That's right.

JUDGE BREDAR: – at the gate again, because there have been efforts in the past to do

something like that voluntarily. The idea might be to have a court orchestrate a settlement through –

MR. KIMBERLY: Certainly.

JUDGE BREDAR: – through a court-created commission and an approval with a consent order.

But any way that's just – these are just ideas. And I don't know if Judge Bredar had any other ways that he was talking about it, but it sounds appetizing if both parties were willing.

MR. KIMBERLY: Certainly. And I'll confess not to [7] having given a lot of thought to a question of a consent decree. But as I say, our ultimate objective is ends-oriented not means-oriented. And if there's another way of getting there apart from a permanent injunction, we would certainly be happy to entertain that possibility.

JUDGE BREDAR: So, Mr. Kimberly, I appreciate your implicit acknowledgment that it's probably an easier call on your side than it is on the other side. But by virtue of the Court raising it with you, we provide your opponents the opportunity to reflect for a few minutes on their answer to what is probably a much more complex question.

MR. KIMBERLY: Certainly. Well, while they think about that, if it's all right with –

JUDGE NIEMEYER: Why don't you turn to your motion.

MR. KIMBERLY: I'll proceed to my motion. What I'd like to do, Your Honors, is first lay out what it is we think that we have to show. And then I'm going to – well, why don't I start with this. So the three elements, according to this Court's decision on the motion to dismiss, is that we have to show specific intent to burden Republicans by reason of their party affiliation and past voting history; we have to show that the redistricting, in fact, resulted in vote dilution that was sufficiently significant that it actually caused a practical consequence in the way that the electoral [8] machinery works; and finally, we have to show that the vote dilution would not have come about absent the protected conduct and the intent to burden that conduct. And we submit we've proved all three elements.

Last time we were here on the preliminary injunction motion, we started out with a discussion of specific intent. And the Court moved fairly quickly away from that. What I'd like to do is just give a very brief sort of three minute highlight reel of specific intent. And then I'm certainly happy to answer any questions that the Court may have on that, but I don't intend to dwell especially long on the question of intent.

Throughout our briefing I think we – and throughout the record we've demonstrated that the goal in the 2011 redistricting was to move from a 6-2 map to a 7-1 map. Here for example is Eric Hawkins the NCEC analyst, who consulted on the map drawing who confirmed this intent.

(Video played.)

MR. KIMBERLY: That evidence does not stand on its own. Later in his deposition, Mr. Hawkins confirmed again that they were going to create a quote, "7-1 split," in their approach to the redistricting in 2011. This was corroborated in turn by many other members of the redistricting actors in the redistricting process, including here Curt Anderson who's giving a press interview after having been briefed on the [9] redistricting on October 17th, 2011.

(Video played.)

MR. KIMBERLY: So this confirms that the goal of the redistricting was to create a 7-1 map that gave Democrats an additional seat in the eight seat congressional delegation.

Now, as it turns out there were – because it was a 6-2 map, the map drawers could have targeted either the 1st District or the 6th District. Here Eric Hawkins, I'll spare you the video, but Eric Hawkins confirms that there were two districts you could look at based on what the line up was, he says. And so this presents a question whether the map drawers targeted the 1st District, which is predominantly Republican, or the 6th District, which is predominantly Republican.

And here is Martin O'Malley confirming in the course of his deposition that a decision was made to go for the 6th.

(Video played.)

MR. KIMBERLY: And what this reflects is a decision to crack the Republican majority in the 1st

District would have required drawing the 1st District in such a way that it jumped the Chesapeake Bay. The map drawers and others involved in the process had decided, for political reasons, that they didn't want to jump the Chesapeake Bay. And so as Governor O'Malley l re confirms, the decision, therefore, was made to go for the 6th.

And, finally, here is Governor O'Malley confirming [10] that his intent, indeed, as the leader of the redistricting process, was to make the 6th District more favorable for Democrats.

(Video played.)

MR. KIMBERLY: Now, we have quite a lot more than this. But as I mentioned, the last time that we were here the Court indicated that Your Honors didn't have extensive questions about the issue of intent. And Chief Judge Bredar, you even suggested that at that point that we have proven intent beyond – beyond the need for a trial. That is certainly our position and I stand ready to answer any questions –

JUDGE NIEMEYER: On that issue he seems to have had the affirmance of Justice Kagan.

MR. KIMBERLY: Certainly so. And obviously, there was some push back at the hearing before the Supreme Court, there was no push back on the question of intent, whatever other issues there may have been push back on. We think that the record here really does not present a genuine dispute as to the

objectives of those who were involved in the map drawing.

JUDGE BREDAR: Does the proof of intent with respect to voter dilution easily sort of slide over and also satisfy whatever proof obligation you have on intent with respect to your claim of associational injuries.

[11] MR. KIMBERLY: As in does proof of an intent to dilute offer proof of intent to impose those –

JUDGE BREDAR: Exactly.

MR. KIMBERLY: Yes, I think so. And it's because those associational harms really grow out of the vote dilution itself.

JUDGE BREDAR: Suppose, though, that we're not focusing on vote dilution ultimately, but on injuries that were sustained to associational rights that people have under the First Amendment, is the proof on intent that you've got in this record nonetheless sufficient to make out those claims as well?

MR. KIMBERLY: I would say so for two reasons. The first, and I'll get to this in greater depth when I start talking about the question of burden and injury, is our position is that those associational harms themselves, in fact, as I mentioned, grow out of vote dilution. But even if you didn't think of it that way and you thought of them as –

JUDGE BREDAR: I don't.

MR. KIMBERLY: – an independent injury, there's no question here that the intent was to make it more difficult for Republicans to win and easier for Democrats to win. And I would say even more than that, it was an intent to ensure that a Democrat wins the 6th Congressional District. And certainly one way to do that is to disrupt the associational activities [12] of Republicans by making it more difficult for them to recruit support to their party, by making it more difficult to get their base to turn out to elections, by making it more difficult to raise money, so on and so forth.

We have evidence in the record, which I'll get to in a little bit, showing just those kinds of harms. But I think more generally at the intent stage, the evidence here is that the intent was to make it a 7-1 district. And disrupting association is part of bringing about this objective.

So I think that's a segue to the question now of burden and intent. And as I say, I'm – I've come prepared to talk more about intent if Your Honors have any questions about that element, beyond Judge Bredar, what we just discussed.

For now what I'd like to do is move on to burden. And before getting to the evidence, I'd like to try to reorient the Court to the legal theory as we understand it, to what this Court had to say in its motion – in its opinion on the motion to dismiss as we understand it. The ultimate question on burden is not whether or not we have shown that every election has changed because [*sic*] the gerrymander. It is instead whether we

have shown a real and practical diminishment of political opportunity. That is what vote dilution is about. And that is, at least the principle theory of harm that we've put forward, although, as I say, I'll get to these associational harms as well.

[13] JUDGE RUSSELL: Isn't the associational harm easier to prove than the voter dilution?

MR. KIMBERLY: I think we have shown both beyond genuine dispute. I think both are quite clear on the record.

JUDGE RUSSELL: As a matter of law, though? We'll get to that in a moment, but as a matter of law you've shown the injury as opposed to the associational theory doesn't appear to be much of a dispute or it may not be much of a dispute that there were 10,000 voters that were taken from one district and placed in another district, with the intent to prevent them from associating with one another for the purposes of supporting a particular party.

MR. KIMBERLY: That, Your Honor, that sounds exactly right to me.

JUDGE RUSSELL: As opposed to winning or losing, establishing winning or losing –

MR. KIMBERLY: Certainly.

JUDGE RUSSELL: – by saying as a matter of law that there are voters out there that we're going to presume are voting in a – based upon a historical pattern and statistics are going to be voting in a

particular way. But the associational theory might be a little bit easier to prove because it's established by taking out a certain block of voters and replacing them with another block.

[14] MR. KIMBERLY: I think – I don't disagree with anything that you've said. I would say that these are two alternative paths.

JUDGE RUSSELL: Thanks.

MR. KIMBERLY: Thank you. I think these are two alternative paths to getting to the same place, which is just to show that the redistricting here had a real and practical impact on the First Amendment rights of Republicans in the old 6th Congressional District. We're certainly not giving up on the idea of vote dilution. And perhaps we can move to the question of –

JUDGE RUSSELL: I didn't mean to disrupt you, but I had a question as you were presenting your case, and – but I didn't want to disrupt your presentation.

MR. KIMBERLY: Well, I appreciate that, Your Honor. I guess what I would say – well, why don't I come back to the question of vote dilution.

JUDGE RUSSELL: That's fine.

MR. KIMBERLY: We have slides also on the associational injury. Let me talk briefly about that right now, the associational injury, as my colleague pulls up that slide. Sorry, just one moment, Your Honor.

JUDGE RUSSELL: Sorry, Mr. Kimberly, I threw you off and I apologize for that.

MR. KIMBERLY: That's okay. Your Honor, ultimately [15] my goal is to convince you. So I'm happy to respond to your questions.

So we – as I said, we have two parallel arguments here with respect to burden. And one is that there has been a chilled political participation and a disruption of that association. And I think at a certain level there is an intuitive element to this that doesn't require a whole lot of evidence or thought. Governor O'Malley put it succinctly in a speech that he gave at Boston College.

(Video played.)

MR. KIMBERLY: The idea that redistricting by cracking majorities, and attempting to rig elections by making it impossible, Judge Russell, as you said, for Republicans who are removed to continue associating with Republicans who remain, carves those individuals' voices effectively into irrelevance.

This is supported by Justice Kagan's opinion in *Gill against Whitford,* which we think is consistent with and very well supported by the Supreme Court's earlier decision in *Anderson against Celebrezze*. The idea behind this notion of burden is that partisan gerrymanders, and I'm quoting now, may infringe First Amendment rights held by parties, political organizations and their members, by making it more difficult for them to fund raise, to register voters, to attract

volunteers to generate support from independents and to [16] recruit candidates, good quality candidates to run for office.

That is reflective of what the Supreme Court said in *Anderson against Celebrezze,* which was a ballot access case, in which the Court explained, in effect, that what mattered was not necessarily whether the burden – and the burden in that case was different filing deadlines for independents versus members of the major political parties. And the Court did not focus there on whether that burden – what it recognized was a burden on a political opportunity had actually change [*sic*] an electoral outcome. What it focused on was the way it diminished political opportunity by disrupting this sort of association.

JUDGE BREDAR: And as a consequence, some of the justiciability issues that arise on the other prong are voided; right?

MR. KIMBERLY: Certainly so, Your Honor. Yes. And I'll come back to that in a little bit as well.

MR. KIMBERLY: Now the last time that we were here on the motion for the preliminary injunction, we had cited to testimony of our plaintiffs, who had testified that in their efforts to campaign in the 6th District they had run into exactly these sorts of effects.

Beyond that, we have actual voter turnout data. Now we have focused here on Republican primary turn out, because – for two reasons – in, I should say, midterm years, [17] for two reasons. One, it is in the

midterm years that the congressional candidate is at the top of the ticket and most likely to drive voters to the ballot box. And Republican primary elections are where Republicans, because Maryland has a closed primary system, only Republicans can participate, registered Republicans can participate in the election.

And what we see is in Allegheny [*sic*], Carroll, Frederick, Garrett and Washington Counties, all of which span the 6th District, turnout fell, for instance, in Allegheny [*sic*] from 42.77 percent, which I can say nationwide is an astronomical turnout for a midterm primary election, dropped by 15 points to 26.65. Every other county here dropped commensurately as well. The smallest drop was roughly a two percent drop, a six percent drop, but elsewhere other 15 percent drops, which you know when you think about a 15 percent drop as compared to 42 percent, that's like one third of the voters who previously had shown up not showing up and staying home.

And the reason is exactly what Governor O'Malley had said in that speech, because what's the point of selecting – showing up to the ballot box, engaging in the political process to select a candidate who's almost certain to fail.

JUDGE BREDAR: But did Republican registration go up during the same period? And if so, what do we make of that?

MR. KIMBERLY: There is a suggestion that Republican registration had gone up. I don't – truthfully, I don't know [18] what to make of that, except to

say that so far as participation in the political process is concerned, registering people doesn't matter much if they don't show up to the ballot box. And I think, ultimately, it's got to be participation in the election itself that is the measure of the engagement of the electorate. But – and here, incidentally, is a line graph demonstration of the drop off in actual voter turnout rather than percentages as actual numbers. You can see after 2010 there was a precipitous drop off.

But I'll say we don't just have the reduction in voter turnout at Republican primaries, we also have drop offs in fundraising by the Republican central committees in Allegheny [*sic*], Garrett and Washington Counties, we have focused on Allegheny [*sic*], Garrett, and Washington, because those were the counties that were in the district before the gerrymander and remained entirely in the district after the gerrymander. And what it shows is that during both midterm years and presidential years, fundraising has dropped off by six to 12 percent.

And that also is unsurprising, because when the Republican party, essentially, as Governor O'Malley put it, gets carved into irrelevance by a gerrymander you would expect to see lower financial support for that party.

And of course, beyond that, Judge Russell, as you [19] noted, it's simply the disruption of association that follows from sorting people on the basis of their part – excuse me, past electoral behavior, making it more

difficult for historical Republican supporters to associate with fellow historical Republican voters by cracking them into surrounding districts where their voices are effectively drowned out by Democratic majorities, that is what gerrymandering is all about. And we think the evidence here very clearly and strongly supports that conclusion.

JUDGE RUSSELL: But you want that as a matter of law. In other words, there's no evidence in the record demonstrating, for example, that the low turnout was weather related or is there a contrasting turnout by the Democratic party?

MR. KIMBERLY: And, Your Honor, the simple question [*sic*] to that is yes, there is no genuine dispute in the record on those questions. The State has not put those issues into dispute. The record is as it is before this Court. And I think you can conclude as a matter of law that these disruptions to the associational activities of Republicans in the area have indeed been disrupted. There's nothing to suggest otherwise. And so we submit that we're entitled to summary judgment on that question. Certainly, at the very least, we'd be entitled to a trial. There's absolutely no basis to suggest that the State would be entitled to summary [20] judgment on its cross motion.

Now, if I could, I'd like also to return to the question of vote dilution which I think is relevant.

JUDGE NIEMEYER: Let me just ask on that last point, which was said sort of casually. If you failed to make your case factually, and we conclude it

didn't establish the requirement, that ends it. You don't get a trial on that. You get a trial on a dispute that's been raised. And so this is a motion, basically, you're asserting based on affidavits, and your argument based on undisputed evidence, that there were these effects. And in order to create a dispute, the State would have to come forward with other possibilities and we'd have to resolve that dispute. But if it turns out that it's just inadequate as a factual matter, that ends the case. You don't get a trial on that; right?

MR. KIMBERLY: That's right, Your Honor, if the Court found that no rational fact finder could – and that's this Court in this case – could find in our favor on the basis of the evidence before it, then it would be a basis –

JUDGE NIEMEYER: I just wanted to keep the standard clear on this.

MR. KIMBERLY: Certainly. And I apologize if I misrepresented that standard.

Now, if I could, I'd like to come back to the question briefly of vote dilution. Recognizing again that [21] this is a entirely independent line of proven burden, and that if you're with us on this question of associational disruption you needn't reach this particular issue. Before I get to that let me just explain, vote dilution is proved with evidence of block voting and political cohesion. Those are concepts that are taken from the Section 2 civil rights litigation context where the question is whether minority performing districts have been

gerrymandered and diluted impermissibly in violation of Section 2 of the Voting Rights Act, those are quote, unquote, vote dilution claims. And I'll get in just a bit into the details of that framework.

And our position is that they have to – vote dilution so proved would have to make a practical difference. We get that from this Court's opinion on the motion to dismiss. And we think there are two ways of showing a practical difference; that's a chilling of political participation, which is related to what we were just talking about, and that it has demonstrably diminished political opportunity and influenced electoral outcomes. And I should say in saying that we don't need to prove that every electoral outcome has changed as a result of the gerrymander, I want to make sure we avoid that misconception.

And here's how the Court put it on the motion to dismiss, the injury is vote dilution. And to establish this element, the plaintiff must show that the challenged map [22] diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. It has to have made a practical difference. And so that's what I'm going to focus on here.

I should say this framework, I think, finds support in the majority opinion in *Gill against Whitford*. The majority opinion there confirmed that the harm of vote dilution arises from the political composition of a particular district, when the lines are drawn in such a way

that the vote, quote, "carries less weight than it would carry in another hypothetical district."

The majority in *Gill* describes this as a burden on plaintiffs' votes that has to be evaluated district by district. And, of course, we have a single district challenge here. So our position is that what the Court said, the majority in *Gill*, is entirely consistent with the approach that we have taken in this case to date.

So to show vote dilution there are typically three showings these are called the *Gingles* preconditions. And proof of these three preconditions is necessary, and we submit in this case, sufficient to show that the vote dilution has, quote, in the language of *Gingles* "impeded the ability of the targeted voters to elect representatives of their choice."

Now, I'll come back to that in a bit. The first element is that the minority group must be sufficiently large [23] and geographically compact to form the majority of a reasonably drawn district in the area. We know that element is satisfied, because between 1991 and 2011 historical Republican voters did form the majority of the district and had succeeded in electing their candidates of choice.

So my focus here is going to be on the second and third elements, what I mentioned before, the idea that the targeted minority's politically cohesive, and the majority into which and among whom they are dispersed, vote as a block, so that the dispersal of the targeted minority among the surrounding majority will generally defeat the political will of the minority.

And this is, in fact, the approach that our expert Dr. McDonald took to the question of vote dilution. He said he approached the question of vote dilution – this is on page 3 of his report – in a manner similar to that used in voter rights litigation. He evaluated the way that registered Republicans and registered Democrats behaved in elections and, unsurprisingly, came to the conclusion that most Democrats prefer Democratic candidates, most registered Republicans prefer Republican candidates.

This is evidence that Democrats vote as a block. If you are a historical Democratic voter you will generally vote as a block with other historical Democratic voters in your area. And if you are a registered Republican, you are [24] politically cohesive, you will generally vote together with other registered Republicans. And it is on this basis that Dr. McDonald found that the current 6th Congressional District has the effect of diluting the votes of Republicans.

This chart was a subject of our preliminary injunction hearing at some length. I'm presenting it here for a much more modest proposition than we discussed last time. It's just to say that when a district comprises a majority of Democratic voters, it's very likely to elect the Democratic candidate for office. This supports the inference that Democrats generally vote together as a block. The more Democrats you get in the district, the more likely it is that the Democratic [*sic*] gets elected. The more Republicans you have in the district, the more likely it is that the Republican gets elected.

And we have evidence of election day voting from members of the 6th District who were – who stayed in the district, who were taken out of the district, and who were added to the district. What this shows is that voters are not automatons, we're not suggesting they are. Voters exercise choice in every election. What this does suggest, though, is those areas that were removed had previously voted overwhelmingly, over 60 percent of the time – excuse me, over 60 percent of the electorate in favor of Republican candidates. And after they were removed in [*sic*] the district they [25] continued to do so. Likewise, those areas who were added voted overwhelmingly for Democrats, when they were added to the District they continued to do so.

JUDGE BREDAR: Don't we just have the same problem that we've had every time you and I have discussed this, which is the difference between what happened in 2012, and what happened in 2014, in the 6th. And, you know, your data, your line drawing in this context shows a nice cluster in terms of results and predictability and so forth, and how then do – what would statisticians say about a nearly 20 percent swing in terms of what happened in that district between those two elections?

MR. KIMBERLY: Well, I guess what I would say is that at this point –

JUDGE BREDAR: The Democrat won both times. One time by 21.5 percent and one time by 1.5 percent. Is that roughly correct?

MR. KIMBERLY: That sounds – yes, here's the graph, so it looks like a 18.5 percent swing.

JUDGE BREDAR: That's a pretty big swing in the context of what we're talking about here where it's all supposed to be so predictable based on how people align themselves.

MR. KIMBERLY: Now, I want to be very clear that at this point I'm not talking about predictability. I'm talking [26] about only the accepted legal concepts of block voting and political cohesion.

JUDGE BREDAR: Should we accept them in the face of data in our own case that show this kind of a swing?

MR. KIMBERLY: Well, I – simply put, I think the answer is yes. And it's because everything else indicates that voters who associate with the Democratic party typically vote as a block. And those who associate with a Republican party are politically cohesive, which is to say –

JUDGE NIEMEYER: I thought that's what Justice Kagan set out in her examples in *Gill*. She and Chief Justice Roberts suggested that the injury is not a change in the result, the injury is the disadvantage to the individual voter by diluting his vote. And the hypothetical that she used, I think, if I understood it, you don't even have to win to prove dilution. In other words, the Democrats would not even have to have won those elections if it were shown that the Republicans were targeted and their votes were diluted –

MR. KIMBERLY: Right.

JUDGE NIEMEYER: – disadvantaged in the process. In other words, they focused, they say it several times, they called it diminishment or disadvantaged to the voter in the voting opportunity. So I – I'm wondering whether it's productive to get too much into the predictability of results. You would expect a swing in the district, that's what the [27] Governor had said he wanted. And it, in fact, did happen. But the fact that we have one year where the margin was minor and two years where the margin was pretty comfortable –

MR. KIMBERLY: Right.

JUDGE NIEMEYER: – I'm not sure detracts from the theory that vote dilution is based on the disadvantage to the voter and has less of an opportunity.

MR. KIMBERLY: Your Honor, that's exactly right. And that's what I'm – that's ultimately what I'm driving at. I think Justice Kagan made another observation in her opinion that was helpful. She said only a perfect gerrymander would ensure beyond doubt that every electoral outcome has been changed. But the standard under the law is not perfection. It can't be that these sorts of targeting of individuals on the basis of the way that they have expressed themselves at the ballot box in prior elections. And in turn the clear diminishment of their political opportunity as a result is actionable only in the face of flawless perfection in execution.

JUDGE BREDAR: So you would have claims here that would succeed even if Roscoe Bartlett had won the 2012 election, despite the best efforts of the state authorities to try to redistrict him out of office. And if he had continued to win, through this decade, there's no requirement that it actually have the concrete result of flipping the district.

[28] MR. KIMBERLY: Well, I guess I would say that I think that's a more difficult question. I think you would be a lot less likely to see a lawsuit in that circumstance in any event. What I would tell you, for certain, our position is that if in 2014 a Republican had won, we'd still have a claim. You know, it's no answer to say, well, we were trying to rig all five elections, but we rigged only three.

Rigging an election by manipulating electoral – excuse me, districting lines is a clear – certainly a clear burden on the voting rights of the Republicans who are targeted. Their will is being thwarted by game playing with line drawing. And the standard cannot be that we have to show to a certainty that every electoral outcome has been changed as a result. That's why I led off by explaining that our goal here is to prove to you that there has been a practical difference that manifests, as Judge Niemeyer was saying, as a diminishment in the political opportunity of the Republicans in the old 6th District.

JUDGE NIEMEYER: I hope it wasn't me. I'm actually repeating the Supreme Court jurisprudence, which they repeatedly stated based on past,

they said it's the diminishment of the votes so that the person, in fact, injured in this instance has a vote of less worth.

MR. KIMBERLY: That's correct, Your Honor. And that's why I started with *Gingles*, which is what lays out this [29] framework and makes it very clear that that's what the standard is.

JUDGE NIEMEYER: Plaintiff has a right to an equally weighted vote, that's the type – that's what dilution is.

MR. KIMBERLY: Right. They're entitled not to be treated differently and in course to have a less weighted, less valuable vote, where the weight of that vote is manipulated by line drawing, because the map drawers in Annapolis disapprove of Republican voters electing Roscoe Bartlett to office. That's exactly right. That is the crux of vote dilution. And we submit to you in – excuse me, in Dr. McDonald's expert report, he undertook exactly this kind of analysis and found there was exactly this kind of result.

And, indeed, you know, he was – well, actually could we go back to the bar graph?

Ultimately, what I would say about election results, because I don't want to say that election results are irrelevant. But I would point the Court to *Johnson versus De Grandy*, a Supreme Court case from 1994, where the Court emphasized that vote dilution and election results are not one in [*sic*] the same, they are distinct, you can have one without the other, and the

other without the one. But lack of electoral success is evidence of meaningful actionable vote dilution. And lack of – equal electoral opportunity, that's the language that Judge Niemeyer was driving at.

[30] And what we have here is evidence of lost elections. So if you look at this graph that's up, you would have to conclude, and there would have to be evidence to suggest that this is really just a coincidence that has nothing to do with the line drawing that took place, so that those red bars up to 28.2 percent in 2010, those red bars to the left of the dotted line shifted to those blue bars to the right of the dotted line in a manner that had nothing to do with the redistricting.

We – I suppose what I would say is it is not our burden to show that each – that the swing from 28.2 to 28.9 is 100 percent attributable to the way that the lines were drawn. But this change in electoral outcomes is clear evidence of meaningful vote dilution. You don't – we have searched, we did a search of academic literature in other voting electoral outcomes, we couldn't find a single other instance in history where a vote swing had changed – this is nearly 50 points from 28.2 plus for Republicans to 20.9 minus for Republicans, nearly a 50-point swing that wasn't associated with an intervening gerrymander. This sort of thing just doesn't happen in the absence of this kind of manipulation.

And so what we submit to you is these changes in electoral outcomes are evidence of precisely the kind of vote dilution that the Supreme Court has said

represents a lack of [31] equal electoral opportunity that is an actionable burden within the meaning of the Court's redistricting cases.

JUDGE BREDAR: But drawing a line so that there will be some level of vote dilution is okay, because as Justice Alito has told us, partisan gerrymandering has been part of the process since the founding. So how do we know when there's been too much?

MR. KIMBERLY: Well, I would point the Court, I think in that regard, to the associational harms that we've identified. Because the two go hand in hand. And I think putting them together makes a rock solid case. We have clear vote dilution here. It is coupled with not only changed electoral outcomes, but as we explained the last time we were here, according to *The Cook Political Report*, the largest partisan swing anywhere in the country. And you couple that with all of the ways it has disrupted Republican political expression and participation and association in the area, and I think you have a very clear recipe for a First Amendment injury sufficient to warrant injunctive relief.

JUDGE BREDAR: But the Supreme Court has said there's a flat ban on punishing people by virtue of their political party membership. No lawful language like, well, there can be some of this, just not too much, which they have, you know, talked about in the context of voter dilution. I mean they're different. It's a much crisper analysis, isn't [32] it, in the context of

state action designed to interfere with political association than is it with respect to state action that's designed to draw the lines so that there's some political consequence, some partisan consequence in the actual votes that result, but not too much.

MR. KIMBERLY: Your Honor, I don't actually think that distinction really holds up, because the cases that we cited to this Court and to the Supreme Court in our merits briefing, make clear that even in more traditional First Amendment retaliation contexts like employment and handling of prisoners, it isn't enough to show hurt feelings, insults are not the stuff of a First Amendment retaliation claim. You have to show that the action taken has actually imposed a practical burden. That's where we got this standard. This is why we presented it to the Court in this way on the motion to dismiss.

And so, you know, for example, you could have somebody who attempts to impose – some superior in state government attempt to impose a burden but it fails, or says something that hurts the feelings of one of his employees because of the way that employee had behaved at a public rally supporting someone that that superior didn't also support. That's not the stuff of a First Amendment retaliation claim. So courts are constantly in the business of drawing the line between abstract injuries and hurt feelings on the one hand, [33] and actions that actually make for a concrete burden to support a First Amendment retaliation claim.

JUDGE BREDAR: But don't we know that some concrete burden, some relatively minimal, but some concrete injury sustained by voters is permittable – is permissible in terms of the consequences for an election? The line drawing to try to nudge a district to be a little bit more Democratic is okay, because it's been part of the – it's root and branch of a political process.

MR. KIMBERLY: Sure. And I guess my response to that is our position has never been that you have to take all consideration of political consequences [*sic*] redistricting out of the mix. Our view is that there are a range of other sorts of considerations that can go into the way that lines are drawn that might nudge political outcomes one way or another, that have nothing to do with a specific intent to burden voters because [*sic*] the way they have voted in the past.

So to give one example, the evidence in this case is that Congressman Ruppersberger wanted Fort Meade in his district because at the time he was on the Intelligence Committee, and he thought it would help him politically to have Fort Meade in his district. That is a political consideration designed to make it easier for him to succeed politically. It is not the same – and that –

JUDGE BREDAR: But not a partisan consideration.

[34] MR. KIMBERLY: No it is a partisan consideration, because to give it instead to the Republican candidate, the 1st District, which is probably

what it would have gone to based on where it is, would give the Republican an advantage politically, or at least deny the Democrat an advantage politically. So these are partisan considerations.

And Congressman Hoyer wanted College Park in his district because he's an alumnus and can raise money more easily from alumni of the University, if the University is in his district. He can bring, I guess, federal benefits to the University more easily if it's in his district. All with a goal of making it easier for him to compete in the political process. These are partisan considerations, designed to – intended to use redistricting to influence politics. There's nothing wrong with – you know, you might have your own judgments about whether or not that's tasteful or appropriate, but under our First Amendment theory it's not unlawful.

And so my response to you, in that line of questioning is that there is nothing inconsistent with what you have observed in applying our theory. It just means that the focus in the redistricting is on those other kinds of political considerations. What's off the table is a specific intent to single out people on the basis of the way they have voted in the past, and attempt to prevent them from participating meaningfully and on an equal playing field in [35] the political process as an expression effectively of disapproval of that past political participation.

Okay. So that's – and I'll be happy to come back to the question of burden. That's what we have on burden. I'd like to talk now a little bit about our third and

final element. And this, I think, is where last time we got – and I'll accept my own fault for this confusion – where we started talking about *Mt. Healthy* and whether *Mt. Healthy* burden shifting applied in this context. And I think there was a misunderstanding about whether it applied to demonstrating electoral outcomes were attributable to the gerrymander.

That is not what this element of the claim is about. This element of the claim is the question whether there are alternative explanations for the way that the lines were drawn, that suggest that even if the map drawers had not considered past partisan voting patterns and party affiliation, they would have drawn the district in such a way that the same results would obtain. Roughly the same lines, same sort of vote dilution, same sort of disruption of association.

And so *Hartman against Moore* puts it this way: Upon a prima facie showing of retaliatory harm, the burden shifts to the defendant to demonstrate that even without the impetus to retaliate he would have taken the action complained of.

[36] The idea is would the line – would the 6th District have been drawn –

JUDGE NIEMEYER: Is this question informed by the nature of the evidence supporting intent? In other words, if the intent is explicit, the intent here is not implied, the intent here is we want to switch the 6th District from Republican to Democrat. And to do so we're going to take out a bunch of Republicans and put in a bunch of be [*sic*] Democrats. It seems to

me if that's the intent to do that, then it's not a big step to go to the result, because that's exactly what they did. Whereas, if there were other reasons for that, then – and the intent was not explicit, then you get a much stronger case. But here the explicit intent was to do exactly what they accomplished.

And it seems to me that the first element feeds on to the last element and helps support the last element. Whereas, the first element they said, well, we just did it for political reasons or we wanted to redo the districts to improve the interests of the people and nothing else was said, then you'd have to go to the last element to see if there's any explanation other than First Amendment violations.

MR. KIMBERLY: I think that's –

JUDGE BREDAR: It's not my issue, but I've never understood why you need *Mt. Healthy*. It's not where I'm going, it's not something – I don't have a dog in the fight [37] because you know where I am on the broader issue.

MR. KIMBERLY: Sure.

JUDGE BREDAR: But as an abstract matter I've never understood why you need it on this proof.

MR. KIMBERLY: Oh, and I agree, Your Honor, I think it's the right way to think about the law. I don't think we need it. I think here the evidence is quite clear that the only reason they drew the map the way that they did is because they wanted to flip the 6th District.

JUDGE NIEMEYER: Because they said so.

MR. KIMBERLY: Because they said so.

JUDGE BREDAR: On TV, in this courtroom they said so.

MR. KIMBERLY: And because every other – and because every other explanation they gave is just flatly disproved in the evidence. The only one that was really pressed in the evidence is the I-270 corridor explanation. But, in fact, what the evidence shows is that no one actually – no one who was actually involved in the redistricting thought one second about the I-270 corridor.

Martin O'Malley was very clear that what they were considering in engaging in the redistricting was they wanted to do it in a timely way that was consistent with what the census results were. That makes sense. They wanted to comply with the case law concerning one person, one vote, and Section [38] 2 of the Voting Rights Act. That also makes sense. And then besides those two things, the only thing they cared about was flipping the 6th District.

I'm going to skip this. And, you know, here for instance, is Speaker of the House Busch confirming he didn't think –

(Video played.)

MR. KIMBERLY: Nobody was thinking about the I-270 corridor. I'm not going to guild [*sic*] the lily here. I think the point is pretty clear. Every witness

asked about the I-270 corridor, who was involved in the redistricting said, no, I didn't think about that. Including Eric Hawkins who explained he doesn't – not only didn't he do it, he didn't recall anybody else thinking about the I-270 corridor.

So the only context in which the I-270 corridor comes up are these GRAC public hearings, which the evidence shows, as we explained in our briefing, was really window dressing for the behind the scenes process. And the only people who raised the I-270 corridor explanation were all Democratic party insiders, who are saying roughly consistent things about a supposed community of interest and linking Frederick and Montgomery Counties. But when asked whether comments taken at the public hearings influenced the way the map was drawn, a GRAC chair Jeanne Hitchcock said, no, they didn't.

[39] And so that leaves, I think, the rest of the permanent injunction framework recognizing that that's at least what we're asking for from the Court at this point. I think the question of irreparable harm is straight forward. The case law that we cited to this court is straight forward. That elections held under unconstitutional maps –

JUDGE NIEMEYER: What's the remedy you're asking for?

MR. KIMBERLY: The remedy that we're asking for is an order enjoining the defendants from enforcing the map as drawn. What I would suggest –

JUDGE NIEMEYER: That doesn't go far enough, does it?

MR. KIMBERLY: Well, it would require in turn for the legislature to enact a new map consistent with the legal principles that the Court lays down, if it were to enter an injunction of the kind that we're asking for.

Now, if it turns out that the legislature is unable or unwilling to do so, either because there's not enough time or because Democrats and the legislature and Governor Hogan in the Governor's mansion can't agree on a map, I think then it would fall to this Court, as is typical in these kinds of redistricting cases, to adopt a map of its own. But we would suggest it's appropriate at least as an initial matter to give the legislature and [*sic*] opportunity to –

[40] JUDGE NIEMEYER: The legislature and the Governor could not even agree on giving it to a commission, could they?

MR. KIMBERLY: They couldn't. And, Your Honor, if this Court concluded that would be a waste of everyone's time, we would certainly be happy –

JUDGE NIEMEYER: I don't know if we can conclude that. But just as a practical matter, thinking out loud, it's – if you're thinking about a remedy and if you were to follow through on your particular claims, timing gets to be an issue.

MR. KIMBERLY: It does.

JUDGE BREDAR: But before the Court jumps into it and starts to draw lines or appoint its own expert or appoint its own commission to do that, it seems that it would only be fair and respectful, as much as we can be, of the role of the other branches, to allow them an opportunity to come into compliance on their own through their own means and methods.

MR. KIMBERLY: And so one alternative – I might suggest, the approach taken in Wisconsin was an injunction was entered against enforcement of the map. And then the question of remedy was briefed separately. I think that would be an appropriate course here, because remedy is not something we've briefed at length.

I would point the Court also to North Carolina, my recollection is that before the Supreme Court proceedings in [41] that case there was leeway to the legislature to attempt to draw a fair map, while in parallel the parties and court worked on their own map. And setting a deadline for what the legislature could accomplish, the Court was – would then in theory, if it hadn't been stayed, would then in theory have been at the ready with a neutrally drawn map of its own if that deadline passed without any objection by the legislature and Governor's office.

But these are all issues that we haven't yet briefed. And it might be that the appropriate course, if the Court were inclined to enter an injunction, would be to order expeditious briefing on that question after entering an injunction.

JUDGE NIEMEYER: All right. Why don't we give the State a little bit of a chance unless you have some –

JUDGE BREDAR: I have one more question for Mr. Kimberly, if I might, Judge Niemeyer. And that is tell me about where in this record do we find evidence of associational injuries and harms, and what are they specifically in your view? We've had some theoretical discussions about what they could be, what they have been found to be in other cases, but in the record of this case, assembled by you and your opponents in the discovery phase, what are we left with as proof of actual injuries in the context of First Amendment retaliation and in relation to [42] associational rights?

MR. KIMBERLY: So I would say it was what we had discussed earlier. It's the actual election returns, which were disclosed to us in discovery in part of the record. Those election returns show – or I should say – yeah, it's I guess it's properly described as election returns – show decreased voter turnout in Republican primaries. That –

JUDGE NIEMEYER: That's what Justice Kagan focused on, the effect on the party.

MR. KIMBERLY: Right.

JUDGE NIEMEYER: She talked about ravaging – that the injuries are ravaging the party he worked to support. In other words, people lost – didn't

support it as much and they didn't show up in elections as much. That would be the best evidence you have; isn't it?

MR. KIMBERLY: That I think also with the campaign finance disclosure reports, which show –

JUDGE NIEMEYER: Well, that's the support.

MR. KIMBERLY: Yes, the decreased financial support. Exactly. Yes. And I think also, as Judge Russell noted, you can also just look at the way that voters here were sorted. The fact of the matter is 60-some-odd thousand historical Republican voters were removed from the district and are now thwarted in their ability to associate with like-minded Republican supporters who were left in the district. I think [43] that too is just a very straight – I mean, you can't deny the disruption of association that's associated with that observation. Whereas, before they could get together and work to select a candidate that they wanted to send to Congress, they can no longer.

JUDGE BREDAR: Can we just take notice of that or do we need affidavits from individual Republicans who formerly were in the 6th, now they're in the 8th or the 3rd, who say I can't do this anymore, here's what I lost. I used to belong to a Republican club and the line split us right down the middle. Now I'm not in the same Republican club anymore. Now I'm over in the 8th.

MR. KIMBERLY: I think the more straight forward observation is simply that those who were moved from the 6th can't vote in the 6th District anymore. So they cannot, I suppose in sort of a, you know, if someone were inclined to campaign for candidates in districts where they didn't reside maybe it – I mean, I think it's commonsensical to think that Republicans in the 8th District would work to support the 8th District candidate, but to no avail because they've been drowned out and diluted by Democrats in the area. And Republicans in the 6th District will work to support members, candidates for congressional office in the 6th District, but again to no avail, because they've been drowned out by redistricting. Whereas, before the gerrymander those two [44] groups could have worked together to – with greater electoral success. And the reason they cannot now is because they've been singled out for disfavored treatment, they've been placed on an unequal playing field, and as a consequence have not enjoyed the same political opportunity that they had before.

JUDGE BREDAR: Are there some associational impacts that do not translate directly to voting. Suppose that one was persuaded that there was something very much awry here, but felt that proving it through actual election returns and voting patterns is problematic because of a history that has been set for us by the United States Supreme Court in the context of voting in particular. Aren't there other First Amendment rights and interests of an associational character that don't tie so directly to voting?

MR. KIMBERLY: Yes and –

JUDGE BREDAR: Advocacy.

MR. KIMBERLY: Sure. Financial support is one example. Which is something that we have. And, of course, we also have the deposition testimony of our plaintiffs explaining exactly this kind of disruption and confusion more broadly than just showing up to the ballot box. But I think, of course, showing up to the ballot box is highly relevant, certainly it's an exercise of First Amendment rights. And the ability of Republicans to associate in the area now has been disrupted. Thank you all.

[45] JUDGE NIEMEYER: All right. Who are we going to hear from, from the State, Ms. Rice?

MS. RICE: Yes, Your Honor.

JUDGE NIEMEYER: I'll tell you what, why don't we take a short recess. And you can gather all your thoughts, as have you have already been doing, right after the break. We'll take a short recess.

(A recess was taken.)

JUDGE NIEMEYER: All right. Be seated, please. Ms. Rice, you haven't been standing there the whole time, have you?

MS. RICE: I have not.

JUDGE NIEMEYER: All right. We'll hear from you.

MS. RICE: Good morning and thank you. The plaintiffs are seeking an injunction applicable only to the –

JUDGE BREDAR: Let's talk about settlement first.

MS. RICE: Yes.

JUDGE BREDAR: Where does the State stand with respect to the viability of a settlement negotiation?

MS. RICE: Your Honor, as an Assistant Attorney General, I don't know that I can currently make any representations about the viability of a settlement negotiation more to say that the State is always willing to dialogue with any party seeking to settle a case. We have not [46] yet been approached in this matter. The client, State Board of Elections is not independently empowered to draw congressional district lines. The reason they're the defendant in this case is because they're charged with implementing that electoral map and that would be the proper subject of the injunction, but there are clearly other –

JUDGE NIEMEYER: Let me suggest something, because I'm fully sensitive to your role and its – I mean, you're a spokesperson for a very complex process and agencies and so forth, is there any room in your role to have the administration – and actually it would have to be, I suppose, the Attorney General and

the Governor – but approve some notion where you could yield to a court jurisdiction over this issue, and agree to some kind of commission, say, headed up by a magistrate judge. And then having a designee of you and a designee of the plaintiffs on there and see if they can't work something out –

MS. RICE: Just to be clear –

JUDGE NIEMEYER: – to try to obviate the problems you were talking about, which are real, there's no doubt about it.

MS. RICE: Sure. Just to be clear, the Attorney General's role here is just to defend the constitutionality of the law, he does not take any position in this matter or would likely not be involved in any resolution of the matter. But [47] in terms of are there options, could we think creatively about a way forward if there was interest on both sides to create a dialogue, I'm sure –

JUDGE BREDAR: I don't hear any state officials within your specific client, or more broadly among the State in general, which the Attorney General represents, overtly defending and advocating for the appropriateness of extreme partisan political gerrymanders. I don't see that in this record, certainly, and I don't see it more broadly out there in the wider world.

If anything, the conventional wisdom seems to be that it's a bad thing, that there's much agreement with what the Supreme Court has said in other cases, that

it's repugnant, that it's in conflict with basic principles about how Democratic government ought to operate and ought to work. Even forces in the state of Maryland have gotten behind legislation saying essentially, Maryland would go along with some kind of a more neutral approach, if other states would as well. That's certainly something that we're all aware of.

So, accordingly, is there an opportunity here, a moment when it's appropriate for litigants in the Maryland case to reach out to litigants in another case, say Wisconsin or North Carolina, where the political equities are exactly opposite of what they are in Maryland, and settle two cases simultaneously with a net effect that no one gains political [48] advantage, which seems to be what's ultimately driving all this.

Everyone condemns it. Everyone says it's terrible, but nobody will fix it, because nobody's prepared to unilaterally disarm. Well, then find others who you can get in partnership with and settle the Maryland and Wisconsin cases simultaneously, with no net effect in terms of the politics, other than the people have a more pure Democratic process. Is anyone thinking along those lines?

MS. RICE: Your Honor, I will certainly bring back the thoughts from this morning's hearings to my clients. I have not, before this hearing, had the opportunity to discuss settlement with them. We have not been approached by the plaintiffs in the past about any willingness to settle. So I just don't have the information –

JUDGE BREDAR: The state of Maryland settles difficult cases in this court every year and perhaps every month. And some of them require all kinds of steps that have to be taken back with the Board of Public Works, even back to the legislature. You know that from personal experience, that our magistrate judges resolve those matters on a tentative basis subject to appropriate legislation being adopted, or the BPW ratifying. But there are ways by which your very complex client can be brought to the settlement table successfully and agreements can be reached that resolve hard thorny problems [49] like this, if there's a will.

MS. RICE: Your Honor, I do agree that there are many different methods and that our office would always advise our clients on the availability of different methods and work creatively with the Court and the other parties to settle a case. I just don't have any information about the willingness to do so at this time. I would point out that Wisconsin is a state legislative case and in North Carolina the gap is something like it's – the number of seats at issue is many more than the one at issue in this case.

JUDGE BREDAR: You could sweep away all of these problems by states such as Maryland and Wisconsin agreeing that across the board, nonpartisan commissions would do the districting at the state legislative level, at the level of congressional districts, and clear away all of these issues in both states with one sweeping initiative that is just adopted on a mere basis

in both places, to no net – no significant net political effect.

MS. RICE: Your Honor, we definitely appreciate these comments and the creative direction that they're heading.

JUDGE NIEMEYER: All right. You have a motion for summary judgment against you, which you've answered, and then you have filed a cross motion for summary judgment. So however you wish to handle it, we'll hear from you on that.

[50] MS. RICE: Thank you, Your Honor. I think that we'll start with our cross motion for summary judgment. And I think it is, again, appropriate to go back to what the plaintiffs have asked for, the context in which they're asking it. We – the plaintiffs are looking to enjoin just the 2020 election. That's one – the 5th and last election under the 2011 plan. The 2011 plan was arrived at only after public comments, compromise between the Governor and the legislature, of all of the incumbents, Republican and Democrat, and approval by the voters of Maryland in referendum.

There have also been many changes of circumstance since 2010. We're actually gearing up right now for the conduct of the 2020 census. So there are many demographic changes that have happened since 2010. There is a different match up in the 6th Congressional District. Congressman Delaney has announced his retirement. We have two new candidates that are facing off in the 2018 election, and we have no evidence of the plaintiff's [*sic*] preferences in that race.

All of this is happening after we have had a long and whirry [*sic*] procedural history of this case in front of this court the plaintiffs did not bring –

JUDGE NIEMEYER: Not many cases have a Supreme Court chiming in twice.

MS. RICE: It's true. We're lucky –

JUDGE NIEMEYER: And still having to take it [51] again.

MS. RICE: We're lucky in that way to have had their wisdom multiple times. And because of that we did not even get this claim from these plaintiffs until March 2016, after the 2016 primaries had already concluded. And the third election cycle under the plan was well underway. So those things have not changed since we were here on the preliminary injunction motion.

Subsequently, the plaintiffs were afforded five months of fact discovery, an additional month of expert discovery, and this Court offered to entertain motions to reopen discovery on remand. An offer which neither party has taken them up on. So that is how we got here. And we are here on motions for summary judgment. The plaintiffs have the burden of persuasion in their claim. So under *Ricci* and *Celotex* you can find in favor of the state in our cross motion for summary judgment merely by finding that the plaintiffs have not met the burden of production on one or more of the elements of their claim.

And we agree with the plaintiffs that there are – do not appear to be many disputes over the material facts as to burden and causation. But what the plaintiffs have done is asked you to make inferences with respect to causation that are not supported by evidence. They can't now hope that evidence will be developed at trial, they must make those [52] demonstrations on the record that are –

JUDGE NIEMEYER: I think I – I think I gather you agree with what I tried to clarify with Mr. Kimberly, which is if they failed to advance facts sufficient to carry their case, then they're not entitled to summary judgment. And the only way to go to trial on that is if they have carried it and then you've created a dispute about those facts. And that needs to be resolved to resolve the case. And it looks to me like both parties have spent a lot of time putting forward almost every fact they have. And I can't foresee anymore facts coming forward.

But you're not entitled to that under summary judgment, you don't get a second crack. If you haven't put your facts forward, sufficiently to carry the day, you lose. And that – I think that's standard Rule 56 jurisprudence; isn't it?

MS. RICE: That's correct, Your Honor. And we also need to bear in mind here that the plaintiffs are seeking a permanent injunction. The four factors are the same, more or less, than a preliminary. The only difference is that plaintiffs actually must succeed on the merits of their claim, not just show likelihood of

success. This is a high bar, as it should be. Even if success on the merits were certain, it's not enough. They must still satisfy those equitable factors. And there has been no change since the Supreme Court [53] held in Benisek, that the plaintiffs failed to do so. They've put no further facts forward on their irreparable harm. In fact they haven't updated the facts that they had about the effects of future elections in their supplemental motions.

So I think –

JUDGE NIEMEYER: Well, I don't quite understand irreparable harm. I understand some of the other equities you've mentioned in your papers, but irreparable harm would be if there has been dilution or injury to their associational rights, those are things – those are still in place, the lines are still in place which have given rise to that. And this is not a damage case in terms of dollars. This is to rectify, according to them, a First Amendment violation. And so on that issue, I have a very hard time conceptualizing what you're saying, that equity would seem to be the only court that could address the remedy. But your other points I understand them from your papers.

MS. RICE: Sure. I think that maybe looking back at this Court's legal finding three, and the memorandum on the preliminary injunction would be helpful. There this Court quoted *Bryant v. Cheney* for the proposition that standing for irreparable injury is ongoing. And that when plaintiffs are seeking prospective – sorry, that's paraphrasing, are asked – the Court is

asked to award prospective equitable relief for a concrete past harm, and a plaintiff's past injury [54] does not confer standing upon him to enjoin the possibility of future injuries.

And I think there we are again, thrown into this complex world of voting causation and what the electoral circumstances actually are on the ground in the 6th District in 2018 and 2020. We just don't have anymore information. We don't even have information from the plaintiffs about what their electoral preferences are, whether it would be for David Trone, Amie Hoeber, or some third candidate, or perhaps even to write in Roscoe Bartlett again. The record's just devoid of that information.

And we did, by contrast, have information that each of the plaintiffs, like good voters do, examines each of the candidates for all of their flaws and strengths, and makes a decision based on the candidates. And each of their depositions each plaintiff admitted at one time or another to voting for a Democrat. Some of these were for not congressperson, a more local matter, sometimes even a judge, but each could recall a time that they had crossed party lines and voted for the other party. Out of the plaintiffs that lived in the 6th District and were eligible to vote at a time – at the time, all four of those plaintiffs Benisek, Strine, Cueman, and Eyler, admitted to voting for a Democrat for Congress, someone other than Roscoe Bartlett, going back that far.

[55] So here we have the plaintiffs, as most voters do, making representations that they evaluate the races individually. And we don't have any information from them about how they would evaluate this match up. It might be a reasonable inference to draw that they would still disfavor John Delaney in subsequent elections, but now that he is not seeking that seat, we simply must proceed without – I think it is helpful to look at *Gill's* pronouncements about standing. *Gill* emphasized that standing was an individualized as opposed to a party-wide injury.

And I think that that is very important here. The majority did not embrace Justice Kagan's suggestion of associational injury even to establish standing. Although, it might be tempting to do so to sort of extend that rationale. And –

JUDGE BREDAR: They didn't reject it either.

MS. RICE: They didn't object to it either. And an interesting fact is that the Supreme Court remanded both *Gill* and *Rucho* for further proceedings on standing, even though the Courts in those matters had made specific findings about district-wide electoral results. So I think we can take from that that there's something more that needs to be done, that something extra needs to be done to tie in individual – the burden on an individual vote, than merely repeating the district wide –

[56] JUDGE NIEMEYER: I thought the Court, if I understood the Court's holding, it was pretty

narrow, and the holding basically was that the plaintiffs did not seek – I'm now quoting – to show such requisite harm, since on the record it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. And – end quote. And the Court pointed out that it's an individual claim and that a person who seeks to assert a right for dilution, or I suppose associational rights too, would have to live in the district that was affected. And it seems just the opposite of what you're saying, that if they do live in the district they have standing.

MS. RICE: Sure. So we can look at the Supreme Court, I think it's at page 1933 in the Supreme Court Reporter, has a discussion of two of the plaintiffs in *Whitford v. Gill*, and one is Whitford who admitted his vote was neither cracked nor packed on the stand. And then there's another plaintiff Donohue. And the Court says Donohue on the other hand alleges that Act 43 burdened her individual vote. And that was because she claimed residency in one of the districts where Democrats like her have allegedly been deliberately cracked.

But the Supreme Court didn't find that allegation sufficient to find that Donohue had standing to proceed with the claim. If it had, there wouldn't have been the standing [57] problem. So we're, again, looking at something more, something that actually shows, like this voter had some impact to their own vote. So I think –

JUDGE NIEMEYER: The Court didn't say that, the Court says to the extent the plaintiffs allege harm is the dilution of their votes, that injury is district specific. This disadvantage to the voter as an individual, therefore, results from the boundaries of the particular district in which he resides. And the plaintiff's remedy must be limited to the inadequacy of [*sic*] that produced his injury in fact, that is the disadvantage. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own districts.

And then the Court went on to point out that in this case they were challenging statewide injury and taking the plaintiff as to where they were. The plaintiffs argue that their claim of statewide injury is analogous to claims presented in *Baker* and the Court then said that's not true. And that's the only standing it addressed.

But it seemed to me, it's pretty clear, and you look at Justice Kagan's opinion too, it's pretty clear that if you live in the district which you are challenging, because it was cracked or packed, you have standing to challenge that. Now, whether you win or lose is another injury, but the standing is created by the disadvantage of their vote in that district.

[58] MS. RICE: Your Honor, I don't think we're disagreeing –

JUDGE NIEMEYER: Okay. Fair enough.

MS. RICE: – disadvantage that exists would be –

JUDGE NIEMEYER: I thought you were suggesting that a couple of people in the *Gill* case actually had standing.

MS. RICE: No, I think what I'm saying is that something more has to be demonstrated about what that cracking or packing is –

JUDGE BREDAR: Well, so when the North Carolina case was remanded, and the Court said very briefly what they said vis-a-vis North Carolina, and that case went back, and the panel reconsidered, and then issued their new opinion and found that there was standing, what – what more did they actually really find on the road to concluding that there was standing in compliance with what *Gill* said there had to be? Not much.

MS. RICE: Well, actually quite a lot. And you anticipated where I was going. And August 27th the *Rucho* court came out with a new opinion. And there the standing facts were well-developed. Each individual put on evidence that their precinct would have been better off, in terms of the way that their precinct voted, would be more like the district total, under 2,000 different maps that were computer generated. So in more than half of those computer generated [59] maps, they would have been better off. So they made actually quite a strong showing that their individual right to vote had been burdened. Because they showed that in the possibility of alternative districts they had

been put in one of the districts that would have most burdened their votes.

So we don't have any of that evidence here. We don't have any expert that's come before you to give you that kind of evidence. We have a singular map that was – could not even be said to have been drawn without reference to political data. And if you look at it – let me put it up here. Is that showing up for you? This is the single alternative map.

And Dr. McDonald admitted that he himself did not draw this map, he had his graduate student do it. When questioned at deposition he could not guarantee that the graduate student had not resorted to political data when drawing that line. The graduate student had access to the data and Dr. McDonald did not have a conversation with him about whether or not he looked at political data.

You can see that the choice was made here to include both Gaithersburg and Rockville in the alternative 8th District that was proposed. And if you look at this is just the next page in that report, the consequence of that choice is that the 8th District becomes even more packed with Democrats than it had been under the prior map.

[60] So – and Dr. McDonald himself admitted that this alternative map – again, this is to establish standing we're not talking about remedy, we're talking about standing, that this alternative map would also burden the votes of Democrats in the 8th District. And the reason that's important here at standing – in standing is

because that makes it not a neutral comparitor map. This map has serious political consequences. It resulted in –

JUDGE NIEMEYER: Sounds to me you're arguing the merits of the case. Standing just focuses on whether he can be in court and make a claim. And in this case the plaintiffs are in the very district and voted in the very district that was affected, and they make a claim. Now, whether their claim is good or not, we have to test that. But I think on the threshold of standing, then no one would have standing in these cases if it weren't the voters affected in that district. At least they claim to be affected. They voted in that district. And they voted in a district that was redrawn to dilute their vote, allegedly.

But I don't know – I don't quite understand why this doesn't fit exactly with what Justice Roberts and Justice Kagan were pointing out pretty straight forwardly.

MS. RICE: Well, Justice Kagan went on a little bit more at length than Justice Roberts did in explaining how you might demonstrate standing. One of the things she said, and [61] plaintiffs also pointed this out, you have to demonstrate by way of a neutrally drawn map that such a citizen's vote would carry less weight, have less consequence –

JUDGE NIEMEYER: That's to show dilution. And then she went on to talk about associational. But that would – to have standing, to bring a partisan

claim on vote dilution, the plaintiff must prove the value of her own vote has been contracted.

MS. RICE: Correct. So to show that your own vote had been contracted you can't just refer to what actually happened, because you don't – you can't see – and this is part of what we talked about last time, also on the merits – you can't see very well or understand statistically whether that is an effect of the redistricting, it is an effect of where you live and changing demographics. To demonstrate that you need something more. And we're at summary judgment, we're not at pleading stage, and evidence is necessary to demonstrate injury at this stage.

So for the vote dilution injury and we can talk about in a minute the associational harms and the evidence there, but for the vote dilution injury, this map that does not explain whether or how many voting tabulation districts or census places are split in the line, that wasn't part of Dr. McDonald's report, that has no explanation of the effects on the neighboring districts, and in this case it's just the [62] 8th –

JUDGE NIEMEYER: What about the evidence that's been advanced that you only needed to remove 10,000 people from the 6th District to comply with the census. Instead, 66,000 Republicans were removed and 20-some thousand Democrats were reintroduced into the district, with the results that the Republicans still continued to vote and the Democrats still continued to vote as they did in prior deals, but their vote didn't have as much value. And that

evidence is in the record, whether it carries the day is something we have to make a judgment on, but it seems to me, for standing purposes, they have alleged that there [*sic*] – the value of their vote has been contracted.

MS. RICE: That evidence, I think we've discussed at length in the past and the – there's a fallacy in saying that only 10,000 people needed to be removed. Because we're talking about redistricting an entire state. We didn't – Maryland didn't redistrict the 6th District in isolation. There were severe population deficits in other parts of the state that needed to be remedied somehow. And in doing that, making those choices, some of which very clearly, including taking the 4th district out of Montgomery County, had absolutely nothing to do with big P partisan politics, *Fletcher v. Lamone* talks about at length about the legislature's intent and adopting the proposal of the Black [63] Legislative Caucus in that move that –

JUDGE NIEMEYER: I don't understand, I thought the 6th District only needed to be reduced in population by some 10,000 people. And those 10,000 people could either be moved into the 3rd or the 8th Districts. And the question is why such a big change when that's a very modest change. I'm sure there are other districts that might be affected by the census, but that – you would expect that if they told the mapmakers we want to get rid of a Republican candidate and have a Democrat win there, that was the goal that the Governor said he had and that's what the map drawer was told that, give us a 7 to 1 map.

MS. RICE: If we're looking at what needed to be done to accomplish the legislature's goals, there's no indication that the legislature and the Governor would have changed their mind about the Chesapeake Bay crossing if it had not helped them –

JUDGE NIEMEYER: I was focusing on just the 10,000 which is a very modest –

MS. RICE: Sure. But I guess what I would counter with is that you cannot focus just on the 10,000. To do so would be to make very grave error about the way that these things are done. The 1st, the 2nd and the 7th all had massive population deficits that needed to be made up. They were bordering the 6th at the time.

[64] So when you look at the shed portions, and this is a page from Dr. McDonald's expert report, he's the one that did this analysis, you can see that the 7th District – for example, the 6th District gave 17,203 people to the 7th District. That's because the 7th District had a massive population deficit. And the 1st District over 100,000 voters needed to be made up for when the Chesapeake Bay crossing was eliminated.

The 6th District had, in the prior map, extended all the way to the Susquehanna River. It went across the entire northern border of the state to border the 1st District. So the legislature, I think, pretty reasonably moved that border westward, back towards the core historic shape of the 6th District. So to say that these population moves were not occasioned by other goals of the legislature is to –

JUDGE NIEMEYER: Let me ask you –

MS. RICE: – reality.

JUDGE NIEMEYER: – what evidence do we have that they had other goals? In other words, we have the direct evidence of the people who made the maps and directed the making the maps. And what you're describing isn't what they said.

MS. RICE: It was, Your Honor. So Governor O'Malley talks about the respecting the natural boundaries of the Chesapeake Bay in his deposition –

[65] JUDGE NIEMEYER: Well, that was when he made the decision to not go across the bay. He said he had to make a choice in order to get a 7-1 state, he had to make a choice either to focus on the Eastern Shore or to focus on western Maryland. And he said the problem with folks on the Eastern Shore were jumping across the Chesapeake Bay, but he didn't back off from the notion that he wanted a 7-1 state and that's what they directed the mapmaker to do.

MS. RICE: I think that if you read that colloquy in context, what he says, that all other things being equal, meaning all other goals of the legislature being met, which include these goals about the 4th District, which was very important to the legislature and proved to be a contentious issue that was litigated before this Court before this case was brought, that those were other goals.

And so the fact that that goal of moving eliminating the Chesapeake Bay crossing, which is a very wide

overwater crossing, also allowed the Democrats to create a competitive district where for the first time they would see a fighting chance in that district to elect a candidate of their choice, after they had heard extensive testimony at the GRAC that that was a concern, including testimony from a former plaintiff in this case, who said that it was eminently reasonable to return the 6th District to its former shape, which would have included the western third of Montgomery County. Again, [66] that's consistent with this I-270 corridor. That's about where I-270 splits the county. That evidence was before the GRAC, that evidence was on the mind of the mapmaker. We have evidence affidavits from the –

JUDGE NIEMEYER: Were there GRAC hearings after the map had been drawn?

MS. RICE: No, the GRAC hearings were before the map had been drawn and the documentation –

JUDGE NIEMEYER: There was no map – there was no proposed map in consideration when they had those hearings?

MS. RICE: Correct. But the time line is that the GRAC hearings were held. The map was drawn and completed at the same time the Governor was gathering input from the congressional delegation, including in-person meetings with both Congressman Bartlett and Congressman Harris, to get their input about what they would like to see from their districts. And the GRAC map was proposed. That's where that

slide show comes in, that again mentions the I-270 corridor as a major organizing point of the geography of the 6th District.

The map was then put up on the public website. Additional public comments were held from e-mail comments. And then the Governor, with minor changes that we've stipulated do not bear on this cause of action, adopted his recommended map, sent it to the legislature. Again, there were a few changes, mostly metes and bounds descriptions type [67] changes. It was passed. Then the entire map was voted on by the people of Maryland.

So there isn't evidence, unlike in North Carolina, where the map had already been drafted and it was only after, you know, there's some evidence that that time line was not adhered to. Here there's no evidence of that. There's no evidence that a map had been drafted before the GRAC hearings.

JUDGE NIEMEYER: There is evidence, though, that the GRAC hearings were superficial, just to accommodate the public, and that the real map was going to be drawn by certain legislatures [*sic*] with the map drawer and the governor, according to the governor's wishes.

MS. RICE: So there's also really no evidence of that. And the plaintiffs put before you testimony from Eric Hawkins on intent. And this is kind of getting a little bit far astray, but since we're talking about it. We introduced affidavit testimony from Jake Weissmann, who was a staffer to the GRAC, about just how

seriously they took the congressional map. Both Jake and also Governor O'Malley stated that they had to scrap the congressional delegation's version of the map.

And I'm going to put it here so you can kind of see that this is the map that Mr. Weissmann testified was the proposal from the congressional delegation. Although, as [68] governor O'Malley would be quick to point out, it was not a unanimous proposal. So you can see how the 6th District here –

JUDGE RUSSELL: Why don't you use a pen or something and use the ELMO as a visual, if you could. Are you following me?

MS. RICE: I am following you. Let's see if I can do it.

JUDGE RUSSELL: Oh, no, just write on the ELMO.

MS. RICE: Oh, write on the ELMO.

JUDGE RUSSELL: Use your pen and point it out as you're describing it.

MS. RICE: I got it. So you can see this is the 6th District, the proposed 6th District, congressional delegation, it's green. And this is the proposed 8th, the pink one. The I-270 corridor is not intact.

JUDGE BREDAR: Laughable.

JUDGE NIEMEYER: That's a fairly complex map; isn't it?

MS. RICE: It is. And as you can see it is not the map that was adopted. And if we want to we can look –

JUDGE BREDAR: Highly reflective of what the politicians intentions were.

MS. RICE: Yes.

JUDGE BREDAR: Absurd on its face.

[69] MS. RICE: So here you can see that the map that was ultimately adopted, actually hews to the I-270 corridor, incorporating both Frederick and all of the Montgomery County portions that would be on the Montgomery corridor down to Rockville, which is too populous to include in a district with Frederick. So that's pretty good evidence that the I-270 justification was important, it was something that actually mattered to the mapmakers, because they altered that map that Mr. Hawkins was testifying about so profoundly in terms of what areas it picks up.

So I think that this just goes to demonstrate that there is a causation element that is missing here. We do not have specific testimony about specific borders about where the plaintiffs live in relation to those borders, why those borders were placed the way that they were. And what effect that had on the plaintiffs in terms of whether or not they would have been burdened under any alternative map or if it was just this one that did it. And I think that's why this is relevant in the standing context. Although, it of course also goes to the burden on the merits.

I think it's worth too exploring a little bit about whether they've met their showing for an associational harm on even at a standing level. First, if we look at *Gill*, and I think that Your Honors each pointed this out, that the associational harm that Justice Kagan is talking about is [70] really one that would enure [*sic*] most to parties or political organizations. There's not a lot of evidence here about the effect on the Republican party.

We have kind of unsupported cherry picking from campaign finance reports, that show at most a $4,000 decline in raising funds from one period to the next. But no explanation if that's unusual. No comparison to the statewide performance, none of the things that would allow this court to make a causal inference that that kind of decline in fundraising had anything to do with the redistricting or this map.

JUDGE BREDAR: Well, are we talking standing or merits right now?

MS. RICE: I think that these deficits are so profound that they do go to standing. We also need to think about the fact that standing is not dispensed in gross and that this associational harm is fairly new to the case in the way that the plaintiffs articulate it. They've talked about chilling, certainly, as another way to demonstrate their burden under the retaliation cause of action, but that's different than an associational harm, which would be actual damage to their associational rights.

So to the extent that the Court believes that associational harm could yield standing, I think we can kind of kill two birds with one stone there.

[71] JUDGE BREDAR: Well, a lot of the answer is rooted in the word "association," right? I mean, if you can't associate, you have an associational harm. And if you're divided from those with whom you previously meaningfully associated, isn't that the end of it?

MS. RICE: I think there too we need to think about what that means in terms of justiciability. If we look just at this map versus the immediately prior map, there's a lot of people in a lot of districts that are not going to be able to associate with the same people that they associated with.

JUDGE BREDAR: Well, that's true, for certain, every time there has been redistricting and there have been population changes in the a state. Without a doubt there are associational consequences from redistricting. But that's not the point. The point is what was the motivation in dividing these people from each other in this particular instance.

MS. RICE: But I think that's why –

JUDGE BREDAR: If the motivation was, look those Republicans concentrated together like that as they are, are able to fund raise and advocate together, strength in numbers in terms of the broader political process, not even talking yet about voting, we're going to break that up. We're going to do this to them because of the – their identifying as Republicans.

MS. RICE: So I think that that's why it's important [72] to think about this in a standing context, that we have to show that that injury is not a statewide injury or a injury that enures [*sic*] generally to anybody because of redistricting. *Gill* reiterated that much at least, that we have to show something more. So when plaintiffs got up here and you asked them what evidence is there of associational harm, one of the things that they said was just the splitting of the districts. That needs to be rejected as a matter of law, because the splitting of the districts breaks up these associations throughout the State in every redistricting cycle, as you just explained.

So then we're left with the supplemental briefing information, and we do have from them the assertion that primary turnout is somehow, in gubernatorial election years, is somehow the thing that we should be looking at. But if we look at some of the other data, and this was actually in our origin until [*sic*] summary judgment motion produced, you can see that turnout actually increased in most of these counties. In Frederick there's a percentage decrease, but the number went up. This is general elections, not primaries.

And here, let me just – my pen disappeared. The – this is the Republican turnout difference. So here in Frederick the percentage did go down, but the number of Republicans went up, who voted. Garrett went up, and Washington it went up. We also have evidence that Republican [73] registration went up year over year in all of these counties.

So at most we have mixed evidence on any effects of associational harm. And that doesn't necessarily – it doesn't generate a dispute of material fact, what it does is call into question the causal link that plaintiffs are asking you guys to draw, that there is some causal inference that would be permissible to be made from those 20 – those primary year – gubernatorial year primary turnout results.

So this defeats the blind assertion that there's some clear causal inference. And what's missing, what the plaintiffs failed to meet the burden to produce, is any expert testimony about turnout, what it meant, if this was a particular effect seen just among Republicans in the 6th District. If it reflected broader trends. That's not our burden to disprove. The plaintiffs needed to come forward with evidence to show that their associational – their claimed associational harm was in some way connected or caused by the redistricting.

Because it's only through that causal link that you guys – that Your Honors all rec – or two of this Court, set forth in the decision on the preliminary injunction, that causal link is still very important in this claim. That otherwise we're getting into the realm of not justiciable claims where we have burdens that are felt by the entire state, or burdens that are being felt by members of both [74] parties. So if we don't have the tools, the statistical tools, the expert evidence to distinguish those burdens, then the plaintiffs haven't met their burden of production on those elements.

JUDGE BREDAR: It's not enough that they're simply – that Republicans are divided from each other by a line that was drawn solely for partisan political purposes?

MS. RICE: It's not enough because that's not –

JUDGE BREDAR: That has to somehow manifest itself in some more detailed consequence than the obvious, which is they cannot associate with each other anymore in the way that is meaningful because they're no longer in the same district.

MS. RICE: So it's not enough because of the standing element as articulated by *Gill*, that there has to be some differentiation between plaintiffs and non-plaintiffs. It cannot be enough to establish standing that you've established a burden that occurs in every election to every person that is moved. It has to be something more. I think that –

JUDGE NIEMEYER: I don't fully understand, because if – and I can put it in very course [*sic*] terms that may not be fully satisfied here, but if the government says we are going to target you, Republicans, in this city, and make sure that you don't work together and that your vote doesn't have the full amount, and then they divide them in half, after that [75] statement, don't we have standing to challenge that by the people who are in those – in that city?

JUDGE BREDAR: The Republican people, can I modify it to that extent? The Republican people who are in that city.

MS. RICE: That – I think that the Republican people in that city would have evidence –

JUDGE NIEMEYER: Not evidence, do they have standing to challenge the conduct?

MS. RICE: They would be able to prove their standing through evidence that that conduct had in fact –

JUDGE NIEMEYER: – the evidence was that the government said we are going to target the Republicans in this city and cut them in half and divide them so as to dilute their vote and to ruin their party. And then they go ahead and they divide the Republicans. Do the Republicans in that city who have been divided and whose vote was diluted have a right to challenge it in a court?

MS. RICE: They might have a right under a First Amendment claim that hasn't been brought here. What the plaintiffs have claimed –

JUDGE NIEMEYER: I'm not talking about here, let's just get some foundational principles. And you're so reluctant to acknowledge that to me, a straight forward standing case, I tried to make it as clear as I could, and if [76] you reject that I'm not sure what your argument is.

MS. RICE: Judge Niemeyer, I think it's important, though, to remember that standing is not dispensed in gross, it's dispensed according to the requisites –

JUDGE NIEMEYER: It depends whether the person hurt, as distinguished from the person not hurt, the person hurt can sue the person who caused the hurt. And in this case, the harm the Supreme Court talked about is the disadvantage in the voting opportunity, the diminishment of the voting opportunity. That's the harm. Now, if somebody says I'm one of those persons, the Court should say, okay, let me hear your claim. And we'll look at the evidence then.

JUDGE BREDAR: None of the proof in this case is along the lines of we're going to attack voters, we're going to attack Republicans.

MS. RICE: Your Honor, I wouldn't submit that any of this proof in this case says anything about attacking anyone.

JUDGE BREDAR: We're going to attack the 6th, that's a direct quote from our former governor.

MS. RICE: The proof in this case shows that the general assembly and the governor intended to create a competitive 6th District.

JUDGE NIEMEYER: Is that a nice way of saying we want to take it away from the Republicans by moving the [77] Republicans out and putting in Democrats. In other words, we want a 7-1 state.

JUDGE BREDAR: And if not that, at least we are going to punish Republicans, regardless of vote – how they vote –

JUDGE NIEMEYER: – organize –

JUDGE BREDAR: We're going to interfere with their capacity to associate with each other to achieve their political aims.

MS. RICE: Again, this problem now is steering us away the solution that this Court had arrived at to find a claim justiciable and into the realm of nonjusticiable claims.

JUDGE NIEMEYER: – I thought we were talking about –

JUDGE RUSSELL: We're steering in the right direction. We just need an answer to the question.

JUDGE NIEMEYER: I thought we were talking about standing; right?

MS. RICE: Right. Yes.

JUDGE NIEMEYER: Okay.

JUDGE BREDAR: I'm not going to deny we got some help from Justice Kagan.

MS. RICE: That may remain to be seen. I think that it is also worth going a little bit into, back to the vote [78] dilution proof that's been proffered by the plaintiffs. When plaintiffs for the first time in their supplemental briefing attempt to put forward proof of

a *Gingles*-type analysis, they do so without the benefit of any expert testimony that is usually the subject of the *Gingles*-type analysis. Actually, Dr. McDonald disclaimed that he was doing the kind of analysis that he would normally do in a racial gerrymandering case, because the data was not available to him. He could not do an ecological inference study about the existence of cohesion voting or block voting.

The plaintiffs also get the law wrong when they talk about Cooper v. Harris. In that case the State was actually looking to Section 2 district as a justification for what was found to be a racial gerrymander. So the burdens were a little bit different than in your typical Section 2 case. There, the Supreme Court said that the past performance of that district showed the absence of block voting. And then they went on to find that the State had put on no evidence of the proposed district's performance. So here where we didn't have any evidence of the actual district as it performed, the crossover voting, the block voting, it's not enough to rely just on past election results by that same case.

I think it might be helpful to look at – I apologize – those election results that the plaintiffs did add in their supplemental briefing. Because what's [79] interesting here is in the precincts retained, so these are precincts that they purport to represent to you were in both the old 6th and the new 6th, there's a sharp drop off in Republican voting strength in the 2012 election. In other words, it's evidence that there's crossover voting between Republicans and the Democratic

congressional candidate, in this case John Delaney, in that election among the precincts that were retained.

You can also see that there's an increase in the precincts that were removed in Republican voting strength. And that makes sense because now those people are in the 8th District. So their choice would be either Representative Van Hollen or Representative Raskin, who were very different candidates from Congressman Delaney, in terms of their political ideology.

So these results, insofar as they can mean anything, don't even seem to, by their face, be what the plaintiffs said, because of those different candidates and different elections among these three groups.

We also again, don't have any information about exactly which plaintiffs are in which of those groups. The kind of information that seems to be called for by the Supreme Court's action in *Gill* and *Rucho* and that is the kind of information that – was present in *Rucho* when the Court there moved forward in that case.

[80] Also, with regard to the *Gingles* criteria the various threshold requirement, plaintiffs talk about the maps in 1991 and 2001 showing that there was a compact region of Republicans. But those maps are some of the only maps in the entire history of the 6th District that exclude Montgomery County, or in the more recent map extend the 6th District into the eastern part of the state. So they're not very good evidence that there's any compact concentration of Republicans in that area. We just don't have any of that

information, the general kinds of proper analyses that would accompany a *Gingles*-type proof.

Again, because we're talking about injunctive relief it's important to bear in mind that there have been other times when the Court has been asked to enter an injunction when there's only one election left. And in those cases, especially when there has been delay by the plaintiffs in bringing their claim, like there was in *White v. Daniel*, and there was in this case as acknowledged by the Supreme Court –

JUDGE NIEMEYER: Is that the role of a court to say we recognize you have suffered First Amendment injury, but just hold up, you can suffer that injury for another election and then we'll take care of you. That's really what that argument says, doesn't it?

MS. RICE: I think what the argument is saying –

JUDGE NIEMEYER: In other words, if there's one [81] election where they are going to sustain First Amendment injury, it seems to me that injury should be redressed if it is a First Amendment injury.

MS. RICE: I think what the Court in *White* was recognizing is that –

JUDGE NIEMEYER: I'm asking you as a general proposition.

MS. RICE: I think as a general proposition, either way, the Court might take into account the First Amendment burdens, burdens on other citizens not before this Court, that would accrue were there to be three successive congressional elections under three successive maps. If we're talking about associational injury we have the 2018, 2020, and 2022 elections that would be undertaken under different maps, different shape of the district –

JUDGE NIEMEYER: Let's make it a little more dicey how about if we have a racial, we find there was a severe racial redistricting and that the plaintiffs were racially diluted. And we say – you're asking us to say, well, there's only one more election, put up with it, we'll fix it in the next election –

MS. RICE: Judge Niemeyer, respectfully I don't think we have to make it more dicey because what we're talking about is invoking the powers of equity.

JUDGE NIEMEYER: I understand, but your argument is [82] because there's only one more election, we shouldn't enter injunctive relief. And my point is if there's a violation we should redress it. And there will be another – there will be another bill down the road, but – and of course, the outcome of this particular mapping, if we were to change it, would inform future maps and maybe get into something that doesn't raise the same constitutional violation.

But I have a little trouble diminishing or demeaning the First Amendment injury, if it is there. They've

demonstrated First Amendment injury, it seems to me they should be entitled to a remedy, even if it's only one more election out of five.

JUDGE BREDAR: And apart from that, are First Amendment associational injuries only inflicted on election day? Not just the election.

MS. RICE: Your Honor, but it would just not be – it would be not just the election for all other members of the public, not just those that are bringing these claims as well. The injunction standard requires this Court to look beyond the merits of the case and to find definitively on the other three prongs, and in doing that laches is a major component of equity. And that's what courts in the 4th Circuit have done in the past –

JUDGE NIEMEYER: Well, you've got a point, this thing really has dragged on, but it was filed in 2013, and [83] it's changed shape, it's been to the Supreme Court twice, there's been discovery, there have been motions. It has a procedural history that I think none of us should be proud of as persons in the 3rd branch, but that's a fact of life. It may affect the preliminary injunction, the Supreme Court pointed out that they waited three years I think after filing before seeking a preliminary injunction to stay. But the permanent injunction was asserted in 2013, and we still have an election cycle in front of us.

MS. RICE: In *White v. Daniel* the Court was considering a permanent injunction, looked at the equities, looked at the laches that had been displayed by the plaintiffs in this case, and also looked at the harm

to the public of successive and frequent redistricting, to find that the equities in that case did not favor entering an injunction for one remaining election.

We would submit that that's an instructive and persuasive case, especially given the procedural history here, the uncertainty of the constitutional claims issue, the novelty of those claims to the general assembly, there's no reason to believe that any election in 2022, any map would suffer from the same deficits. And in those cases permanent injunctive relief has been in the past withheld. And so we –

JUDGE NIEMEYER: So plaintiffs –

MS. RICE: We do think that's an appropriate [84] outcome –

JUDGE NIEMEYER: – so individual plaintiffs who suffer First Amendment rights [*sic*] have to be told we can't remedy your rights, because there are interests of other people who are going to be confused and are going to be having be effected [*sic*] with different maps.

MS. RICE: So –

JUDGE NIEMEYER: It doesn't quite make sense. It seems to me what you're saying are factors for exercising equity. But I was trying to load the facts up for you to find out how much equity you get. And I'm suggesting that hypothetically, if we find a violation of the Constitution, ongoing and existing, both in the next election and both in the organizational efforts within a

political party from now going forward, do we just ignore it? Don't we have an absolute duty to remedy it.

MS. RICE: In *Perry v. Judd*, which was another –

JUDGE NIEMEYER: Is that yes or no?

MS. RICE: I don't think that there is any affirmative duty one way or the other. I think that these are equitable factors that must be found in addition to the merits. So if –

JUDGE BREDAR: How can one reasonably even say in Maryland that voters are all that settled in the districts they are in, given the make – given the appearance of the [85] map? Half the people in the state probably don't even know what district they're in, because you can't look at a map and figure it out without a microscope. So, implicit in your argument is this notion of sort of regularity and the value of the status quo, but there's an argument to be made in contrast with that, that the situation itself in this – under the current map is so convoluted and susceptible of misunderstanding, the public is not well-served at all by it, in terms of just a fundamental understanding of their role and place in the Democratic process.

MS. RICE: The public will have been going to the same polling place, voting in the same set of elections for four successive elections at this point when they go to the polls again in November. So to the extent that redistricting always involves some shuffling of people, that it always involves some confusion, there –

maryland [*sic*] has taken the position that they will redistrict every ten years. And –

JUDGE NIEMEYER: And if somebody was hurt during each one of those elections by unconstitutional conduct, but we should not remedy it.

MS. RICE: It is certainly –

JUDGE NIEMEYER: Because it's been going on for four elections and, therefore, we just discount it.

MS. RICE: It is certainly the case that that is what has happened in other cases in the 4th Circuit in the [86] past, that courts have declined to give remedies to plaintiffs that have been dilatory in their pursuit of claims, even First Amendment claims, when elections are at issue, because of the great public interest in the regularity of elections.

It is not only that plaintiffs have brought this case late, too late, they have also failed to meet their burden of production. They have not given this court sufficient evidence of causation. They have not – which and maybe now is a good time to say a little bit about *Hartman v. Moore* and *Mt. Healthy*. I think there has been some confusion about what *Mt. Healthy* burden shifting relieves a plaintiff of, even if it were to apply. It's causation that it substitutes for.

So that burden shifting substitutes for showing of causation. But it's inappropriate to do that here. It can't substitute for intent or for harm, both of those things still need to be shown under *Mt. Healthy*. It just

relieves the party, the moving party, the plaintiffs of showing causation and instead flips the burden to show that the action was not caused by the intent to [*sic*] the State. And it should not be imposed here.

Lozman clarified that even further last term, by expressly analyzing the facts of that case and saying that the only reason that the Supreme Court would apply ***Mt. Healthy*** was because the facts in that case showed that there was no [87] distance between the decision maker and the retaliatory action, that the decision maker had, in fact, ordered the retaliatory action. In that case kicking Mr. Lozman out of a public council meeting. They said that if the facts were to develop in some other way that their analysis would not necessarily hold.

And it is that other way that we exactly have here, where we have an attenuated causal chain, where there are multiple potential causes and the plaintiffs have simply not given the Court enough aid in disentangling those for inferences to be made about causation. And in that case they have failed to meet their burden and summary judgment should be granted for the State on those grounds.

JUDGE NIEMEYER: Okay. Thank you. What I think we'll do, it's better to keep it together. How about if I give you each ten minutes on rebuttal, is that – can you handle that?

MR. KIMBERLY: That would be acceptable, Your Honor I wonder if I might ask for a restroom break before –

JUDGE NIEMEYER: Of course. Why don't we take a five minute break and then we'll allow each side short rebuttal. I'm not going to cut anybody off arbitrarily, because we do want to hear the views of the parties, but I think we're hearing the same thing from both sides again and again. So we'll take a five minute break then.

[88] (A recess was taken.)

JUDGE NIEMEYER: All right. Mr. Kimberly, I think we're going to start with a ten minute time. And I know down at the Court of Appeals we have little lights that come on, there's an orange light and then there's a red light, you get a ticket if you go through. But we'll start with that for both sides, since there are cross motions here. And if it turns out that something really productive and something new is working we can be a little flexible, but let's start out with a ten minute –

MR. KIMBERLY: I appreciate that, Your Honor. And I'll endeavor to be even shorter than that unless the Court has questions. I'd like to start just very quickly, a substantial amount of Ms. Rice's presentation concerned intent. I want just very briefly to rehabilitate a few points on that score. The first is that really the – there's no question that NCEC was at the heart of the redistricting here. So if you can – I'm sorry, I don't have my clicker. I'm sorry, just one moment.

(Video played.)

MR. KIMBERLY: And so it was clear that at least so far as the confessional [*sic*] map was concerned there was predominantly outsourcing to the congressional delegation. That was confirmed by former Secretary of State John Willis and also by sitting Senate President Mike Miller, Mike Miller [89] who said like I told you the map was drawn, it was primarily drawn by the congressional people.

Now Ms. Rice showed you a map that she said Eric Hawkins put before the commission and that map doesn't in any way resemble what actually was adopted. In fact, what the evidence shows is Mr. Hawkins drafted some dozen maps. And it was ultimately too [*sic*] broad blue prints that were put before the GRAC. There's the one that you see on the left is the one that Ms. Rice was talking about. And it's true, the GRAC did not proceed with that proposal. The second proposal is Congressional Proposal 2, which also is not precisely what was adopted, but you can see much more closely resembles the blueprint that was adopted.

So the GRAC, and really when I say the GRAC, I mean the staffers who were working on this project rejected Congressional Proposal 1, which coincidentally did not have as high EPI [*sic*] as the other one. And this is what we ended up with. This is the adopted map. You can see the close resemblance to the map that had been proposed by Eric Hawkins as one of the dozen or so maps that he drafted.

Ms. Rice also suggested that it was unnecessary – or excuse me, there were reasons that it was necessary

to fundamentally reshuffle the map in such a way that huge numbers of voters were going to have to be shuffled no matter what. Well, in fact, the only evidence that we have on this, [90] the testimonial evidence, suggests the exact opposite. This is Speaker of the House Michael Busch.

(Video played.)

MR. KIMBERLY: All right. Unless there are additional questions from the panel on the question about –

JUDGE NIEMEYER: Yes, I have one question, is it clear in the record as to the instructions given to Hawkins in drawing the map?

MR. KIMBERLY: The record is clear that Hawkins understood that his – and I can bring up slides if it would be helpful there – that his directive was to protect Democratic incumbents and otherwise to flip one of the two Republican districts.

JUDGE NIEMEYER: All right. Okay.

MR. KIMBERLY: And that's in his own testimony.

Your Honor, I'm sorry, if I may just very briefly, I meant just to move on. Just briefly to suggest there is no First Amendment right to infrequent redistricting. In fact, there's no reason to think that a state couldn't redistrict every election, that wouldn't be a First Amendment violation. So it's, I think, hard to square that reality with what Ms. Rice was suggesting about

frequent redistricting being a First Amendment burden on other voters.

And just a point of clarification concerning confusion and the like. Polling places don't change when [91] redistricting changes. And precincts, as a general matter, are fairly stable. They actually change from election to election, occasionally independent of redistricting because of changes in population. But they are relatively stable. So this kind of disruption that Ms. Rice suggested would follow from adopting a new map here I don't think actually holds up.

JUDGE BREDAR: What do you say also about the notion that associational harms don't occur only on election day, is there anything to that? That it isn't solely about the impact on how someone votes.

MR. KIMBERLY: I wouldn't disagree, Your Honor. I guess as you pointed out, so far as the Constitution is concerned, the question is not whether this effect happens, what makes it an unconstitutional burden is that it's coupled with the specific intent to impose it on a particular segment of the –

JUDGE NIEMEYER: I think the question was whether the harm –

JUDGE BREDAR: The burden.

JUDGE NIEMEYER: The burden caused by damage in the associational right is given effect only at an election, or does it continue on an ongoing basis.

MR. KIMBERLY: No, I think it continues on an ongoing basis.

[92] JUDGE NIEMEYER: That's because the organizational efforts of the parties.

MR. KIMBERLY: That's exactly right. That's exactly right. Thank you, Your Honors.

JUDGE NIEMEYER: All right. Ms. Rice.

MS. RICE: I will similarly keep this brief and very much related to Mr. Kimberly's presentation. Again, on intent, and this just shows why summary judgment can't be granted on this issue, this is – I apologize, I don't have the video, but this is Governor O'Malley's deposition. If you go here, Governor O'Malley –

JUDGE RUSSELL: Why don't you go ahead and use the ELMO and focus down on it – that particular portion. There you go.

MS. RICE: Talks about how Congressman Hoyer might have come in with a map to which he confessed nobody supported. So when you say I was given a map, I was given a map with the caveat that – that there's no consensus supporting the congressional delegation for this map.

So Governor O'Malley talks about and then the first declaration of Mr. Weissmann, which I didn't bring up with me, but it's Exhibit 11 to our motion for summary judgment, also discusses how there was only one map provided and how they didn't really use it

because they didn't think it had consensus and couldn't be used. More specifically, as to the [93] point about Congressional Option 1 and Congressional Option 2, the only evidence that Congressional Option 2 came from NCEC comes from a supplemental declaration of Dr. McDonald upon his examination of some computer files.

In our reply we attached the second declaration of Mr. Weissmann, who says that he does not recall receiving anything other than what was attached to his first declaration, that those file names that Dr. McDonald relied on were chosen by him to mark those draft maps as the two main options, and that he didn't use those names to explain that they were from the congressional delegation, but to merely denote that they were congressional maps as opposed to legislature maps, which he was simultaneously drawing the legislative maps, those redistricting processes happen simultaneously in Maryland. That's the continuation of that affidavit.

And relying again on Speaker Busch's lack of recall on this issue, which plaintiffs have done a number of times, just goes to show that laches was actually damaging to the pursuit of this case, that people's memories have faded, that they could not recall with specificity what had happened when they were deposed in 2017, their thoughts about this in 2011.

And there really are many examples of courts declining to disrupt elections. One of the most famous is *Reynolds v. Sims*, in that case the Court declined to

enter an [94] injunction even when it did find a pretty severe violation of constitutional rights. So that is typical in election law, that it is not just the rights of the plaintiffs before the Court, but the interests of the public in the elections.

As for whether precincts are redrawn, it really depends if those precinct boundaries need to shift because of the census and the redistricting process, the redistricting time that the State Board of Elections works in concert with the Department of Planning, but it's certainly possible that those precincts shift. Certainly, who is on the ballot would shift for many people.

So, with those points, unless the Court has further questions –

JUDGE NIEMEYER: Well, thank you very much. And thank both counsel not only for the arguments but for the papers and clear presentations of what this record is.

Is there anything further we need to take into account today? Otherwise, we'll take this under counsel and see if three judges can get together and decide something.

MS. RICE: Thank you, Your Honor.

JUDGE NIEMEYER: Okay. Will you please adjourn court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	
	*	

* * * * * * *

CONSENT MOTION TO STAY

Defendants Linda H. Lamone and David J. McManus, Jr., respectfully move for a stay of the Court's November 7, 2018, final judgment (Dkt. 223) during the pendency of their appeal to the Supreme Court. Plaintiffs have authorized defendants to state that they conditionally consent to the relief requested in this motion and will file a separate statement respecting the motion.

A stay of this matter pending the defendants' appeal to the Supreme Court is warranted to avoid potentially contradictory results or needless expenditure of public resources. This Court's opinions and order set forth two different theories of First Amendment retaliation claims applied to the issue of partisan gerrymandering, one involving a vote dilution injury and one involving an injury to representational rights. This Court's opinion adds potentially two new justiciable claims for partisan gerrymandering to the multiple

claims recognized in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018). The North Carolina defendants have appealed, *Robert A. Rucho, et al. v. Common Cause, et al.*, No. 18-422 (October 1, 2018). The Supreme Court is therefore poised to address the issue of partisan gerrymandering once again this term. Any further guidance from the Supreme Court will be important to ensure that, even if this Court's order is affirmed, state lawmakers do not redraw Maryland's electoral map for 2020 using a standard that is not the one ultimately adopted by the Supreme Court. Moreover, this Court's order may be reversed, either because the Supreme Court finds partisan gerrymandering to be nonjusticiable or because the Supreme Court approves a different test for partisan gerrymandering claims, which Maryland's map may or may not satisfy. As this Court's order is currently structured, the State must submit a map prior to the end of the current Supreme Court term. Proceeding in parallel with the pending appeal could require duplicate efforts or result in the waste of public resources if the 2011 map is ultimately upheld.

In support of this motion, the defendants make the following representations:

1. Defendants recognize that, if the Supreme Court affirms this Court's final judgment, there must be adequate time to draft and implement a new congressional map for use in Maryland's 2020 congressional elections. To meet that goal, the State Board of Elections must have a final, court-approved map completed and in-hand by or before October 18, 2019. It is

not necessary to have a map completed before that date.

2. The Supreme Court's current term is scheduled to conclude on June 24, 2019. If the Supreme Court affirms this Court's final judgment on or before that date, defendants represent that there will be adequate time to draft and implement a new congressional map by or before October 18, 2019, in time for use in Maryland's 2020 congressional elections.

3. To ensure that the Supreme Court is able to consider defendants' appeal on the merits this term, defendants agree to file their notice of appeal and jurisdictional statement by December 3, 2018. Counsel for plaintiffs have represented that they will file their motion to affirm by December 11, 2018. Defendants will file their reply on December 18, 2018, together with a letter pursuant to Supreme Court Rule 18.7 waiving the 14-day waiting period.

4. If the Supreme Court affirms this Court's final judgment, upon issuance of the Supreme Court's decision, defendants agree to begin immediately drafting a new map and simultaneously to negotiate in good faith with plaintiffs to reach a mutually agreed revised schedule for arriving at a new map, in the same form as the procedure established by the Court's final judgment. Defendants commit that in no event will plaintiffs have fewer than 15 days for the filing of their objections to the defendants' proposed plan, if any. Defendants also commit that there will be no fewer than 60 days for the Court-established Congressional

District Commission to develop its own plan, if that becomes necessary.

A proposed order is attached.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' STATEMENT OF CONDITIONAL CONSENT TO A DISCRETIONARY STAY PENDING APPEAL

Plaintiffs respectfully submit this statement to express and explain their conditional consent to the State's motion for a stay pending appeal.

As we have stressed repeatedly throughout our briefs, and as the Court stated in its final judgment, time is of the essence in this case. Plaintiffs agree as a general matter that, if the State appeals, the Supreme Court must be allowed to rule promptly. Yet ensuring a decision during the Supreme Court's current term will require expedited jurisdictional briefing. Failure to brief the appeal in time for resolution during the current term would risk disrupting this Court's established procedure for the adoption of a new map.

The State now moves for a stay of the Court's final judgment pending resolution of its appeal to the Supreme Court. Although plaintiffs do not believe that the State is entitled to a stay as of right under the

framework established in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), they conditionally consent to a discretionary stay in reliance on the representations and commitments described below.

First, the State has represented that if a new map is approved by the Court on or around October 18, 2019, there will be sufficient time for that map to be used in the 2020 congressional elections. Second, the State has represented that if the Supreme Court affirms this Court's final judgment on or before June 24, 2019, there will be adequate time to draft and obtain this Court's approval of a new map by the October 18, 2019 deadline. The State has also committed to working in good faith to reach a mutually agreeable modified schedule—and one that is acceptable to the Court—to achieve that goal.

To ensure that the Supreme Court has adequate time to hear the appeal during the October 2018 Term, the State has agreed to an expedited schedule for initial jurisdictional briefing. The expedited briefing schedule, which was negotiated and mutual [*sic*] agreed to by the parties, is set out in the State's motion. Abiding by the agreed schedule will ensure that there is adequate time for the Supreme Court either to summarily affirm or to note probable jurisdiction and rule on the merits of the State's appeal this term, sufficiently in advance of the 2020 election cycle.

The Court has authority to condition a discretionary stay of its final judgment on the State's pursuit of an expedited appeal. *See, e.g.*, Order 2, *Common Cause*

v. Rucho, No. 1:16-cv-1026 (M.D.N.C. Sept. 12, 2018) (Dkt. 155) (granting a discretionary stay of the final judgment pending appeal "subject to certain conditions," including an expedited briefing schedule before the Supreme Court); *United States v. Westchester Cty., New York*, 2016 WL 3566236, at *11 (S.D.N.Y. 2016) ("The County's application for a stay of this Order pending appeal is granted on the condition that it file its appeal promptly and seek expedited review."); *Florida v. United States HHS*, 780 F. Supp. 2d 1307, 1319 (N.D. Fla. 2011) (similar); *People for the Am. Way Found. v. United States Dep't of Educ.*, 518 F. Supp. 2d 174, 178-79 (D.D.C. 2007) (similar); *Ctr. For Int'l Evt'l Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 23-24 (D.D.C. 2003) (similar).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, et al.,	*	
Plaintiffs,	*	
v.	*	**CIVIL NO. JKB-13-3233**
LINDA H. LAMONE, et al.,	*	
Defendants.	*	

* * * * * * *

ORDER

(Filed Nov. 16, 2018)

Now pending before this Three Judge Court is the Consent Motion to Stay (ECF No. 226). The Plaintiffs have docketed their Statement of Conditional Consent to a Discretionary Stay Pending Appeal (ECF No. 227).

Upon consideration of the Motion and Statement, the Motion is GRANTED IN PART. The Judgment (ECF No. 223) previously entered is STAYED until the United States Supreme Court decides the appeal of this case or until the passage of the date of July 1, 2019, whichever first occurs. Upon expiration of the stay, counsel shall jointly and immediately move to set in a status conference, during which this Court will set new deadlines to execute the previously entered Judgment (unless action of the Supreme Court supersedes proceedings in this Court).

So ORDERED this 16 day of November, 2018.

For the Three Judge Court:

/s/ James K. Bredar
Honorable James K. Bredar
Chief Judge

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the
United States District Court
for the District of Maryland

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QUESTIONS PRESENTED

1. Are the various legal claims articulated by the three-judge district court unmanageable?

2. Did the three-judge district court err when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections?

3. Did the three-judge district court abuse its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs: O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine

Defendants: Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chairman of the Maryland State Board of Elections

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Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 51, 52

Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394 (D. Md. 1991) 11

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Bailey v. Callaghan, 715 F.3d 956 (6th Cir. 2013) 47

Baker v. Carr, 369 U.S. 186 (1962) 32, 46

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Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) 46

Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233 (5th Cir. 1988) 56

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 61

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City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) 49

Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005) 36

Crawford-El v. Britton, 523 U.S. 574 (1998) 46

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Cromartie v. Hunt, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001) 38, 53

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Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) 49, 63

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Fouts v. Harris, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000) 61

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. J.S. App. 1a-77a. Previous opinions are reported at 266 F. Supp. 3d 799 (D. Md. 2017), and 203 F. Supp. 3d 579 (D. Md. 2016). J.S. App. 78a-171a, 172a-225a.

JURISDICTION

The district court issued its decision on November 7, 2018. Appellants filed their notice of appeal on November 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

Maryland's 2011 Congressional redistricting plan does not "entrench[] a minority party in power." *Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting). Unlike *Rucho v. Common Cause*, No. 18-422, where North Carolina's electorate is "split almost equally" between major parties, *id.*, Common Cause's Mot. to Affirm 4, here the plaintiffs challenging Maryland's plan belong to a minority party whose members number less than half of the majority party's statewide total. J.A. 1056. This is not a case where a redistricting plan was engineered by a party that "happens to be in power at the right time." *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring). As plaintiffs themselves allege, in Maryland, Democratic majorities have controlled both houses of the legislature since 1920. J.A. 624 ¶ 40.

Nor is this a case where "politicians [have] entrench[ed] themselves in power against the people's will," *Gill*, 138 S. Ct. at 1935, or undermined "the most fundamental of all democratic principles—that 'the voters should choose their representatives, not the other way around,'" *id.* at 1940 (quoting *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (other citation omitted)). Rather, Maryland's 2011 plan was created with the people's input, both at twelve public hearings conducted around the State and via submission of hundreds of written comments. J.A. 657 ¶ 22, 658 ¶ 26. The legislation establishing the plan is the law of Maryland today because it was "adopted by the people,"

Md. Const. art. XVI, § 5(b), in a statewide referendum. J.A. 661 ¶ 39.

Unlike some other redistricting maps this Court has seen, Maryland's 2011 redistricting plan has not "plac[ed] a state party at an enduring electoral disadvantage." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). If anything, Maryland's Republican Party has strengthened since the 2011 redistricting. In 2014, Marylanders elected a Republican Governor who won by a 14% margin among voters residing in the Sixth Congressional District, the district at issue here. J.A. 771. In November 2018, Governor Lawrence J. Hogan, Jr. became the first Republican Governor to win reelection in Maryland since Theodore Roosevelt McKeldin won his bid for a second term in 1954.

Faced with these undisputed facts contradicting the circumstances that typify the abuses of partisan gerrymandering, the three-judge court failed to arrive at a manageable standard that can be applied fairly and predictably, in this or any future case.

Reversal is also required for two other reasons: (1) the three-judge court impermissibly weighed evidence and drew inferences against the non-moving party in its ruling on summary judgment, and (2) in issuing a permanent injunction, it abused its discretion by contradicting this Court's prior decision and failing to take into account harm to the State, the voters, and the public interest.

1. On October 20, 2011, the Maryland General Assembly enacted a Congressional districting plan

based on the results of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (LexisNexis 2017). In June 2012, this Court summarily affirmed a three-judge court's decision upholding the 2011 plan.[1] *Fletcher v. Lamone*, 567 U.S. 930 (2012), *aff'g* 831 F. Supp. 2d 887 (D. Md. 2011). *Fletcher* rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." 831 F. Supp. 2d at 903.

2. More than six years after *Fletcher*, and one day after Marylanders voted in the fourth Congressional election under the 2011 plan, the three-judge district court in this case reached the opposite conclusion and entered summary judgment enjoining the plan, upon finding that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." J.S. App. 51a. In so ruling, the court below disagreed with its own prior conclusion that, based on the evidence in the summary judgment record, plaintiffs were not "*likely* to prevail on the merits." J.S. App. 113a (emphasis in original); *see also id.* at 100a, 110a-113a.

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[1] During that same period, the 2011 plan also survived two other court challenges. *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 F. App'x 150 (4th Cir. July 12, 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

History of the Sixth District

3.a. The five counties located entirely or partially in the current Sixth District—Garrett, Allegany, Washington, Frederick, and Montgomery—were all part of Maryland's original Frederick County as it existed in 1748, J.A. 947-48, and from 1872 until 1991 some portion of Montgomery County was included in the Sixth District in every legislatively enacted map,[2] *see* J.A. 979-93. The 1991 plan's exclusion of Montgomery County from the Sixth District represented a break from the past. This exclusion continued with the 2002 plan, in which the Sixth District further departed from tradition by stretching, for the first time ever, eastward to the Susquehanna River to take in parts of Baltimore and Harford Counties. With this extension, the Sixth District spanned nearly the entire northern border of Maryland and measured more than 170 miles from end to end. J.A. 995. The 2002 plan's non-traditional, elongated, eastward-reaching version of the Sixth District is plaintiffs' "benchmark district" for assessing their claims. J.A. 767, 779, 1088, 1094. The 2011 plan returned the district to a configuration more consistent with its history, by dispensing with the Baltimore and Harford County extension and restoring significant portions of Montgomery County to the Sixth District. J.A. 997.

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[2] In the 1960s, a *court*-drawn map excluded Montgomery County from the Sixth District. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 736 (D. Md. 1966); J.A. 955.

b. The 2011 configuration brought the Sixth District's percentage of registered Democrats to a level closer to what existed pre-1991, though the new district's composition was both less Democratic and less Republican than it had been prior to 1991. J.A. 656 ¶ 13; J.A. 666 ¶ 53. According to expert testimony in the record, the political makeup and voting tendencies of the 2011 Sixth District placed it within the range of what independent rating organizations and applicable scholarship considered a "competitive" district. J.A. 860-62 (district qualified as competitive even under analyses of plaintiffs' expert), 881, 887, 1131-32.

Sixth District Registered Voters
(by percentage of total registered voters)

	Democrat	Republican	Other
August 1990	46.05%	45.36%	8.59%
October 2012	44.11%	33.32%	22.57%

The 2011 plan's Sixth District included a significant percentage of third-party and unaffiliated voters (22.57%). J.A. 728. Neither plaintiffs' experts nor the court below ventured any analysis of how those voters' preferences might bear on plaintiffs' claims or how those voters would be affected by the relief requested. J.A. 857, 526-27. But plaintiffs did demonstrate the unpredictability and volatility of the unaffiliated vote, by presenting survey data showing that in 2012 more Sixth District unaffiliated voters preferred the Democratic candidate over the Republican, by a margin of 28% to 15%, but in 2014 a majority of them (54%)

favored the Republican candidate. J.A. 769. The same survey illustrated the disconnect between party registration and voting, by showing that in the 2012 election for the Sixth District seat, only 69% of registered Democrats preferred the Democratic candidate, only 64% of registered Republicans preferred the Republican candidate, and 57% of unaffiliated voters preferred neither of the two major party candidates.[3] *Id.*; *see* J.A. 857.

c. Similar ambivalence and shifting voter preferences have characterized the Sixth District throughout much of its history. In the period from 1911 through 2012, the Sixth District elected seven Democrats to Congress and six Republicans. J.A. 655 ¶ 7. From 1971 through 1992, the district was represented by moderate Democrats Goodloe Byron and his successor Beverly Byron, *id.*; the latter enjoyed the support of three of the plaintiffs in this suit. J.A. 276, 358, 467-69. When Republican Roscoe Bartlett mounted his first challenge to Congresswoman Byron in 1982, he lost by a 49-point margin. J.A. 655 ¶ 8. He did not make another

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[3] A Pew Research Center study found that voters' identification as independent or unaffiliated serves as a transition for those moving away from or toward identifying themselves as Republican or Democrat; though "few people switch immediately from Republican to Democratic identification," party affiliation "is an attitude, one which can and does change," and "[m]ost of the movement is from independents who assume a party label or from partisans who no longer identify with their former party." J.A. 857 (quoting Pew Research Center, "Trends in Party Affiliation" (Sept. 23, 2010), http://www.people-press.org/2010/09/23/section-3-trends-in-party-affiliation/ (last visited Jan. 19, 2019)).

attempt until after the 1991 redistricting flipped the Sixth District from Democratic to Republican.

In the 1992 election, Roscoe Bartlett won by just over eight percentage points and thereafter retained the seat through 2012, which constituted the longest period of uninterrupted Republican representation in the District's modern history. J.A. 655 ¶¶ 7, 8. Toward the end of his tenure, most Republicans in the district signaled their readiness for a change. After the 2011 redistricting, seven other Republicans, including two state legislators, challenged Congressman Bartlett in the 2012 primary, which he won despite receiving fewer votes than the combined total garnered by the other candidates.[4] Still, in his 2012 reelection bid, he increased his fundraising by 2,500% compared to the 2010 cycle,[5] before losing in the general election to a self-financed moderate Democrat, John Delaney. The election of a moderate Democrat was a return to the Sixth District's norm prior to the 1991 redistricting's exclusion of Montgomery County.

Development and Approval of the 2011 Congressional Map

4. Maryland's 2011 congressional districting plan emerged from a months-long process of public hearings held across the State, which informed the drafting

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[4] *See* https://elections.maryland.gov/elections/2012/results/primary/gen_results_2012_3_00806.html (last visited Jan. 18, 2019).

[5] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (last visited Feb. 7, 2019).

work by state legislative staffers. J.A. 657-58 ¶¶ 18-23, 26; J.A. 61. To assist in preparing the plan, Governor Martin O'Malley appointed a Governor's Redistricting Advisory Committee ("GRAC"), whose members included the General Assembly's Senate President and Speaker of the House; Appointments Secretary Jeanne D. Hitchcock; James J. King, a former Republican member of the House of Delegates; and Richard Stewart, a private business owner. J.A. 657 ¶¶ 18-21.

a. The GRAC held public hearings in all areas of the State. J.A. 657-58 ¶ 22. Stephen Shapiro, one of this litigation's original plaintiffs, told the GRAC that, "based on history and geography," combining "the western third of Montgomery County . . . with Western Maryland . . . would be a reasonable situation and one that existed several decades ago." J.A. 434; *see* J.A. 845-46 (quoting similar testimony from seven others who attended GRAC's public hearings). Constituents also expressed a desire for competitive political districts. J.A. 402. Mr. Shapiro observed that non-competitive districts had "decreased turnout and interest" in the general election "where the result is usually a foregone conclusion." J.A. 435; *see also* J.A. 405-06, 408-09, 410-12, 417 (other commenters expressing affinity and common interests with Montgomery County and distance from Carroll, Harford, and Baltimore Counties).

b. As had been the practice in past redistricting, J.A. 186-87, 189-90, Governor O'Malley solicited the views of the Maryland congressional delegation, including Republicans Roscoe Bartlett and Andy Harris.

J.A. 57-60. Though the congressional delegation contracted with Eric Hawkins to draw a draft map, J.S. App. 14a, 101a, Mr. Hawkins did not have any meaningful contact with the GRAC and could recall only one occasion when he met with state staff, J.A. 144-45.

As for the map that Mr. Hawkins submitted to the GRAC, Governor O'Malley rejected it, J.A. 77, and instead oversaw the preparation of a separate, very different proposal.[6] J.A. 937-38 ¶¶ 8, 9; J.A. 76-77; *see* J.S. App. 102a, ¶ 5. That proposed map rejected major features of the congressional delegation's proposed map: it (1) kept intact Washington County and several cities split by the congressional delegation's map; (2) limited the districts in Prince George's County to just two; (3) ensured that the Fourth District did not include population from Montgomery County, in response to constituent and state legislative requests; and (4) kept intact the I-270 corridor, making the connection between Frederick and Montgomery Counties a major feature of the Sixth District. J.A. 937-38; *compare* J.A. 941 *with* J.A. 997.

The GRAC's proposed map was submitted to the Governor and published for public comment on October 4, 2011, J.A. 660 ¶ 32; between October 4 and 11, 2011, the GRAC received hundreds of public comments, J.A. 658 ¶ 26. The Governor made minor changes to the

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[6] As the three-judge court found, "[t]here is no evidence that Hawkins personally created the final map that was enacted into law." J.S. App. 102a ¶ 5.

GRAC proposal and announced his plan on October 15, 2011. J.A. 660 ¶ 33, 688.

c. Introduced as Senate Bill 1 on October 17, 2011, during a special legislative session, the plan passed with several technical amendments and was signed by the Governor on October 20, 2011. J.A. 660 ¶ 34.

Legislative Priorities Addressed by the 2011 Congressional Plan

5.a. The 2011 congressional plan met significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

First, the 2011 plan eliminated a geographic anomaly, first introduced in Maryland's 1991 congressional districting plan and continued in the 2002 plan. That is, beginning in 1991, Maryland's First District had contained portions of both the eastern and western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This configuration had been created to protect an incumbent Republican representative, who sought "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991) (Niemeyer, J., dissenting), *aff'd*, 504 U.S. 938 (1992). The 2011 plan eliminated the Bay Bridge crossing by extending the northern portion of the First District

westward into precincts formerly contained within the Sixth District.

Second, the 2011 plan accommodated the request of the Maryland Legislative Black Caucus to reduce from three to two the number of districts having territory in Prince George's County. *Fletcher*, 831 F. Supp. 2d at 902. This required shifts in population in the Fourth and Eighth Districts, as well as the Sixth District, which borders the Eighth.

Third, the 2011 plan retained as majority-minority districts both of Maryland's Section 2 Voting Rights Act districts (the Seventh and Fourth Districts). *Fletcher*, 831 F. Supp. 2d at 891. Because the 2010 Census results showed that both districts were underpopulated compared to the ideal district population, J.A. 670, retaining them as Section 2 districts necessitated shifts that affected boundaries of other districts. In addition, two other districts "with significant and growing minority populations," the Second and the Fifth, *Fletcher*, 831 F. Supp. 2d at 902, were found by the census to be underpopulated and overpopulated, respectively, J.A. 670, thus requiring adjustments elsewhere in the map to attain population equality.

b. In addition to meeting these significant legislative goals, the map adopted as "a major feature of the Sixth district," J.A. 938 ¶ 9, the connection of portions of Frederick and Montgomery Counties that make up the I-270 corridor, "one of Maryland's premier economic regions." J.A. 1052; *see* J.A. 695 (depicting Sixth District in relation to I-270); J.A. 440 (describing

significant increase in commuter rail and automobile traffic along the I-270 corridor prior to the 2011 redistricting); J.A. 844. With I-270 serving as the primary thoroughfare, Frederick and Montgomery Counties account for 21.8% of Maryland's jobs and 25.4% of its total wages. J.A. 1052. About one-third of the 131,000 new residents Frederick County acquired in the decade preceding the 2011 redistricting came from Montgomery County. J.A. 440; *see* J.A. 437, 1052.

The growth along the I-270 corridor was an important interest expressed by constituents during the redistricting process. J.A. 437-43 (Baltimore Sun article); J.A. 403-04, 409, 418-19, 422-23 (public testimony requesting redistricting committee consider the I-270 corridor). Contemporary statements and testimony of Maryland decision-makers confirm the significance of the I-270 corridor as a consideration in drafting the Sixth District. J.A. 710-11; J.A. 43, 52-53 (O'Malley); J.A. 157-58 (Hitchcock); J.A. 193-96 (Senate President Miller); J.A. 937-38 ¶ 9 (Weissmann draft plan preserving the I-270 corridor as "major feature" of Sixth District).

Adding significant parts of Montgomery County in a way that kept largely intact the communities surrounding the I-270 corridor meant that 145,984 registered voters in the former Sixth District were reassigned to the Eighth and 128,992 registered voters in the former Eighth were reassigned to the Sixth. J.A. 773. All told, reconfiguration of the Sixth District reassigned 66,417 registered Republicans to other districts and 24,460 registered Democrats to the Sixth. J.S. App. 102a. Putting aside changes required by the

reconfiguration of the First District (i.e., reversing the extension across the Bay) and Fourth District (including having only two districts in Prince George's County), a net 40,066 registered Republicans were reapportioned out of the Sixth District and 18,420 registered Democrats were reapportioned into the Sixth. J.A. 773. That combined change of 58,486 registered Republicans and Democrats is smaller than the 64,608-vote margin that separated candidates John Delaney and Roscoe Bartlett in the 2012 election. J.A. 1026.

c. The final map also responded to constituents' expressed unhappiness with the contours of the Sixth District under the 2002 map. Sixth District voters had "advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County." J.S. App. 19a. Residents explained that these changes were needed to "mak[e] it viable for someone to reach the voters, and in terms of better representing the population." *Id.* 20a. Former plaintiff Shapiro described the associational harms caused by the 2002 map and lamented the "decreased turnout and interest" in the general election caused by packing in the Eighth District, which yielded results he characterized as "usually a foregone conclusion." J.A. 435. One Democratic candidate explained that the then-existing map made it difficult to campaign because the former Sixth District encompassed a huge swath of geographic territory centered on two different metropolitan areas. J.A. 411-12.

Statewide Referendum Approving the Plan

6. After the three-judge court in *Fletcher* issued its decision rejecting racial and partisan gerrymandering challenges to the plan, opponents of the plan petitioned Senate Bill 1 to referendum and it was placed on the 2012 general election ballot. J.A. 661 ¶ 39.

a. In the run-up to the 2012 general election, the referendum was publicized and discussed in the media, including articles cited by plaintiffs in the second amended complaint. *See* J.A. 630 (citing *Gerrymandered? Maryland Voters to Decide*, Wash. Post (Sept. 27, 2012)); J.A. 631 (citing Aaron C. Davis, *For Maryland Democrats, Redistricting Referendum Forces a Look in the Mirror*, Wash. Post (Sept. 30, 2012)); *see also* J.A. 631-35, 638-40 (reproducing maps credited to Washington Post's Sept. 27, 2012 coverage). As required by statute, in the weeks prior to the election, each county's election board provided the county's registered voters a notice "prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the [referendum] question." Md. Code Ann., Elec. Law § 7-105(b) (LexisNexis 2017).

b. In a case brought by the referendum's proponents, the Court of Special Appeals of Maryland rejected contentions that the ballot language was misleading or insufficiently informative. *Parrott v. McDonough*, No. 1445, Sept. Term, 2012 (Md. Ct. Spec. App. Jul. 23, 2014) (unpublished), *cert. denied*, 440 Md.

226 (2014), *available at* http://redistricting.lls.edu/files/MD%20parrott%2020140723%20opinion.pdf (last visited Jan. 19, 2019). The court confirmed that the ballot language "adequately conveyed the actual scope and effect" of the 2011 plan, *id.* at slip op. 21, and further concluded that plaintiffs' "concerns regarding whether Question 5 adequately described the scope of the changes arising from Senate Bill 1" were addressed by the notice summary sent to voters as required by Election Law § 7-105(b), *id.*

c. The referendum resulted in voters approving the plan by 1,549,511 votes in favor (64.1%) and 869,568 votes against (35.9%), with majorities favoring it in all but two of Maryland's 24 counties. J.A. 661 ¶ 39. The plan won voters' approval not just in areas of Democratic voting strength, but also in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, including three counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties.[7] J.A. 1056.

Republican Political Engagement After the 2011 Redistricting

7. Available information for the period since the 2011 redistricting shows a growing and comparatively

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[7] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Jan. 20, 2019).

active Republican electorate in the Sixth District. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, J.A. 1054, and percentage turnout among Republicans increased between the 2008 and 2012 presidential elections, J.A. 1059. Percentage Republican turnout in the Sixth District exceeded Democratic turnout in the 2012, 2014, and 2016 general elections.[8] Although overall turnout in the 2014 gubernatorial primary was down statewide, from 25.35% in 2010 to 21.81% in 2014,[9] Republican turnout in Garrett, Allegany, and Washington Counties exceeded Democratic turnout in the 2014 primary. *Id.* Notwithstanding small variations in contributions to local Republican central committees, contributions to Roscoe Bartlett's campaign committee in 2012 were more than *25 times* those received in 2010.[10]

As for the plaintiffs in this lawsuit, they admit to having maintained or increased their own associational

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[8] *See* https://elections.maryland.gov/elections/2012/turnout/general/2012_Congressional_District.html#Dem; https://elections.maryland.gov/elections/2014/turnout/general/GG14_Turnout_by_party_by_congressional.xlsx; https://elections.maryland.gov/elections/2016/turnout/general/Official%20by%20Party%20and%20Congressional.pdf (all last visited Jan. 20, 2019).

[9] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

[10] *Compare* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ (Post-General 2010, reporting $46,091.96 in total contributions for reporting period and election cycle-to-date) *with* http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (Post-General 2012, reporting $1,170,021.87 in same).

activities since 2011. All the plaintiffs voted regularly after the 2011 redistricting. J.A. 274-75, 532-33, 568-69, 357, 464-65, 317, 498. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and became a member of the Washington County Republican Central Committee and a member of the Washington County Republican Club. J.A. 434-35, 541. Plaintiffs Ropp and Strine were also active in local Republican political campaigns both before and after the 2011 redistricting. J.S. App. 26a-27a.

Proceedings in this Action

8.a. Three Maryland residents, only one of whom remains a current plaintiff, filed this action in November 2013—more than two years after the 2011 plan was enacted, more than 15 months after this Court's *Fletcher* affirmance, and one year after the plan was implemented in the 2012 general election and approved by voters in the statewide referendum. J.A. 1, 660, 661. The complaint as initially filed and subsequently amended "did not present the [First Amendment] retaliation theory asserted here." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Although the complaint alleged "infringement of First Amendment rights of political association," Dkt. 11 ¶ 5, it did not specify facts supporting that claim, and plaintiffs denied that their claims "rely on the reason or intent of the legislature—partisan or otherwise," *id.* ¶ 2; *see also id.* ¶ 23. Rather than contend that it was impermissible for districting to consider party affiliation or voting

history, the first amended complaint advocated for districts to be drawn based on "commonality of interest, reflected through demographics *and voting history*[.]" *Id.* ¶ 29 (emphasis added).

b. After a single district judge ordered dismissal, this Court on December 8, 2015 reversed and remanded for further proceedings before a three-judge court. *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

c. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. J.S. App. 84a. They asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." J.S. App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. J.S. App. 172a-225a. The majority held that a judicially manageable standard existed to adjudicate the plaintiffs' vote-dilution (or "representational-rights") claim. Under that standard, plaintiffs must show that (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the *specific intent* to impose a burden on him and similarly situated citizens

because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." J.S. App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months later, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. J.A. 25. After oral argument, the district court denied the request for preliminary injunction, declined to dispose of the parties' fully briefed cross-motions for summary judgment, and entered a "stay pending further guidance" from this Court's disposition of *Gill v. Whitford*, No. 16-1161. J.S. App. 82a-83a & n.1.

In denying preliminary injunctive relief, the court concluded that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. J.S. App. 83a. The court deemed plaintiffs unlikely to succeed in carrying their burden of proving it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and,

more importantly, that will continue to control the electoral outcomes in that district." J.S. App. 100a.

d. On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. J.A. 30. After hearing argument, this Court issued its June 18, 2018 *per curiam* opinion noting its jurisdiction and affirming the district court's denial of the preliminary injunction. *Benisek*, 138 S. Ct. 1942. This Court affirmed the order denying preliminary relief on grounds that included plaintiffs' "years-long delay" in pursuing injunctive relief, their failure to plead their First Amendment claim until 2016, and the reasonableness of withholding relief "to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs' claims" and thereby avoid "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1944, 1945 (citation omitted). Even if plaintiffs were able to show a likelihood of success on the merits, the Court concluded, "the balance of equities and the public interest tilted against" injunctive relief. *Id.* at 1944.

e. On remand, the parties filed a joint status report informing the three-judge court that "the plaintiffs will not move to reopen discovery" and confirming that the parties' cross-motions for summary judgment were "fully briefed and ripe for decision," with one exception: the parties agreed that they would file supplemental briefs "to allow the parties to address *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Supreme Court's disposition of the appeal in this case, and other subsequent relevant authority." J.A. 1172. Instead of adhering to the parties' agreement regarding the ripeness of

the cross-motions, however, plaintiffs' supplemental brief did not present only argument and analysis addressing this Court's decisions and other relevant authority, but also presented new evidence that was neither part of the summary judgment record, nor disclosed in discovery. J.A. 1176-1205. Plaintiffs sought to introduce the evidence by way of an affidavit of counsel. J.A. 1206-16. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. J.A. 1180-98. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which there was little evidence in their prior presentations. J.A. 1198-1204. Attempting to fill that void in their evidence, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections' website, together with lay opinion testimony from one of their own attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. J.A. 1210-12, 1200-02. Plaintiffs also submitted campaign-finance reports retrieved from the Maryland State Board of Elections, which they claimed showed declines in contributions to local Republican Party committees in relevant areas before and after the implementation of the 2011 map. J.A. 1202-03, 1214-16.

Defendants moved to exclude this evidence because the data was hearsay, outside the affiant's personal knowledge, not part of the discovery record, and not otherwise subject to judicial notice, and because the attorney's lay analysis of election-return data

constituted inadmissible lay opinion testimony. J.A. 1249-50; *see also* Dkt. 215-1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections; instead, the denial rested on the ground that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. J.A. 1251-52.

The District Court's Summary Judgment Decision and Injunction

9. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018, in a decision that featured two majority opinions, one by Judge Niemeyer and one by Judge Bredar, each joined by Judge Russell. *See* J.S. App. 1a-77a; 78a-81a. Applying the First Amendment retaliation framework the court had adopted in denying defendants' motion to dismiss, J.S. App. 199a, Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both their First Amendment retaliation theories of vote dilution and impairment of associational rights, J.S. App. 4a, 42a-43a, 48a-54a, 59a, 61a-64a.

a. Judge Niemeyer's opinion concluded that plaintiffs had established each element of their vote-dilution claim. J.S. App. 48a. As to intent, he found that Maryland Democratic officials worked with "precise purpose" to "flip the Sixth District from safely Republican to likely Democratic." J.S. App. 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," J.S. App. 52a, even if the district had become more electorally competitive, because "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting." J.S. App. 53a. He further observed that, although not essential to the conclusion, "the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence" of injury. *Id.*

Finally, as to causation, Judge Niemeyer found that only retaliatory intent explained the Sixth District's boundaries. J.S. App. 54a-56a. In so ruling, he rejected as "utter[ly] implausib[le]," the State's evidence of alternative motivations, described above, for the redrawing of the district, including the western extension of the First District into territory previously occupied by the Sixth District "to prevent the new First District from crossing the Chesapeake Bay," and "grouping residents along the Interstate 270 corridor," who previously resided in separate districts, into the Sixth District. J.S. App. 55a. He deemed the State's evidence of alternative motivation irrelevant in light of "the undisputed fact" that "the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic control." *Id.*

b. Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the

one the district court established for evaluating plaintiffs' vote-dilution claim, except that "in lieu of the harm involving a burden on representational rights, [plaintiffs] must prove a harm involving a burden on their associational rights," namely, "that the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims." J.S. App. 59a. Plaintiffs satisfied that burden, he explained, because several indicators of "voter engagement in support of the Republican Party" in the Sixth District "dropped significantly." J.S. App. 62a. These indicators included voter turnout data and fundraising data—including data that was the subject of the State's motion to strike in advance of the summary judgment hearing. J.A. 1249-50; *see* Dkt. 215-1; J.S. App. 28a, 63a (citing fundraising data submitted with supplemental briefing); J.S. App. 74a-75a (concurring opinion of Judge Bredar citing the same).

c. Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for injunctive relief. J.S. App. 64a-65a. He opined that plaintiffs' delay in pursuing relief need not be considered in determining whether to enter a permanent injunction, and, contrary to this Court's conclusion, *Benisek*, 138 U.S. at 1944, found that the case's "protraction cannot be attributed to the plaintiffs[.]" J.S. App. 66a. According to Judge Niemeyer, an election in 2020 with the current map—even if only for one election cycle—would irreparably harm plaintiffs, whereas ordering a new map for the 2020 election would not unduly disrupt the election process, despite the inevitable need to

redraw that map yet again to reflect results of the 2020 census. J.S. App. 65a-67a.

d. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational-rights theory alone, J.S. App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, J.S. App. 69a-70a.

e. In awarding judgment to plaintiffs, the three-judge court enjoined the State from conducting any further elections under the 2011 map, and directed the State to submit for the district court's approval a new congressional districting plan for the Sixth District adhering to two conditions for which the court's opinions cite no applicable authority: the legislature must redraw the boundaries (1) "applying traditional criteria for redistricting" and (2) "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. App. 78a-79a. If the State fails to submit a map, or if the district court declines to approve the map, a court-appointed commission will assume the responsibility of drawing and submitting a map for approval. J.S. App. 79a-80a. On November 16, 2018, the three-judge court stayed its injunction. J.A. 1350-51.

SUMMARY OF ARGUMENT

I. Maryland recognizes that the problem of partisan gerrymandering poses a threat to democracy in

the United States and that our courts have an important role, in both remedying existing unconstitutional gerrymanders and preventing future violations by providing clear guidance for legislatures and other districting bodies. This Court can and should determine a manageable standard, one that lower courts can apply to remedy abusive partisan gerrymanders such as those that entrench in power a political party whose adherents enjoy only minority support. This is not such a case, and the decision below fails to supply the much-needed standard.

A. This Court's decisions reflect a consensus that excessive partisanship in districting is impermissible, although officials may use political considerations in crafting a districting plan. The Court has not yet announced a standard for adjudicating a partisan-gerrymandering claim, but the Court has described the essential criteria: an acceptable standard must be clear, manageable, politically neutral, reliably fair, and precise. The First Amendment retaliation test proposed by plaintiffs and adopted by the district court does not satisfy these criteria.

The retaliation test has three elements: intent, injury, and causation. It does not promise to be clear, manageable, politically neutral, reliably fair, and precise because its first element forbids consideration of party affiliation at all, its second element embeds a standardless inquiry into excessiveness, and its third element does nothing more than duplicate its first. Because the first and third elements ask only whether officials took party into account at all, the work of

identifying impermissible political motives must be performed in assessing the element of injury.

The difficulties with the test are apparent from the way the district court applied it to plaintiffs' representational- and associational-injury claims.

In assessing the representational-injury claim, the district court described the injury as one imposing a "meaningful[] burden" on "representational rights." J.S. App. 52a; however, the only burden that the court ever identifies is a species of vote dilution, and, unlike the vote-dilution injury present in one person, one vote claims, the injury here lacks an independent mathematical definition. And although the court allowed that vote dilution is a matter of degree, the court's test did not provide any method for measuring an unconstitutional amount. Rather, the court unhelpfully suggested that, to be actionable, boundary changes in redistricting must have made more than a trivial difference to an aggrieved party's achievement of electoral success.

On the associational-injury claim, the district court was even less precise. It required only a showing that the new plan somehow burdened some group's ability to associate in furtherance of some political goal, perhaps by dampening voters' enthusiasm or making them indifferent to voting. But the court offered no guidance on how to establish that the supposed lack of enthusiasm resulted from the plan, as opposed to some other cause; indeed, the court did not require the plaintiffs here to make such a showing.

Moreover, under the district court's test, a plaintiff would satisfy the injury element just by showing that in creating a districting plan, mapmakers considered political aims *to any degree*—unless the plan survived "exacting scrutiny." J.S. App. 200a (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976)). These presumptively improper aims would include incorporating constituent interests, identifying and considering communities of interest, and achieving proportional representation. But the first two of these have long been thought to be inherent in redistricting, while the last has been upheld by this Court. *Gaffney v. Cummings*, 412 U.S. 735 (1973). And, because the district court's approach uses the preceding districting plan as a benchmark, it would even presumptively invalidate efforts to undo a prior partisan gerrymander. The innate shortcomings of the court's test are further exacerbated by the terms of its injunction, which impose restrictive redistricting criteria that are unexplained in the court's opinions and unsupported by applicable law.

B. For at least three other reasons, the First Amendment retaliation approach is ill-suited to separate permissible political considerations from excessive partisanship.

First, it depends on the fiction that when members of one party favor their legislative goals over those of an opposition party, they act with retaliatory intent, and the resulting legislation constitutes retaliation against the opposition party's members. Employing that fiction could make actionable much of the legislation passed by state legislatures and Congress, which

in many instances pass legislation favored by one party and opposed by the other. Here, the record contains no evidence that mapmakers, state officials, or the voters who enacted the plan at referendum, intended to retaliate against anyone for past voting.

Second, the First Amendment retaliation framework developed in the context of executive action, and it is based on the conduct of identified government officials retaliating against individuals known to them to have exercised protected speech or political affiliation. It was never intended to apply to legislation, like the districting legislation challenged here, and there is no precedent for expanding retaliation to the legislative arena.

Third, First Amendment retaliation jurisprudence is even less appropriate for a challenge to legislation approved by the voters at referendum.

II. Reversal is also necessary because contrary to the well-established summary judgment standard, the three-judge court resolved issues of disputed fact by impermissibly drawing inferences against the party opposing summary judgment, engaging in credibility determinations, and weighing evidence. The court also erred by relying on evidence that was subject to unresolved hearsay and other objections to admissibility, instead of resolving evidentiary objections that were material to its ruling.

III. Finally, this Court should reverse because the three-judge court abused its discretion in entering permanent injunctive relief. Whether considering

preliminary or permanent relief, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The court erroneously concluded that harm caused by the plaintiffs' delay had no bearing on whether to grant permanent relief, as opposed to a preliminary injunction. The three-judge court also contradicted this Court's previous finding that the years-long delay in this case was due to circumstances largely within plaintiffs' control. Thus, the three-judge court's analysis disregards the well-established principle that laches can bar constitutional claims, including First Amendment claims.

ARGUMENT

I. THE THREE-JUDGE DISTRICT COURT DID NOT SET FORTH A "LIMITED AND PRECISE" TEST FOR ADJUDICATING PARTISAN-GERRYMANDERING CLAIMS.

This Court can and should determine a manageable standard, one that lower courts can apply to remedy partisan gerrymanders such as "the unjustified entrenching in power of a political party" that "enjoys only minority support among the populace" but "has nonetheless contrived to take, and hold, legislative power." *Vieth v. Jubelirer*, 541 U.S. 267, 365, 360 (Breyer, J., dissenting). This case, however, involves no such circumstance, and the three-judge court's analyses fail to supply the much-needed standard.

A. The District Court's First Amendment Retaliation Approach Does Not Distinguish Between Permissible Political Considerations and Excessive Partisanship.

1. This Court's decisions acknowledge a widely accepted principle: "excessive" partisanship in creating a districting plan is impermissible, but state officials may take into account political considerations in creating a districting plan. Various justices, with varying views on whether and how best to adjudicate partisan gerrymandering challenges, have agreed that the process of redistricting is "inherently political." *Abrams v. Johnson*, 521 U.S. 74, 117 (1997) (Breyer, J., dissenting); *see Gaffney*, 412 U.S. at 753 ("[P]olitical considerations are inseparable from districting and apportionment.").

The great challenge is discerning how and where to draw a line between acceptable political considerations and what is "excessive." *See Vieth*, 541 U.S. at 293 (plurality); *id.* at 316 (Kennedy, J., concurring); *id.* at 365 (Breyer, J., dissenting). Though the Court has yet to resolve this question, it has described criteria for reaching the correct answer: drawing on principles that are "well developed and familiar," *Baker v. Carr*, 369 U.S. 186, 226 (1962), the necessary test for excessive partisanship in redistricting must be "limited and precise," "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 306, 307-08 (Kennedy, J.), and it must provide a "reliable measure of fairness," *League*

of United Latin Am. Citizens v. Perry ("*LULAC*"), 548 U.S. 399, 414 (2006) (Kennedy, J.).

2. The plaintiffs here and the district court below believe they have found a solution in the form of a First Amendment retaliation claim. Contrary to what this Court has opined, however, the plaintiffs insist that the question "whether mapmakers have gone 'too far'" can be sidestepped by using their approach. *Benisek v. Lamone*, No. 17-333, Reply Br. 9; *see also* No. 17-333, Appellant's Br. 35; No. 18-726, Mot. to Affirm 26. In plaintiffs' view—adopted by the district court—the problem can be solved by using the three elements of "a garden variety retaliation claim," J.S. App. 197a—intent, injury, and causation—and by simply deeming the injury to be vote dilution (for their representational-rights claim) or some "burden on their associational rights" (for their associational-rights claim), J.S. App. 52a, 59a.

a. But plaintiffs' test does not offer a standard that promises to be limited, precise, clear, manageable, politically neutral, and reliably fair. Instead, the first element of the test (intent) deems any degree of partisanship excessive, while the second element (injury) perpetuates the existing problem by embedding a standardless excessiveness inquiry. Although the third element (causation) purports to ask a different question, it does no more than duplicate the first element, intent.[11]

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[11] The causation element's redundancy is seen in the way the district court applied it here: "In short, the record refutes the conclusion that the actions were taken for any other reason than to

That first element, though phrased in terms of retribution for plaintiffs' past voting and political affiliation, essentially asks whether those who adopted the plan intended to favor one political party over another. It draws no line between acceptable and excessive political consideration. Any degree of partisan intent and almost all political aims of any nature will suffice, because any intent to draw a boundary in a way that marginally benefits one political party, even as it serves another redistricting goal, can be characterized as an intent "to impose a burden" on members of a competing political party "because of how they voted or the political party with which they were affiliated." J.S. App. 43a. Thus, this intent element is likely to be satisfied in *every* redistricting challenge. *See Vieth*, 541 U.S. at 298 (plurality op.); *id.* at 344 (Souter, J., dissenting).

b. Given that likelihood, if the task of separating permissible from impermissible political considerations is to be performed at all, it must be done at the second stage, which addresses the element of injury. Although the three-judge court describes the injury as a "meaningful[] burden [on plaintiffs'] representational rights," J.S. App. 52a, the only burden ever identified or discussed by the court is a species of vote dilution, e.g., J.S. App. 53a-54a. Yet, unlike the vote-dilution injury

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carry out the specific intent expressed." J.S. App. 54a; *see id.* ("[A]s to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.").

assessed in one person, one vote claims, vote dilution under this retaliation theory has no independent mathematical definition. Faced with the reality that any redrawing of a district is bound to cause at least minimal dilution of some party's voting strength, the district court acknowledged that "vote dilution is a matter of degree," J.S. App. 199a, but the court's test does not attempt to measure it. Instead, under its test, the vote-dilution inquiry asks whether the boundary changes "make some practical difference," at least somewhat "'more than *de minimis* or trivial.'" J.S. App. 199a, 198a (citation omitted). Put another way, to some "more than *de minimis*" extent, did the mapmakers "mak[e] it harder for a particular group of voters to achieve electoral success"? J.S. App. at 199a, 200a. But the court makes no attempt to define, either qualitatively or quantitatively, when increased electoral difficulties amount to a burden, and if so, at what point the burden becomes unconstitutional. As an assay of excessiveness, this inquiry is either indeterminate or toothless.

c. The district court's application of its three-part test to the plaintiffs' claim of associational injury differs only at the second stage, assessment of injury, but there its standards are even more open-ended and imprecise. They require only a showing that the redistricting somehow indirectly "burdened" some group of voters' "ability to associate in furtherance of their political beliefs and aims," which might manifest itself in voters' "lack of enthusiasm" or "indifference to voting." J.S. App. 59a, 62a. The district court does not even suggest how to measure the seriousness of this type of

alleged injury. Nor does the court hint at how to determine whether the redistricting was the proximate cause of a voter's "lack of enthusiasm" or "indifference," or whether those are merely sentiments shared by some number of voters, irrespective of redistricting or party affiliation.

Like the vote dilution injury, the district court's element of associational injury is too indeterminate and too easily satisfied to provide a "limited and precise" standard. *Vieth*, 541 U.S. at 306 (Kennedy, J.). As if to confirm this imprecision, the court's discussion of associational injury neither acknowledges nor applies the principle, recited in its earlier decision, that First Amendment retaliation requires a showing of harm "sufficiently serious that it 'would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" J.S. App. 198a (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)).

d. Thus, at least under the district court's articulation, the injury element of either a representational- or associational-rights claim would be satisfied any time mapmakers took political aims into account, for any reason. The only political considerations reliably excluded would be *failed* attempts to take politics into account, i.e., attempts that did not yield some "practical difference." J.S. App. 199a. This element's representational formula effectively treats as "excessive" any non-trivial difference effected by redistricting, and its associational variant is susceptible to a reading that would render impermissible any redistricting that

indirectly imposes even some *de minimis* burden. Consequently, under the test applied to either variant of a First Amendment retaliation claim, any consideration of politics with "more than *de minimis*" partisan impact is prohibited, unless it survives "'exacting scrutiny,'" J.S. App. 200a (citation omitted), or as plaintiffs insist, "strict scrutiny," Mot. to Affirm 23. *See Vieth*, 541 U.S. at 294 (plurality op.) (noting that "strict scrutiny readily, and almost always, results in invalidation"). Rather than "separate the unjustified abuse of partisan boundary-drawing considerations . . . from their more ordinary and justified use," *id.* at 365 (Breyer, J., dissenting), the district court's First Amendment retaliation standards presumptively outlaw all political considerations, including incorporation of constituent views and identification of communities of interest, long thought to be inherent in redistricting.

3. The First Amendment retaliation framework's inability to discern the point at which redistricting constitutes "unjustified abuse of partisan boundary-drawing considerations," *id.*, manifests itself in the way it would apply in several foreseeable situations. In each, the test is either overinclusive, because it would invalidate otherwise lawful maps, or underinclusive, because it would not afford relief to some victims of partisan gerrymanders.

a. First, by effectively condemning any consideration of political affiliation or voting patterns, the approach would invalidate state efforts to draw district lines to achieve proportional representation. Yet *Gaffney v. Cummings* established that such

proportional schemes are permissible. There, the Court rejected a challenge to a state's proportional districting plan that drew "virtually every" line with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752, 754. The Court "reasoned that it would be 'idle' to hold that 'any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it,' because districting 'inevitably has and is intended to have substantial political consequences.'" *Gill*, 138 S. Ct. at 1927 (quoting *Gaffney*, 412 U.S. at 752-53). Since *Gaffney*, this Court has upheld a congressional plan purposely drawn to maintain "partisan balance." *Easley v. Cromartie*, 532 U.S. 234, 239 (2001).

The three-judge court's standards would invalidate maps such as the one upheld in *Gaffney*, where mapmakers relied on voters' political affiliations to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties," 412 U.S. at 752, and the map this Court upheld in *Easley*, where the drafters necessarily relied on similar information to ensure "the maintenance of a six-six Democrat-Republican split in the congressional delegation," *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 419 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001).

Though the three-judge court acknowledges *Gaffney* and recites that "courts cannot invalidate a redistricting

map merely because its drafters took political considerations into account in some manner," J.S. App. 34a-35a, the decision below compels the opposite conclusion, by effectively prohibiting consideration of political affiliation. Confirmation of this interdiction appears in the judgment, which expressly prohibits mapmakers from "considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. App. 79a. That restriction would preclude adopting maps, such as the ones in *Gaffney* and *Easley*, that seek to approximate the relative voting strengths of Democrats and Republicans statewide. Thus, the First Amendment retaliation approach would invalidate maps of the type previously viewed as "less likely" to inflict "partisan discrimination." *LULAC*, 548 U.S. at 419 (Kennedy, J.) ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.").

b. Second, because the First Amendment retaliation approach uses the prior map as a benchmark in making its injury assessment, it presumptively invalidates mapmakers' efforts to undo previous partisan gerrymanders. As the opinions of Judges Niemeyer and Bredar demonstrate, applying the intent and effects elements of the three-judge court's test requires comparison to the prior district, which in the terminology repeatedly invoked by plaintiffs' expert, serves as the "benchmark." J.A. 766, 767, 772, 773, 775, 776, 779, 1088, 1094. Comparison between the current Sixth

District and its predecessor permeates Judge Niemeyer's analysis of voters' representational rights (J.S. App. 53a-54a) and both judges' analyses of associational rights (J.S. App. 61a-63a, 73a-75a). For purposes of both representational and associational injuries, the identified offending "intent" is "the specific intent to flip the Sixth District" that had been drawn in 2002 "from safely Republican to likely Democratic." J.S. App. 49a. To clarify that the test necessarily hinges on the superior position one party enjoyed under the prior map, Judge Niemeyer's opinion reduced the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." J.S. App. 50a-51a. Thus, it is impossible to evaluate whether a district was intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to the representational vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," J.S. App. 52a, without consideration of the electoral advantages enjoyed under the prior map. So, too, does the associational harm require comparison to associational activity under the prior map to determine whether the new map "burdened the targeted citizens' ability to associate in furtherance of their politic[al] beliefs and aims." J.S. App. 59a, 75a (party members narmed if "severed from their preferred associates" in the prior district); *see* J.S. App. 61a-63a (comparing pre- versus post-redistricting data).

c. In these respects, the three-judge court's opinions test the constitutionality of a redistricting plan by

comparing the current districting plan to the status quo ante. But there is no *constitutional* reason to believe a prior district "has any special claim to fairness," particularly if that district "was formed for partisan reasons." *LULAC*, 548 U.S. at 446-47 (Kennedy, J.). On the contrary, gauging the constitutionality of a new district by the contours of the old would impair a legislature's ability to remedy a past partisan gerrymander. Under the three-judge court's test, claims from those voters whose districts did not change, and are therefore still affected by the prior gerrymander, would be barred, because they could not show that their vote was diluted, or their associational opportunities diminished, compared to the prior gerrymandered districting map. But claims from voters who were newly in a political minority, due to legislation *curing* a prior partisan gerrymander, would be actionable because claimants would be able to demonstrate that the legislature, in acting to cure a prior partisan gerrymander, could and did "flip" the makeup of their district intentionally. *See* J.S. App. 50a.

If that is so, the State would be unable to "avoid liability," J.S. App. 43a, because its interest in remedying past gerrymandering would conflict with what the three-judge court deems claimants' entitlement to continue enjoying the benefits of a previously gerrymandered but "safely Republican" district, J.S. App. 49a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders. Even if the plaintiffs are correct that victims of past gerrymanders could still bring suits to challenge them,

Benisek, No. 17-333, Reply Br. 11, at best, that would mean a state faces the likelihood of litigation irrespective of how it chooses to redraw the lines of a previously gerrymandered district.

Nor would the district court's approach work in a scenario where the political makeup of multiple districts changed in both directions. Instead, it would permit competing, contradictory claims by Republican voters alleging their districts "were intentionally flipped" and by Democratic voters "in the district that changed hands in the opposite direction" claiming "they too were targeted." Br. of Campaign Legal Center, *et al.*, as amici curiae in support of neither party, *Benisek v. Lamone*, No. 17-333 (Jan. 29, 2018) at 25. For example, the retaliation test would authorize claims by allegedly targeted voters in all thirteen of the districts that were "flipped" in Florida's 2011 redistricting, though five of the districts changed in favor of one major party and eight were changed in the other direction. *Id.* at 26.

d. Finally, the retaliation test does not provide a satisfactory answer to the question Justice Alito posed in the *Benisek* oral argument: if legislators "have two possible plans that they're considering," both of them having "exactly the same" population and both "compact" and "contiguous," but one gives the legislature's majority party "a more than de minimis advantage," and the other plan "gives the other party a more than de minimis advantage," is it "unconstitutional" for legislators to "pick the one that favors [their] party"? No. 17-333, Tr. 14-15. Plaintiffs' counsel answered that "it

may well be that that would be a violation," *id.* at 15-16, but under the district court's test it *would* be a violation. That is, under the retaliation framework, when faced with that toss-up between two otherwise equally meritorious maps, legislators are compelled to do what legislators rarely do, which is choose the option that favors the opposition party and disfavors their own party. There can be no better indication that this test does not offer a limited and precise way of determining when partisanship is excessive.

4. The problems of unmanageability inherent in the test are compounded by two components of the three-judge court's injunction that go unexplained in its opinions and lack any authorization in applicable law. That is, the new districting plan mandated by the court must be drawn (1) by "applying traditional criteria for redistricting—such as geographic contiguity, compactness, regard for natural boundaries and boundaries of political subdivisions, and regard for geographic and other communities of interest," and (2) "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. App. 79a. The court did not cite any legal authority for imposing these requirements. On the contrary, the court acknowledged that Congress has not elected to impose any such requirements in existing statutes governing Congressional redistricting. J.S. App. 34a; *see Vieth*, 541 U.S. at 276-77 (plurality op.).

The injunction's two restrictions are not only devoid of legal authority; they actually threaten to cause

or perpetuate partisan gerrymandering. First, "'traditional' districting principles have rarely, if ever, been politically neutral." *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting). Applying "traditional criteria," such as "compactness and respect for the lines of political subdivisions," for example, may "systematically" disadvantage "political groups that tend to cluster (as is the case with Democratic voters in cities)[.]" *Vieth*, 541 U.S. at 290 (plurality op.) (parentheses in original). Second, the injunction's ban on consideration of political affiliation or voting patterns similarly offers no assurance of political neutrality. This Court has criticized the approach of requiring districts to be drawn without using "political[] data" and "without regard for political impact," because it "may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney*, 412 U.S. at 753. The requirement is also unrealistic, because even without resorting to data, "politicians . . . normally understand how 'the location and shape of districts' determine 'the political complexion of the area.'" *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting) (quoting *Gaffney*, 412 U.S. at 753).

B. Partisan Gerrymandering Is Not Properly Understood as a Form of First Amendment Retaliation.

1. It is not surprising that the First Amendment retaliation approach fails to meet the challenge of separating permissible political considerations from impermissible, excessive partisanship. Legislatively drawn and approved maps are a far cry from the executive

actions traditionally subject to First Amendment retaliation claims. Whereas the redistricting process typically involves legislators taking into account competing views of constituents, whose "various interests compete for recognition," *Miller v. Johnson*, 515 U.S. 900, 914 (1995), the basic premise of the political patronage line of retaliation cases, for example, prohibits *any* consideration of a non-policymaking employee's political views as a basis for termination or other employment action, *see, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

2. To justify their resort to First Amendment retaliation principles, plaintiffs and the district court advance the notion that mapmakers who favor the interests of one party necessarily intend to "punish" voters of another party "by reason of their constitutionally protected conduct." J.S. App. 205a (emphasis omitted). But that construct is only a legal fiction contrived by the plaintiffs, and one that unfairly treats each political party's natural inclination to serve its members' interests as if it were the equivalent of malicious retribution against members of a competing party. Prior to this case, courts have refused to indulge that notion and, instead, have turned away attempts to challenge statutes on First Amendment retaliation grounds, to avoid "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child*

Ctr., Inc., 135 S. Ct. 1378, 1383 (2015). The record here contains no evidence that any legislators or mapmakers, or the people of Maryland who enacted the 2011 plan at referendum, knew how any of the plaintiffs voted in the past,[12] or tried to "punish" them for their past voting.

3. In the jurisprudence of challenges to legislation, First Amendment retaliation principles are not "well developed and familiar," *Baker*, 369 U.S. at 226; rather, they are absent.

a. The First Amendment retaliation framework emerged from, and is designed to work in, the context of government acting in its *executive* capacity, where the government generally lacks authority to take measures implicating protected speech and political affiliation. *See, e.g.*, *Rutan*, 497 U.S. at 77 (government as employer); *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) (government as contracting party); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (government as administrator of law enforcement and corrections agencies).

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[12] An individual's voting history is unknowable due to ballot secrecy. *See* Md. Code Ann., Elec. Law § 9-203(4) (LexisNexis 2017). Election results are known and reportable at no smaller unit than the precinct. Md. Code Ann., Elec. Law § 11-402(a), (d)(1)(i) (LexisNexis 2017). Moreover, voting behavior cannot be reliably inferred from party registration. *See* J.A. 769 (table showing that no more than 69% of Democrats and 64% of Republicans preferred their respective party's nominee in the 2012 Congressional election); J.A. 857. It "is assuredly not true" that "the only factor determining voting behavior at all levels is political affiliation." *Vieth*, 541 U.S. at 288 (plurality op.).

b. The retaliation analysis does not work, and was never intended to work, in challenges to legislation enacted by legislators or approved directly by the voters. Unlike those executive contexts where First Amendment retaliation principles have been applied, adoption of a districting statute is *legislating*, which always involves consideration of speech and, typically, political speech. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]" *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Moreover, the structures and processes of state legislatures, like those of Congress, tend to make frequent and explicit reference to members' political affiliations, to a degree that would be impermissible in the executive contexts of government employment, procurement, and law enforcement.

There is no precedent for "expanding" First Amendment retaliation principles "to legislative enactments." *Moser*, 747 F.3d at 840. Instead, for more than a half-century since this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (upholding statute that punished knowing destruction or mutilation of selective service registration certificates), lower courts have rejected First Amendment retaliation claims, like plaintiffs', alleging that facially neutral statutes indirectly burdened First Amendment rights.[13]

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[13] *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (stating that such challenges do "not present[] a cognizable First Amendment claim"); *see also Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Kensington Vol. Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467-70 (4th Cir. 2012); *Southern Christian*

c. If First Amendment retaliation analysis is inappropriate for challenging enactments of a legislature, it is even less apt and less workable for a challenge to legislation approved by the voters and, therefore, "adopted by the people," rather than legislators. Md. Const. art. XVI, § 5(b). First, attributing to the voters at large "specific intent" to "punish" a subset of voters for their past voting record would present insurmountable difficulties of proof, challenges that the plaintiffs and the district court here did not even attempt to address. For example, more than 1.5 million Maryland residents voted to approve the 2011 congressional districting plan, including majorities in 10 of 12 counties where registered Republicans outnumber Democrats.[14] J.A. 1056. The record contains no evidence, or even a proffer, suggesting that these results can be attributed to voters' retaliatory intent. The plaintiffs' second amended complaint makes no allegation about the referendum at all, J.A. 612-50, and the district court's decision mentions only that the referendum occurred, J.S. App. 22a-23a.

To presume retaliatory intent on the part of the people, or to ascribe to them vicarious responsibility for views expressed by certain legislators or government officials, would conflict with this Court's

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Leadership Conf. v. Supreme Ct. of La., 252 F.3d 781, 795 (5th Cir. 2001); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-59 (4th Cir. 1989).

[14] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Jan. 20, 2019).

precedent. For similar reasons, "voters' sentiments" expressed via referendum cannot, without proof, "be attributed in any way to the state actors," like those sued here and typically sued in other redistricting cases. *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 197 (2003).

Rather than presume that referenda are expressions of vengeful or punitive intent, this Court has "assess[ed] the referendum as a 'basic instrument of democratic government,'" and "observed that '[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.'" *Id.* at 196 (quoting *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976), and *James v. Valtierra*, 402 U.S. 137, 141 (1971)). Far from being a rubber stamp for actions of legislators and government officials, "the referendum serves as a negative check" on improvident legislation and affords the electorate an opportunity to "'correct[] sins of commission'" on the part of the legislature. *Arizona State Legislature*, 135 S. Ct. at 2660 (citations omitted). For this reason, referenda provide a recognized means for voters "to check legislators' ability to choose the district lines they run in," *id.* at 2675; *see Vieth*, 541 U.S. at 363 (Breyer, J., dissenting), a check that Maryland voters have previously exercised by invalidating a Congressional redistricting plan through referendum.[15]

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[15] *See* Maryland General Election Returns November 6, 1962 at 17, Question 6, https://elections.maryland.gov/elections/documents/1962_1964_General_Results.pdf (last visited Jan. 19, 2019).

More fundamentally, the district court's First Amendment retaliation framework does not work in a challenge to legislation adopted by referendum for reasons that go beyond problems of proof: aside from the analyses developed in viewpoint discrimination cases, which the district court does not purport to employ,[16] the Constitution does not afford a basis for prioritizing plaintiffs' First Amendment representational and associational interests and subordinating those of the more than 1.5 million voters who exercised their rights in the referendum.

II. The Three-Judge Court Erred by Departing from the Summary Judgment Standard When It Resolved Disputes of Material Fact, Made Credibility Findings, and Weighed Evidence.

A. The Court Resolved Disputed Issues of Material Fact.

1. Irrespective of how the Court resolves the question of the applicable standard and its manageability, reversal is necessary because the three-judge court

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[16] Plaintiffs have not asserted a claim of viewpoint discrimination, and with good reason: A statute establishing a districting map is, on its face, neutral as to political affiliation, and the First Amendment is not violated by neutral statutes that may negatively affect some groups or individuals more than others. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 695 (2010) ("'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

committed a more extreme version of the error for which this Court reversed a three-judge court's entry of summary judgment in *Hunt v. Cromartie*, 526 U.S. 541 (1999).[17] Like the three-judge court in *Hunt*, the court below impermissibly resolved issues of "disputed fact," "credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due," and otherwise engaged in "'[c]redibility determinations'" and "'the weighing of the evidence,'" which are functions for the trier-of-fact and "not suited for summary disposition." *Id.* at 552, 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). But unlike *Hunt*, where the lower court resolved disputed facts as to only one element of a racial-gerrymandering claim, i.e., the legislature's "impermissible racial motivation," 526 U.S. at 552, the three-judge court here resolved disputed facts pertaining to multiple elements of plaintiffs' claims, and did so by crediting and relying on evidence that is the subject of still-unresolved and timely hearsay and other objections to admissibility.

a. Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the

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[17] On appeal from a grant of summary judgment, this Court "may examine the record *de novo* without relying on the lower courts' understanding." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (citation omitted). When reviewing a ruling on cross-motions for summary judgment, the Court applies the same Rule 56 standard that applies to all motions for summary judgment. *See, e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990); *Hunt*, 526 U.S. at 552, 554.

requirement that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Id.* at 552 (quoting *Anderson*, 477 U.S. at 255). This requirement has added significance in a redistricting challenge, because of "'the sensitive nature of redistricting,'" "'the presumption of good faith that must be accorded legislative enactments,'" and "'the intrusive potential of judicial intervention into the legislative realm'"—considerations that tend to "tip the balance in favor of" the need for a trial before "making findings of fact" adverse to defendants. *Hunt*, 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. at 916-17). Consequently, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9, even when, "[v]iewed *in toto*, [plaintiffs'] evidence tends to support an inference that the State drew its district lines with an impermissible racial motive," *Hunt*, 526 U.S. at 548-49. Precedent suggests no reason summary judgment should be more easily granted to plaintiffs bringing partisan-gerrymandering claims.

Thus, even if plaintiffs' evidence "might *allow* the District Court to find" in their favor after a trial, or even if the summary judgment record "tends to support" plaintiffs' claims, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."[18] *Id.*

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[18] As it turned out, the reversal in *Hunt* was no mere formality. On remand, the three-judge court remained convinced of its previous summary judgment finding that the State "utilized race

at 552, 548, 553 (emphasis in original). Rather than heed these concerns, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See, e.g.*, J.S. App. 50a (stating that "[t]he State's argument . . . rings hollow"). This error infects the three-judge court's conclusions as to all elements of plaintiffs' claims, including injury, intent, and causation.

b. For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own depositions, that plaintiffs had not suffered chilling or associational injury, but had, instead, become more politically active post-redistricting. *See* Statement *supra* at 17-18. As the record also showed, the only evidence purporting to indicate chilling of political activity constituted inadmissible hearsay: plaintiffs' descriptions of what some unidentified persons said or felt about voting.[19] Dkt. 201, at 16. Plaintiffs' descriptions of conversations with unnamed persons convey statements by unidentified out-of-court declarants, offered "for the truth of the matter asserted," and thus are hearsay, Fed. R. Evid. 801(c)(2), "inadmissible

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as the predominant factor" in drawing a district and, after a trial, made the same finding. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420. On appeal, this Court reversed that finding as clearly erroneous and upheld the challenged redistricting plan. *Easley*, 532 U.S. at 258.

[19] The only non-hearsay evidence plaintiffs presented on this subject was deposition testimony of plaintiff Ned Cueman, who described himself as "disoriented" or "disconnected," Dkt. 177-1, at 24, but conceded that post-redistricting he continued his political engagement by voting regularly, J.A. 357.

at trial," and "cannot be considered on a motion for summary judgment," *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998).

B. The Court Failed to Resolve Material Evidentiary Objections.

"Before ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). Yet, rather than either disregard these hearsay statements or rule on defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," J.S. App. 60a-61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible," *Vazquez*, 134 F.3d at 34. *See* J.S. App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); *id.* 62a (same); *id.* 27a (she frequently met potential Republican voters who "'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); *id.* 63a (same); *id.* 74a (crediting same hearsay statements). The court employed the statements for "the truth of the matter asserted." *See* J.S. App. 62a (crediting statements as "clear evidence" of "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters"). The court never addressed

defendants' hearsay objections to these statements nor identified any applicable exception to the hearsay rule. Instead, the court inaccurately characterized these hearsay statements as among "undisputed facts of record." J.S. App. 61a.

Similarly, to demonstrate that Republican political participation in the Sixth District remained comparatively undeterred after the 2011 redistricting, defendants presented evidence showing increases in the district's Republican voter registration and Republican voter turnout in general elections. *See* J.A. 1054-58; 1059-83. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: the court (1) looked at Sixth District Republican voters' low turnout in the 2014 primary, J.S. App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[20] and (2) credited hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel filed more than 13 months after the close of discovery, approximately a year after cross-motions for summary judgment were briefed, and two weeks after plaintiffs declined the court's invitation to reopen discovery.

The referenced campaign-finance information was the subject of defendants' motion to exclude on grounds

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[20] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

of hearsay, the affiant's lack of personal knowledge, and the widely recognized inaccuracy and unreliability of campaign-finance reports, which render them unsuitable for judicial notice. J.A. 1249-50; Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. J.A. 1251-52. Instead, the order merely cited cases pertaining to bench trials and not involving hearsay objections, before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." J.A. 1252. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial."). Because the campaign-finance evidence was submitted in the final round of briefing permitted by the court, long after the close of discovery, defendants had no opportunity to probe the information's veracity through discovery or submit rebuttal evidence. In any case, the selective campaign-finance information cited by plaintiffs' counsel is unrepresentative of overall campaign contributions since redistricting. For example, other campaign-finance reports on file show that contributions to Roscoe Bartlett's campaign committee *increased* by 2,500% between 2010 and the post-redistricting 2012 election.[21]

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[21] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/.

C. The Court Improperly Weighed Evidence and Drew Inferences Against the Party Opposing Summary Judgment.

Similar departures from the summary judgment standard plague the court's intent analysis. The decision cites no evidence regarding the intent of the people who "adopted" the 2011 plan through referendum. As in *Hunt*, the court impermissibly gave greater weight to plaintiffs' evidence of the "legislature's motivation"—"a factual question"—while failing to accept defendants' alternative "motivation explanation as true, as the District Court was required to do in ruling on [plaintiffs'] motion for summary judgment." 526 U.S. at 549, 551. The court accepted plaintiffs' characterization of "the mapmakers' intent," J.S. App. 48a, and refused to accept as true, J.S. App. 50a-51a, defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions, including the rejection of a Chesapeake Bay crossing; deference to Prince George's County residents' desire for their county to have two districts, neither of them shared by Montgomery County; and heeding constituents' public testimony expressing the importance of having a district to serve the I-270 corridor economic region, *e.g.* J.A. 937-38 ¶¶ 8-9; *see* Dkt. 201, at 3-6 (discussing evidence of varied legislative motives). In so doing, the court weighed evidence. *See, e.g.*, J.S. App. 14a-16a, 48a-49a (relying on deposition testimony of Congressional consultant Eric Hawkins, J.A. 90-156, while failing to acknowledge material contradictory testimony in the affidavit of State legislative

staffer Yaakov Weissmann, J.A. 936-39, and elsewhere in the record); J.S. App. 13a, 55a (selectively crediting and disbelieving the former Governor's deposition testimony). Once again, the court credited inadmissible hearsay to which defendants had objected, Dkt. 201, at 6-7, and did so without addressing the hearsay objection, *see* J.S. App. 22a (quoting foundationless hearsay email, Dkt. 177-58).

Perhaps the decision's most conspicuous failure to acknowledge a genuine dispute of material fact appears in its finding that plaintiffs have satisfied the causation element. J.S. App. 54a-56a. This conclusion contradicts the court's previous determination, based on the same evidentiary record, that it was "not persuaded" that plaintiffs "have met their burden of proof with respect to causation." J.S. App. 100a. If, as the court previously acknowledged, it "cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*," *id.*, then, at a minimum, "the evidence is susceptible of different interpretations or inferences by the trier of fact," and, consequently, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate[.]" *Hunt*, 526 U.S. at 553.

III. Equitable Principles and the Public Interest Preclude Injunctive Relief.

The Court should also reverse because the three-judge court abused its discretion in (1) erroneously

concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction; and (2) contradicting this Court's finding that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944; J.S. App. 66a. The court also failed to consider that the public interest weighs against granting an injunction at this late stage.

A. The Court Failed to Properly Apply Equitable Principles.

1. Entry of an injunction is "a matter of equitable discretion," and success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek*, 138 S. Ct. at 1943-44. This principle applies equally to requests for preliminary and permanent injunctions. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). This Court has recognized that "equitable considerations" apply to redistricting cases and may warrant withholding relief "even though the existing apportionment scheme was found invalid." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see Benisek*, 138 S. Ct. at 1944 (diligence is required for injunctive relief "in election law cases as elsewhere").

2. The three-judge court was under the incorrect impression that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," J.S. App. 66a, but that notion disregards well-established equitable principles, including laches, that "can bar constitutional claims" altogether, even First Amendment claims. *Southside Fair Hous. Comm. v. City of N.Y.*, 928 F.2d 1336, 1354, 1355-56 (2d Cir. 1991) (holding plaintiffs' First Amendment claims barred by laches in addition to other deficiencies). The idea that plaintiffs' delay can be forgotten when it is time to consider whether to order a permanent injunction also leads to the unjust result that plaintiffs benefit from the prejudice their delay caused to the defendants' ability to defend the case on the merits. For example, due to these plaintiffs' years of delay in filing and then later amending the complaint, defendants suffered substantial prejudice to their ability to preserve and access material evidence, *see* Dkt. 186-1, at 56 (summarizing evidence), particularly because the initial plaintiffs in this lawsuit disclaimed any reliance on the specific intent of legislators, Dkt. 11 ¶¶ 2, 23.

a. Other courts have applied equitable principles in withholding injunctive relief for constitutional violations when, as in this case, the relief would apply "for only the last election in the decade" prior to completion of the next decennial census. *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 695 (N.D. Ill. 1969) (three-judge court); *Maryland Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (same). In the face of "inexcusable

and unreasonable" delay, "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 102, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290, 1291 (11th Cir. 2001) (delay of "over six years" sufficient to bar injunctive relief under laches doctrine); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (three-judge court), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

b. Proximity to an upcoming census creates a presumption against ordering a map redrawn, because "two reapportionments within a short period of two years would greatly prejudice the [jurisdiction] and its citizens by creating instability and dislocation in the electoral system," "imposing great financial and logistical burdens," and jeopardizing "fair and accurate representation for the citizens" through the use of stale census data. *White*, 909 F.2d at 104. Even courts finding an apportionment invalid have nonetheless recognized the public interest in avoiding injunctions that necessitate resort to outdated census data. *Skolnick*, 307 F. Supp. at 694-95 (three-judge court finding plan unconstitutional for lack of population equality but declining to impose injunction); *see Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (Even where prior district boundaries may have been racially motivated, the "passage of six years" "does caution against wholesale alteration" of district lines "based on out-of-date census figures when the process will in any case have to be done in the immediate future" because of a new census.).

c. In June 2018, this Court concluded that plaintiffs did not "show reasonable diligence," not only in belatedly requesting a preliminary injunction, but more significantly, in "fail[ing] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs' own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary years-long delay in asking for preliminary injunctive relief," *id.*, caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed," *id.*, it has been seven years, and four general elections, after the 2011 map was adopted and nearly five years since the original complaint was filed. The loss of the additional election cycle was the direct consequence of plaintiffs' late-filed request for preliminary injunction, an optional litigation strategy that plaintiffs opted to pursue instead of pressing their claim for permanent injunction.

d. The three-judge court sought to justify its entry of injunctive relief, notwithstanding plaintiffs' delay, by declaring that this case's protracted procedural history "cannot be attributed to the plaintiffs, but to process." J.S. App. 66a. That finding contradicts this Court's assessment that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. Though the three-judge court cited the prayer for permanent injunction that appeared in plaintiffs' 2013 complaint, J.S. App. 66a, as this Court observed, that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944.

B. The Court Failed to Consider the Public Interest.

Whether considering preliminary or permanent relief, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted). In its discussion of remedy, J.S. App. 64a-67a, the district court did not address the impact its injunction will have on those voters, other than plaintiffs, who have participated in four elections under the 2011 plan, including the large majority of voters who approved the plan at referendum and thereby exercised their right to determine "'what serves the public interest.'" *Eastlake*, 426 U.S. at 678 (citation omitted). Despite "the legal uncertainty surrounding any potential

remedy" due to *Rucho*'s pending appeal, *Benisek*, 138 S. Ct. at 1945, the three-judge court enjoined the State's 2011 congressional districting plan, J.S. App. 78a. Under these circumstances, entering the injunction was an abuse of discretion.

CONCLUSION

The Court should reverse and vacate the judgment of the United States District Court for the District of Maryland.

Respectfully submitted,

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In the Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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INTRODUCTION

A State may not inhibit "the political participation of some in order to enhance the relative influence of others." *McCutcheon* v. *FEC*, 572 U.S. 185, 191 (2014). Given this insuperable principle, counsel for the State agreed last Term that if "the Maryland legislature passed a statute and said, in the next round of reapportionment, we're going to create seven Democratic districts and one Republican district," it would be unconstitutional "viewpoint discrimination." Tr. 45:9-47:22, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). Yet in practical effect, that is exactly what Maryland did during the 2011 congressional redistricting process.

Since receiving an eighth congressional seat in 1963, Maryland voters had generally sent five or six Democrats and two or three Republicans to the U.S. House of Representatives, roughly reflecting the breakdown of Maryland's electorate. But Governor Martin O'Malley and Democratic officials in control of the Maryland legislature disapproved of citizens' successful support of the incumbent Republican congressmen in the State's First and Sixth Districts. These officials considered it their duty to bring that success to an end—to break the majority in one of Maryland's two Republican districts and ensure a "7-1" delegation. The record overwhelmingly confirms this goal.

Early on, according to Governor O'Malley, "a decision was made to go for the Sixth." 1JA44. To that end, mapdrawers methodically dismantled the Sixth District, breaking apart large swaths of territory dominated by rural Republicans and replacing them with smaller, densely populated areas dominated by suburban Democrats. In total, the mapdrawers cut more than 360,000 citizens out of the district and jammed around 350,000 back in—vastly more than the

10,189-person adjustment necessary to comply with the one-person-one-vote rule. The result was a 90,000-voter swing in favor of registered Democrats—a political earthquake for a district where typically 230,000 voters cast ballots in midterm elections.

The gerrymander was a resounding success. Republican votes were diluted so substantially that a Democrat has won every election since 2011—including in 2014, a wave year for Republicans. Interest in Republican congressional politics in the district has also declined significantly. As supporters of the Republican Party in the area have become disengaged and disinterested, fewer voters have turned out for the primaries, and party fundraising has fallen off.

As the district court held below, the 2011 gerrymander violated appellees' First Amendment rights. For its part, the State now candidly admits (Br. 27) that "excessive partisanship in districting is impermissible." And it does not deny that government regulation may not favor some citizens over others on the basis of their political views. The State's position, instead, is that the First Amendment framework employed below is not cognizable in federal court.

That is wrong. The Court has held repeatedly that election regulations may not unduly "burden[] the availability of political opportunity" of particular groups of citizens on the basis of their political views. *Clements* v. *Fashing*, 457 U.S. 957, 964-65 (1982). In particular, "schemes that impose burdens on new or small political parties or independent candidates" violate "First Amendment interests in ensuring freedom of association" when they concretely inhibit individuals' "association with particular political parties" and "mak[e] it virtually impossible for" candidates from disfavored parties to achieve electoral success. *Ibid.* Accord, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780

(1983); *Cook* v. *Gralike*, 531 U.S. 510 (2001). That is exactly what a partisan gerrymander does—and if those burdens are capable of principled evaluation in the ballot-access context, they are equally so here.

Application of the First Amendment to partisan gerrymandering would not outlaw politics in redistricting; mapdrawers would be free to use political data in pursuit of balanced and competitive maps, and to undo past gerrymanders. The First Amendment framework provides a more workable and analytically sound approach to evaluating the problem of partisan gerrymandering—it focuses on *what kind* of political considerations are impermissible, not just *how much* political consideration is too much. Many political considerations that play important, proven roles in redistricting remain lawful under the First Amendment.

STATEMENT

A. Factual background

1. ***The drafting process.*** Maryland set out after the 2010 Census to redraw its congressional district lines. The redistricting process was overseen by then-Governor Martin O'Malley, who set in motion two parallel procedures for drafting a new map. The first was a public-facing process led by the Governor's Redistricting Advisory Committee (GRAC). The second was a backroom process led by key legislative staffers and Maryland's Democratic congressional delegation, together with the consulting firm they hired.

Governor O'Malley appointed all five members of the GRAC, including chair Jeanne Hitchcock, Speaker of the House Michael Busch, and Senate President Thomas "Mike" Miller. 3JA657 (¶¶19-20).

The GRAC's mission was "to solicit public input on the map, hold a number of public hearings all around

the state, and allow people to voice their concerns, their desires." 1JA36. It held 12 public hearings during the summer of 2011 concerning both federal congressional and state legislative redistricting plans. 3JA657 (¶22). Because the GRAC was not itself drafting the map, however, there is no evidence that any relevant public comments were actually taken into account by the mapdrawers.

At the same time that the GRAC's public hearings were being held, Governor O'Malley tasked Maryland's Democratic members of Congress—led by confessed "serial gerrymanderer" Steny Hoyer (2JA581)—with drafting the redistricting plan. See 1JA57. Accord 1JA198 (Maryland Senate President Mike Miller testifying that the map "primarily was drawn by the congressional people").

Congressman Hoyer, in turn, retained NCEC Services to draw the delegation's map. 1JA99-100. NCEC "specializes in electoral analysis, campaign strategy, political targeting, and [mapdrawing] services" (3JA761), exclusively for the Democratic Party (1JA97).

NCEC's Eric Hawkins was engaged to analyze Maryland's 2011 redistricting plan and to draw maps. 3JA762. He used software called Maptitude for Redistricting. 1JA219. Maptitude allows users, among other things, to "create districts using any level of geography," "add political data and election results," and "update historic election results to new political boundaries." 3JA659 (¶28); 3JA676-87.

Detailed data reflecting Maryland citizens' voting histories and party affiliations were compiled for use in the redistricting process (3JA659 (¶29)), including precinct-level data on "voter registration, voter turnout and election results" (1JA175). Accord 4JA936-37.

To evaluate the predicted electoral outcomes of the draft maps, Hawkins (and others) used this data and a proprietary metric called the Democratic Performance Index, or DPI. 1JA93, 126. Accord 4JA936-37. Whereas a score above 50 indicates a district likely to be won by a Democrat, a score below 50 indicates a district likely to be won by a Republican. See 4JA1123-24. The DPI is, in short, a metric that predicts future electoral outcomes by analyzing "past voting history." 1JA93. Voting history is the most reliable indicator of future voting behavior. See Dkt. 210, at 10-12.

Hawkins worked directly with Maryland state officials to draft the 2011 redistricting map. While the DPI belongs exclusively to NCEC (1JA126, 188), references to "democratic performance" and "DPI" appear throughout documents produced by Maryland state lawmakers and their staffers. 3JA789-92. The map files produced by Jake Weissmann—the Miller staffer who was "primarily charged with using the Maptitude software to create draft plans" onsite (4JA936-37)—had the DPI metric built into them. 4JA1087; 4JA936 (¶4). And emails confirm that Weissmann was actively collaborating with Hawkins through the end of the mapdrawing process. 3JA823, 825.

Hawkins drew upwards of ten draft maps and analyzed how they would affect the outcomes of future elections if adopted. 1JA100-01. According to a September 15, 2011 NCEC spreadsheet, he carefully analyzed at least six potential maps alongside proposals submitted by third parties. 3JA794-97. Each of the six NCEC-drafted options would have resulted in a federal DPI of 52 or greater for the Sixth District. *Ibid.* The maps proposed by third parties (and rejected by lawmakers) would have resulted in a far smaller DPI for the Sixth District. *Ibid.* The maps proposed by the Legislative Black Caucus, for example, would have

resulted in a federal DPI well below 50. 3JA794. As Jason Gleason, a staffer to Congressman Sarbanes, lamented, the Black Caucus proposal was "a recipe for 5-3 not 7-1." 3JA822.

After conferring with Maryland legislative staffers and refining the maps (1JA144-47, 86-87), two conceptual blueprints were presented for the redistricting plan: "Congressional Option 1" and "Congressional Option 2." 4JA1089, 1097-98. The DPI score for Option 1 was lower than it was for Option 2. 4JA1089.

Maryland officials deemed Option 1 "not acceptable" (4JA937 (¶9)) and thus pressed forward with Option 2, which became the blueprint for the map that was ultimately enacted. One of the notable differences between Option 2 and the final map is that the DPI increased yet further. 3JA826.

After Senate President Miller introduced the final map in the Senate, Democrats jammed the bill through both legislative chambers in just two days (3JA660 (¶34)), leaving no time for debate. The bill was enacted without the support of a single Republican lawmaker (3JA660 (¶36)), none of whom even saw the final map until it was introduced in the Senate.

2. ***Intent.*** Governor O'Malley and others involved in the redistricting have candidly acknowledged their intent to prevent Republican voters in the Sixth District from reelecting Congressman Roscoe Bartlett.

According to Hawkins, the dual "goals" of his consulting arrangement were to maximize "incumbent protection" for Democratic members of Congress and to increase the DPI of the Sixth District "to see if there was a possibility for another Democratic district." 1JA107-08. The goal, in other words, was to change the composition of the delegation from six Democrats and two Republicans (a "6-2" plan) to seven Democrats and

one Republican (a "7-1" plan). 1JA104. Accord 1JA108 (Hawkins testifying that the plan was to create "a seventh [Democratic] seat, regardless of where it was, just to create a 7-1 split").

Hawkins explored two ways of drawing a 7-1 map: one that cracked the Republican majority in the First District and one that cracked it in the Sixth District. 1JA105-06. Because Maryland lawmakers were concerned that targeting the First District would require "jumping over the Chesapeake Bay" (1JA77), they chose the Sixth District (1JA44). As Governor O'Malley explained in deposition: "Was a decision made? I suppose in the sense that we decided not to try to cross the Chesapeake Bay, that a decision was made to go for the Sixth." *Ibid.*[1]

Governor O'Malley, time and again, confirmed that the State's express goal in redistricting was to flip the Sixth District. He and others in the party leadership wanted to "re[draw] the lines" of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat" in Maryland's congressional delegation. 1JA44. Thus, Governor O'Malley acknowledged that, in addition to complying with the one-person-one-vote principle and the non-retrogression rule of Section 2 of the Voting Rights Act, "it was also my intent to * * * create a district where the people would be more likely to elect a Democrat than a Republican, yes, this was clearly my intent." 1JA79-80. Accord 1JA57, 78-79. And he expressly confirmed that, to flip the Sixth District to Democratic control, the mapdrawers "look[ed] at voting

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[1] Hawkins and the Maryland staffers with whom he collaborated also considered an "8-0 map," but this proved infeasible given concern for protecting incumbent Democrats (1JA104) and the preference not to cross the Chesapeake Bay (4JA913, 916).

histories in addition to voting registration—party affiliation." 1JA69.

The goal of "pick[ing] up a seventh seat * * * by targeting Roscoe Bartlett" (1JA232) was confirmed repeatedly by numerous other individuals. Delegate Curt Anderson, for example, explained in a press interview that "currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one." 3JA664 (¶47). Attorney General Douglas Gansler acknowledged that the goal was "to make it 7 to 1" (3JA752), as did Congresswoman Donna Edwards, who confirmed the goal "of drawing a seventh district for Democrats" (3JA662 (¶41)). And state officials repeatedly referred to the map as a "7-1 plan." See, *e.g.*, 3JA823 (email to Jason Gleason stating that Hawkins "worked out a new version of the 7-1 plan") . See also generally 3JA661-65 (¶¶40-51).

3. a. ***Burden.*** Given the relatively modest population growth in the district over the prior decade, only slight alterations to the Sixth District's lines were necessary to comply with the one-person-one-vote mandate. The Sixth District "could have reasonably been immune to substantial changes" after the 2010 census because the district "was located in the northwest corner of the state and needed only to shed 10,189 total population." 3JA767.

But to achieve the goal of ensuring that the Republican majority in the Sixth District would not be able to reelect Congressman Bartlett, the mapdrawers changed the district's boundaries so that they extended to the south, deep into Montgomery County, a Democratic stronghold. 1JA106-07.

In doing so, the map moved over 360,000 citizens out of—and around 350,000 citizens into—the district,

shuffling nearly half of its population. 3JA772-73. The plan removed all areas of Harford, Baltimore, and Carroll counties that had been in the Sixth District. 3JA801-02. In Frederick County, the plan removed all but the Democratic-leaning areas of the City of Frederick, southern areas of the county, and a narrow geographic connector to the Sixth District (3JA774-75, 784), splitting the county between two congressional districts for the first time since 1840 (1JA181-82).

These targeted subtractions and additions to the district diluted Republican votes very efficiently, putting Republicans at a manifest electoral disadvantage. "In the course of redrawing the district, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district." 3JA767. Also added to the Sixth District were 7,643 registered independent voters. 3JA766. This "massive interchange of territory" upended the political complexion of the district. 3JA808 (¶140).

The district's political complexion was thus almost perfectly inverted (3JA656 (¶10); 3JA666 (¶53)):

	Pre-gerrymander, Oct. 17, 2010		Post-gerrymander, Oct. 21, 2012	
Reg'd Rep.	208,024	46.7%	145,620	33.3%
Reg'd Dem.	159,715	35.8%	192,820	44.1%
Difference	+48,309	+10.9%	-47,200	-10.8%

b. The result was a legally cognizable dilution of Republican votes. 3JA764-66. Using an analysis drawn from Section 2 vote dilution cases, our redistricting expert, Dr. Michael McDonald, concluded that registered Republican voters are politically cohesive and

that both Republicans and Democrats engage in bloc voting. See 3JA764, 767-70.

Dr. McDonald's findings of political cohesion and bloc voting were corroborated by pre- and post-gerrymander election returns, which reflect votes cast by all voters, including independents. The data show, in particular (5JA1188, 1209-10 (¶¶13-15)):

Precincts that were ↓	Vote share for Republican congressional candidate as percentage of election-day votes				
	2008	2010	2012	2014	2016
retained	53.7%	57.8%	47.8%	59.5%	51.9%
removed	61.6%	65.7%	64.2%	71.5%	69.3%
added	28.7%	34.7%	30.3%	37.1%	32.1%

Because Republican voters—those who, irrespective of their formal party registrations, generally cast their votes for Republican candidates—are sufficiently numerous and geographically compact to form the majority of a reasonably drawn district in northwest Maryland (3JA655 (¶8), 4JA949-56), these findings were "incontrovertible" evidence that the lines of the new Sixth District "diminish[ed] the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district." 3JA764. Accord 3JA766-70.

The State's principal expert, history professor Allan Lichtman, agreed: "[T]he 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan." 3JA827. Indeed, Dr. Lichtman described the degradation of Republican political opportunity as "obvious." 1JA255-56.

As further evidence of vote dilution, Dr. McDonald produced (3JA786-87) an alternative map under which plaintiffs' votes would have carried more weight. See also 3JA776. The map altered only the 2011 line between the Sixth and Eighth Districts, thus preserving the political judgments reflected in the shape of every other district in the State, including the decision to prevent the First District from crossing the Chesapeake Bay.

c. The practical consequences of this vote dilution were just as the mapdrawers intended. Whereas Congressman Bartlett had consistently won reelection in the Sixth District by double-digit margins over the past two decades (3JA655 (¶8)), Democrat John Delaney defeated him by a 20.9% margin in 2012 (3JA666 (¶54)). Delaney won re-election in 2014 (3JA666 (¶55)), even as the 2014 "elections saw sweeping gains by the Republican Party in the Senate, House, and in numerous gubernatorial, state, and local races" throughout the rest of the Nation (3JA878). He won again handily in 2016, with a 14.4% margin. 3JA666 (¶56). Delaney did not run for reelection in 2018, but his Democratic successor, David Trone, won that year with a 21% margin. See Amicus Br. of David Trone 1.

This was, of course, just what the mapdrawers' metrics predicted would happen. Both the DPI and the highly regarded Cook PVI (1JA259) showed that, because of the huge shift in the district's population from mostly Republican voters to mostly Democratic voters, the chances of a Republican victory in the district dropped from 99.7%-100% in 2010 to just 6%-7.5% in 2012. JS App. 24a-26a. According to the *Cook Political Report*, this was the single "most dramatic alteration[]" in a district's political complexion in 2011 anywhere in the Nation. 4JA885-88.

d. The evidence also demonstrates indisputable associational harms inflicted on plaintiffs (several of whom are party and former campaign officials) and on Republican voters in the area more generally.

Republican engagement in congressional politics has been depressed in counties comprising the old Sixth District. As plaintiff Sharon Strine explained, when she went canvassing in support of Republican candidates, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time. * * * [T]hey just feel disenfranchised that they can't, they don't have somebody that represents them anymore." 1JA306-07. Plaintiff Alonnie Ropp shared a similar view: Voters in the former Sixth District stopped voting after the redistricting because "they were confused about the candidates." 1JA328. "They didn't know who they should be engaging. It was a very confusing situation for them." *Ibid.*

Plaintiff Ned Cueman described the disruption of Republican-leaning communities as "a chop job." 2JA371. He explained that, after the gerrymander, "I have absolutely no connection with what is in this district except the portions of Frederick that were thrown in." *Ibid.*

These accounts are borne out by the data. To start, turnout for the Republican primary elections in midterm years—when congressional candidates are more likely to drive voters to the polls—has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary stood at 42.8%. 4JA1112. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. 4JA1118. Participation in midterm Republican primaries dropped similarly throughout all five counties comprising the old Sixth District. 4JA1112, 1118-19. Turnout has also decreased

for midterm general elections. 4JA1060, 1067-73, 1079-83.[2]

Fundraising by the Republican Central Committees in the counties that remained entirely in the Sixth District has also fallen off since the gerrymander. According to State Board of Elections campaign finance filings, fundraising during midterm election years has fallen by more than 12%. 5JA1216. Fundraising during presidential election years has suffered as well, dropping by over 6%. *Ibid.*

4. ***Causation.*** The evidence confirms beyond doubt that the political complexion of the Sixth District would not have been completely reconfigured, and Republicans' associational activities would not have been so badly hindered, but for the lawmakers' intent to burden Republicans' representational rights.

Governor O'Malley was explicit that state officials' effort to change the outcome of future elections in the Sixth District was subordinated only to their concern for the one-person-one-vote doctrine and to avoid "discriminat[ing] in any way against underrepresented minority groups." 1JA54. The State has presented no evidence suggesting that compliance with the one-person-one-vote standard or Section 2 of the Voting Rights Act, taken alone, would have necessitated *any* dilution of Republican votes in the Sixth District, much less dilution so substantial as actually seen.

Nor does the record otherwise reveal any plausible alternative explanation for the reconfiguration of the Sixth District. State officials have on occasion cited the

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[2] The State notes (Br. 17) that Republican registration increased in the district after the gerrymander. The same sources (1JA1054) show that Democratic registration increased at a greater pace. And there is no dispute that Republican *turnout* for midterm elections decreased. 4JA1060, 1067-73, 1079-83, 1112-19.

"I-270 corridor" as a "community of interest" as one rationale for the shape of the Sixth District. See, *e.g.*, 3JA707-08, 710. Yet none of those involved in the redistricting testified that they considered the I-270 corridor when drafting or evaluating the map. When asked whether he had considered "a community of interest related to the I-270 corridor when analyzing potential maps in the 2011 Maryland congressional redistricting process," Eric Hawkins replied, "No." 1JA137. When asked whether he had "at all consider[ed] commuting patterns on I-270 when [he] voted on the proposed congressional map," House Speaker Busch, who was on the GRAC and closely involved in the redistricting process, likewise responded "No. It never—never crossed my mind." 1JA245.

For her part, GRAC chair Jeanne Hitchcock confirmed that she was not provided with, and did not request, any information concerning the I-270 corridor during the redistricting process. 1JA165-66. So did Senate President Miller (1JA196), and Senate Majority Leader Garagiola (1JA239).

To be sure, testimony at the public hearings by Democratic party insiders appeared to promote the idea of migration along the "I-270 corridor." *E.g.*, 2JA418-20 (testimony of Sue Hecht, former Democratic house delegate); 2JA403-05 (testimony of Bob Kresslein, Maryland Democratic Party Treasurer). But because the GRAC was not itself drafting the map, there is no evidence that these public comments were actually taken into account by the mapdrawers. Ms. Hitchcock, for example, could not recall "any alterations that were made to the draft congressional maps * * * based on any testimony that was given at any of the GRAC hearings" concerning the I-270 corridor. Dkt. 177-8, at 123:16-20.

None of this is surprising, because the I-270 story is simply implausible. See 3JA805-09 (expert report of Dr. Peter Morrison).

B. Procedural background

1. Initial proceedings, the first appeal, and the amended complaint

Three *pro se* plaintiffs filed suit, challenging the 2011 gerrymander as (among other things) a violation of their First Amendment rights. Dkt. 11 ¶¶2, 23.

The district court dismissed without calling for a three-judge court. *Benisek* v. *Mack*, 11 F. Supp. 3d 516 (D. Md. 2014). The Fourth Circuit affirmed. *Benisek* v. *Mack*, 584 F. App'x 140 (4th Cir. 2014). This Court granted certiorari and reversed. *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015).

On remand, plaintiffs "promptly filed a second amended complaint in February 2016," about "one week after [the] three-judge court was empaneled." JS App. 29a. "The amended complaint added six additional plaintiffs and refined the [First Amendment] theory underlying their constitutional challenge." *Ibid.*

Plaintiffs alleged that:

- those responsible for the redistricting expressly considered citizens' voting histories and political party affiliations (*e.g.*, 3JA624, 629, 642 (¶¶38, 59, 101)), with a specific intent to disadvantage those voters in future elections because of their past support for Republican candidates (*e.g.*, 3JA624, 640-41 (¶¶38, 93, 95-97));
- the 2011 redistricting plan burdened Republican voters in the Sixth District by (a) diluting their votes so effectively that it prevented them from reelecting a Republican representative (3JA624, 638 (¶¶38, 85-87)); and (b) "chill[ing] and manip-

ulat[ing] political participation" in the district, including by making citizens less likely to vote and "less likely to participate actively in campaigning" (3JA645-46 (¶¶112-19)); and

- the State would not have drawn the map as it did without consideration of voting history and party affiliation (3JA646-48 (¶¶120-28)).

2. The denial of the motion to dismiss

The district court denied the State's motion to dismiss. JS App. 172a-25a. "[W]hen a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens," the majority explained, "the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." *Id.* at 195a. "The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id.* at 196a.

Observing that "there is no redistricting exception" to the First Amendment's protections, the majority concluded that a gerrymander plaintiff "must allege that those responsible for the map redrew the lines of his district with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." JS App. 198a-99a (emphasis omitted). Such a plaintiff must also prove a concrete harm and causation. *Id.* at 199a-202a.

Judge Bredar dissented. JS App. 206a-25a. He concluded that harm based on vote dilution is nonjusticiable (*id.* at 210a, 225a) but recognized that "[t]here may yet come a day when federal courts, finally armed

with a reliable standard, are equipped to adjudicate political gerrymandering claims." *Id.* at 224a.

3. The denial of preliminary relief and the second appeal

Following lengthy discovery, plaintiffs moved for a preliminary injunction and in the alternative for summary judgment. JS App. 30a. The State filed an opposition to the motion for a preliminary injunction and alternatively cross-moved for summary judgment. *Ibid.* The State did not argue, however, that there were any factual disputes necessitating a trial (Dkt. 186-1), and it disavowed the need for an evidentiary hearing on the preliminary injunction motion (Dkt. 180, at 6).

The district court denied a preliminary injunction and stayed the proceedings. JS App. 82a-119a. Judge Niemeyer dissented. *Id.* at 119a-71a.

This Court affirmed. *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (per curiam).

4. The unanimous entry of final judgment for plaintiffs

a. The parties subsequently filed a joint status report in which the State reaffirmed that "this matter is appropriate for resolution on summary judgment" without need for a trial. Dkt. 209, at 3.

The parties filed supplemental summary judgment briefs addressing the Court's decisions in this case and *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018). Our brief reiterated that plaintiffs had suffered vote dilution. Dkt. 210, at 5-15. It also stressed that Republican voters' associational activities had been chilled and disrupted by the gerrymander, including through depress-

ed voter interest, lower turnout, and reduced fundraising. *Id.* at 15-18.[3]

In support of the second point, we attached voting data and campaign finance reports publicly available on the State's own website, together with an affidavit that included basic arithmetic. 5JA1206-16.

The State did not offer additional data (then, or at any later time), nor did it ever purport to identify any genuine disputes of material fact. Instead, it moved two months later to strike the affidavit attached to our supplemental brief. 5JA1249-50. The district court denied the motion. 5JA1251-52.

b. On November 7, 2018—the day after the 2018 congressional elections—the three-judge court unanimously granted final judgment to plaintiffs and enjoined the State from using the 2011 redistricting map in future elections. JS App. 1a-77a.

Judge Niemeyer's lead opinion for the court, joined in by Judge Russell, held first that plaintiffs have standing. JS App. 43a-47a. "The plaintiffs in this case, unlike the plaintiffs in *Gill* have brought and pursued the kind of single-district challenge that *Gill* recognized as providing * * * standing." *Id.* at 47a.

"Turning to the merits," the court ruled that the "undisputed facts" in the record "establish[] each element of [plaintiffs'] First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history." JS App. 48a.

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[3] The State incorrectly calls this second point a "new claim." Br. 22. The second amended complaint alleged associational burdens (3JA645-46 (¶¶112-19)), and our opposition to the motion to dismiss defended on that ground (Dkt. 68, at 31-32). Our summary judgment brief likewise pointed to evidence that political engagement had been "chilled and disrupted." Dkt. 177-1, at 18-19.

> ***First***, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's [eight-member] congressional delegation.

JS App. 48a. (boldface added). Indeed, "the record is replete with direct evidence of this precise purpose." *Id.* at 49a.

The court rejected the State's argument that an intent to help Democrats is not the same as an intent to harm Republicans: "If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party." JS App. 50a.

The court also rejected the State's argument that the First Amendment requires proof that lawmakers "target[ed] *specific* voters based on their individual party affiliation or voting history." JS App. 51a. "The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment." *Ibid.*

> ***Second***, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights.

JS App. 52a (boldface added). On this point, the court concluded that "plaintiffs must have experienced a

'demonstrable and concrete adverse effect' on their right to have 'an equally effective voice in the election' of a representative, which they can establish by showing that they have been placed at a concrete electoral disadvantage." *Ibid.* And "[t]he plaintiffs here have made that showing" with evidence of vote dilution confirmed by both parties' experts. *Id.* at 53a.

Drawing on Justice Kagan's concurring opinion in *Gill*, the court held further that "plaintiffs can prove injury in the form of associational harm, as 'distinct from vote dilution,' by showing that the State has 'burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objectives.'" JS App. 58a (quoting 138 S. Ct. at 1938-39).

Here too, the court held, "the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights," in several ways. JS App. 61a. For example, "voter engagement in support of the Republican Party dropped significantly" following the gerrymander. *Id.* at 62a. Testimony thus "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters," making it more difficult for plaintiffs and other Republicans "to 'band together in promoting among the electorate candidates who espouse their political views.'" *Ibid.* In addition, there was undisputed evidence "that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections." *Id.* at 63a.

> ***Finally***, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries

> would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

JS App. 54a (boldface added). And it was the same "reshuffling that caused the associational harms noted." *Id.* at 63a-64a.

Having held that the undisputed record evidence established a First Amendment violation, the court addressed the standard for entering a permanent injunction. On this score, the court emphasized that plaintiffs' request for permanent injunctive relief dates to the original complaint, filed in 2013. JS App. 66a. "While it is true that the case has dragged on" in the interim, the court found that the "protraction cannot be attributed to the plaintiffs, but to process." *Ibid.* The court thus held that both plaintiffs and defendants had been diligent in their litigation of the case. *Ibid.*

Concluding that the "balance of the equities" and the "public interest" both favor a permanent injunction (JS App. 64a-67a), the court enjoined the State from using the 2011 redistricting map in future elections and ordered the preparation of a new map.

c. Chief Judge Bredar concurred in the judgment in an opinion also joined by Judge Russell. JS App. 67a-76a. "Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win," he reasoned, "the State certainly caused harm" by breaking apart Republican communities of interest and inhibiting their associations. *Id.* at 72a.

d. The State moved for a discretionary stay of the injunction. Dkt. 226. Plaintiffs consented on condition that (1) the parties brief jurisdiction before this Court on an expedited schedule, and (2) the State stipulate that there will be sufficient time to draw a new map

before the 2020 elections following a decision by this Court by June 2019. 5JA1347-49.

SUMMARY OF ARGUMENT

I. Government regulation may not favor one citizen over another on the basis of his or her political views. Thus, the government offends the First Amendment when it imposes burdens on certain groups of citizens based on the content of their expression.

That is exactly what a partisan gerrymander does: It inflicts concrete burdens (vote dilution and associational disruptions) on a particular group of citizens because government officials disapprove of those citizens' voting histories and political-party affiliations. That is a violation of the First Amendment.

Gerrymander plaintiffs are entitled to relief under the First Amendment when they prove that mapdrawers deliberately diluted their votes or disrupted their associational activities because of their political views, producing a discernable, concrete injury.

II. Plaintiffs' First Amendment claim is justiciable. Although suits challenging partisan gerrymanders are likely to have political consequences, that alone does not make them nonjusticiable "political questions." The question is whether there are principled and manageable standards for decision; if there are, the courts must hear the case.

The First Amendment rubric offers manageable standards for judging partisan gerrymanders. Inquiry into legislative intent, even when intent does not appear on the face of the challenged law, is a familiar exercise for federal courts. This case confirms that the inquiry is manageable.

The burden prong of the First Amendment framework is equally manageable. The inquiry asks whether

the gerrymander imposed a discernable and concrete burden on the targeted voters. The gerrymander here at issue did so in two ways: First, it diluted plaintiffs' votes, so much so that they and others who share their views have been unable to elect a representative of their choice. Second, it has manifestly burdened their associational activities, including by demonstrably depressing voter interest in congressional politics. Judicial analysis of these burdens mirrors the analysis undertaken in other constitutional contexts, including the Court's ballot-access cases.

III. Application of the First Amendment in this context does not mean extirpating politics from redistricting. Mapdrawers are free to continue using political data in pursuit of balanced and competitive maps and to undo past partisan gerrymanders. And the First Amendment does not impugn the wide range of very important political considerations in redistricting that do not entail targeting particular groups of citizens on the basis of their political views.

IV. The district court properly entered final judgment and a permanent injunction for plaintiffs. To begin with, the State waived any argument that there were genuine disputes warranting a trial. Indeed, its conduct below may be best understood as having submitted the case to the district court for judgment on the papers.

Regardless, the State has not identified any genuine disputes of material fact. The evidence concerning intent was entirely one-sided; no rational finder of fact could have ruled in the State's favor. The same goes for associational burdens.

The State's evidentiary objections are meritless. The proffered testimony was not hearsay, and there was nothing problematic in the denial of those objec-

tions *sub silentio*. The campaign finance reports also were plainly admissible.

Finally, the district court acted well within its discretion to enter a permanent injunction. It correctly concluded that both sides litigated the case diligently. This Court's affirmance of the district court's denial of preliminary relief for the 2018 election did not constrain that court's discretion to enter a permanent injunction for plaintiffs.

ARGUMENT

After nearly five years of hard-fought litigation, the district court entered a unanimous final judgment in favor of plaintiffs, enjoining enforcement of Maryland's unlawful 2011 political gerrymander of its Sixth Congressional District.

The standards adopted and applied by the district court, grounded in settled First Amendment doctrine, are readily justiciable. And plaintiffs' entitlement to relief under those standards is beyond dispute. The Court accordingly should affirm.

I. PARTISAN GERRYMANDERING VIOLATES THE FIRST AMENDMENT

A. States may not burden their citizens for expressing disfavored political beliefs

It is a foundational First Amendment rule that States may not deny benefits to, or impose burdens on, citizens because of their political views. "[G]overnment regulation may not favor one speaker over another," and "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Thus, "the government offends the First Amendment when it imposes," for example, "financial burdens on certain speakers based on the

content of their expression." *Ibid.* (citing *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

This essential rule is not context-dependent. It applies to public employment decisions (*O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996)), government contracts (*Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996)), state grant support (*Rosenberger*, 515 U.S. at 827-31), and prisoner benefits (*Ortiz* v. *Jordan*, 562 U.S. 180 (2011)). In these cases and many others, the First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their views.

When a State imposes a burden on individuals because of their *past* expression—as opposed to regulating expression prospectively—this Court's cases often describe the violation as "retaliation." *E.g.*, *Lozman* v. *Riviera Beach*, 138 S. Ct. 1945, 1949 (2018); *Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998) (similar). But elsewhere—including in the context of political patronage—the Court has used the same analytical framework without invoking the label "retaliation." See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti* v. *Fenkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality).

Thus, the central question in a First Amendment challenge to partisan gerrymandering is not whether lawmakers acted with vengeance or "malicious retribution" per se (State Br. 45); rather, it is whether they have burdened a particular group of voters "*because of* [those voters'] political association, participation in the electoral process, voting history, or expression of political views." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (emphasis added). No more, no less.

The focus is process-based. A state official may fire a subordinate, a police officer may arrest a pedestrian, and a prison guard may deny a prisoner some privilege for a wide range of permissible reasons. But even though the government may deny a benefit or impose a burden "for any number of reasons, there are some reasons upon which the government may not rely." *Branti*, 445 U.S. at 514-15 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). Among those is an intent to burden individuals because of their points of view, "[f]or if the government could" impose a burden on or "deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized." *Ibid.* (quoting same).

B. Partisan gerrymandering violates these basic First Amendment principles

1. This First Amendment framework is an appropriate fit to the constitutional violation in this case. Partisan gerrymandering is the infliction of concrete burdens (vote dilution and associational harms) on a particular group of citizens because of official disapproval of the views expressed by those citizens at the ballot box and in their association with a particular political party.

"Political belief and association constitute the core of those activities protected by the First Amendment." *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 356 (plurality)). Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968).

Casting a ballot for one candidate or another is perhaps the most fundamental expression of a citizen's political beliefs. "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty'" protected by the Constitution. *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986). And "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Ibid.* Among the "broad spectrum of roles in [a political party]'s activities" is "casting [one's] votes for some or all of the Party's candidates." *Id.* at 215.

It follows that a burden deliberately imposed upon particular citizens because of the views reflected in their prior votes and party affiliations is a burden upon protected speech.

"[T]here is no redistricting exception to [the] well-established * * * [and] fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights." JS App. 198a. Because there is a "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)), "significant First Amendment concerns arise when a State purposely subjects a group of voters or their party to disfavored treatment" in redistricting. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

Applied in this context, the First Amendment framework asks three questions:

1. Did the State consider citizens' protected First Amendment conduct with an intent to burden those citizens because of their political beliefs?
2. If so, did the redistricting map, in fact, dilute the votes of the targeted citizens or disrupt

their political association in a discernable and concrete way?

3. If so, is there a constitutionally acceptable explanation for the map's ill effects, independent of the intent to discriminate on the basis of political belief?

It makes no difference that the drawing of congressional districts is a political function committed by the Constitution to the States. See U.S. Const. art. I, § 4. In redistricting, as in any other context, "a denial of constitutionally protected rights demands judicial protection." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). States can no more violate the First Amendment when engaging in redistricting than they may violate the Fourteenth Amendment.

2. The State responds (Br. 45) that application of the First Amendment turns on a "legal fiction" that "unfairly treats each political party's natural inclination to serve its members' interests as if it were the equivalent of malicious retribution against members of a competing party." The State implies that recognition of the First Amendment's role in this context would mean that legislators in the majority violate the Constitution every time they enact a law that advantages them politically at the cost of the minority.

That misconstrues our theory, which is that lawmakers may not target particular groups of private citizens for disfavored treatment on the basis of those citizens' political views, including past voting history. This has nothing to do with lawmakers' advancing policies of general application that they and their supporters prefer but their political opponents do not. Such legislative actions involve eminently permissible differences of opinion concerning public policy—not discrimination against particular *groups of voters*

based on official disapproval of those voters' expressive conduct. The gerrymander in this case involved such discrimination, and thus constituted unlawful "government regulation * * * favor[ing] one speaker over another." *Rosenberger*, 515 U.S. at 828.

II. PLAINTIFFS' FIRST AMENDMENT CLAIM IS JUSTICIABLE

The State has never expressly disagreed with the basic principles underlying plaintiffs' First Amendment claim. It has never asserted a right to use redistricting to burden voters by reason of their political views. Indeed, the State now acknowledges (Br. 31-32) that "excessive partisanship in creating a districting plan is impermissible" and agrees (*ibid.*) that "[t]his Court can and should determine a manageable standard * * * to remedy partisan gerrymanders."

Thus, the State's principal bid for reversal hinges on its claim that plaintiffs' First Amendment claim is nonjusticiable. This Court's cases show otherwise.

A. Political consequences do not make for "political questions"

1. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky* v. *Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821)). Deciding whether official governmental conduct "exceeds whatever authority has been committed" to the officials undertaking it is "a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). The Court "cannot shirk this responsibility merely because" the case is difficult or its "decision may have significant political overtones." *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)

Put another way, the doctrine "is one of 'political questions,' not one of 'political cases.'" *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986). "[C]ourts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid.*

2. The concept of justiciability "expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Among those limitations is the "narrow" political-question doctrine (*Zivotofsky*, 566 U.S. at 195), which, as relevant here, requires that courts have principled and rational standards of decision. "[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). "A lack of judicially discoverable and manageable standards for resolving" a controversy indicates a commitment of the issue to the political branches. *Zivotofsky*, 566 U.S. at 195.

The doctrine sets a high bar on this score. It does not ask whether the case presented is merely a difficult one; rather, the question is whether the issue put to the court entirely "defies judicial treatment" (*Baker*, 369 U.S. at 212), such that it cannot be described as "legal in nature" at all (*Japan Whaling*, 478 U.S. at 230). And when familiar constitutional principles and manageable legal standards are available for the adjudication of a true case or controversy, "a federal court's obligation to hear and decide [the] case is virtually unflagging." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013).

B. The First Amendment framework offers manageable standards for judging partisan gerrymanders

The First Amendment provides a time-tested set of rules that ask familiar, objective questions answerable with traditional evidence under ordinary legal standards.

1. The intent prong is justiciable and satisfied in this case

a. The question of "governmental purpose is a key element of a good deal of constitutional doctrine," including under the Equal Protection Clause, Commerce Clause, and Establishment Clause. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 861 (2005). In such cases, the Court has repeatedly rejected the notion "that official purpose is unknowable." *Id.* at 859.

The State nevertheless implies (Br. 46-47) that discovery of legislative intent is unworkable because the relevant doctrine "emerged from, and is designed to work in, the context of government acting in its *executive* capacity," which differs from the legislative capacity because legislating "always involves consideration of speech and, typically, political speech." That is both wrong and irrelevant.

It is wrong because this Court has applied the First Amendment framework, not only to executive officials, but also to multi-member political bodies similar to legislatures. Indeed, some of this Court's most important retaliation cases involved claims against multi-member school boards. See *Mt. Healthy City Sch. Dist. Bocard of Educ.* v. *Doyle*, 429 U.S. 274 (1977); *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968). The Court has not found anything unworkable about discerning official intent in such cases.

It is irrelevant because, although the legislative process typically involves legislators' "consideration" of their colleagues' "speech" and "political affiliation" (Br. 47), the framework here is not concerned with legislators reacting to one another in the daily tit-for-tat of capital-city politics. The question is whether the challenged law reflects official disapproval of the protected conduct of a particular, targeted group of private citizens. Judicial analysis of pin-point intent of that sort is precise and limited; it would not capture ordinary interactions among legislators.

At argument last Term—and in a footnote buried in its present brief (at 50 n.16)—the State suggests that discriminatory legislative intent cannot be discerned unless it is "on [the] face" of the statute. But the Court evaluates non-facial legislative intent all the time, as it does in the racial gerrymandering context. *E.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017); *Shaw* v. *Reno*, 509 U.S. 630, 646-47 (1993).

In other First Amendment contexts, too, this Court has "recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 645 (1994). Accord, *e.g.*, *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).[4]

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[4] *United States* v. *O'Brien*, 391 U.S. 367 (1968), is not to the contrary. The Court there upheld the challenged law because the conduct at issue was not protected by the First Amendment, and the law was appropriately tailored to a "substantial [governmental] purpose" regardless. *Id.* at 377-78. Although the Court suggested "an alleged illicit legislative motive" cannot alone invalidate a statute (*id.* at 383), a law with an "unconstitutional effect" rightly would be struck down (*id.* at 385). The Court used as a telling example "the redrawing of municipal boundaries * * * to deprive" particular citizens "of their right to vote." *Ibid.*

b. We proved beyond all doubt a specific intent to burden Republican voters according to established judicial standards. See pages 6-8, *supra*; JS App. 48a-51a. Democratic officials in 2011 disapproved of citizens' successful support of Roscoe Bartlett and set out to dilute Republican votes and disrupt Republican organization to prevent his reelection, ensuring a 7-1 map. *Ibid.*

The State's effort (Br. 48-49) to cleanse the gerrymander of the legislature's unconstitutional intent with the 2012 referendum is not persuasive.

The constitutional violation in this case was complete at the time the State enacted the map. That the public later rejected a referendum challenging that action has no bearing on the unlawfulness of the original action. It would not cure an Equal Protection violation to ratify a racial gerrymander in a statewide referendum; nor can it cure a First Amendment violation to do so. A State's infringement of the First Amendment is not made acceptable simply because a majority of the public thinks it is good policy.

Even if that were incorrect, the referendum would not have sanitized the 2011 gerrymander. The ballot question was opaque, appearing on the 2012 ballot as follows:

QUESTION 5
Referendum Petition
(Ch. 1 of the 2011 Special Session)
Congressional Districting Plan

Establishes the Boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

_____ For the referred law

_____ Against the referred law

See Opinion 4, *Parrott* v. *McDonough*, No. 1445, Sept. Term, 2012 (Md. Ct. Spec. App. Jul. 23, 2014). This language was so diversionary that not even the State's own redistricting expert, Dr. Lichtman, could explain what it meant. In his view, "[i]t means constitutionally when you do a redistricting you base it on the most recent census figures" and "[no]thing more than that." Dkt. 177-49, at 174:22-175:10.

The State notes (Br. 15) that the Maryland appellate court "rejected contentions that the ballot language was misleading or insufficiently informative." But if it were relevant, the issue would not be whether the ballot language was sufficient as a legal matter. It would be whether, as a factual matter, voters *actually* understood what they were being asked to approve. On that score, Dr. Lichtman's testimony says it all.

2. The burden prong is justiciable and satisfied in this case

The State also asserts that the burden element is not judicially manageable. But the burdens at issue here are practical and functional and can be evaluated in ways readily familiar to courts.

a. Vote dilution and its practical consequences

Vote dilution is undeniably a justiciable harm. See *Gill*, 138 S. Ct. at 1921; *Cooper*, 137 S. Ct. at 1470. It is caused "either 'by the dispersal of [disfavored voters] into districts in which they constitute an ineffective minority'" or by "concentrat[ing disfavored voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

i. One straightforward way to judge vote dilution stems from the racial vote dilution cases under Section

2 of the Voting Rights Act, where the governing standards are well established. To show that vote dilution has "impeded the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 51), a Section 2 plaintiff must satisfy the three *Gingles* preconditions:

- *first*, the targeted voters must be sufficiently numerous and "geographically compact to constitute a majority in some reasonably configured legislative district";
- *second*, "the minority group must be politically cohesive"; and
- *third*, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate."

Cooper, 137 S. Ct. at 1470.

If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority" in a reasonably-drawn district, then the drawing of the district's lines "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. If the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51. And if the majority does not "vote[] sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[] its ability to elect its chosen representatives." *Ibid.* (citations omitted).

When these three conditions are satisfied, however, it follows that there has been a denial of "equal electoral opportunity" as a result of the lines that the legislature drew. *Johnson* v. *De Grandy*, 512 U.S. 997, 1012 (1994). *Gingles* and its progeny are proof positive that

vote dilution—the principal burden relied upon by the district court below—is a justiciable question.[5]

ii. What vote dilution ultimately reflects is a burden upon electoral opportunity. JS App. 23a-26a, 195a. The Court has recognized in a variety of contexts that such burdens are justiciable.

In *Anderson*, for example, the Court confronted an early candidacy deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-88.

Courts faced with First Amendment challenges to such regulations must evaluate the burdens imposed using "an analytical process that parallels [their] work in ordinary litigation." *Anderson*, 460 U.S. at 789. This requires consideration of "character and magnitude of the asserted injury" measured against "the precise interests put forward by the State as justifications for the burden imposed." *Ibid.*

The Court ultimately invalidated the early deadline in *Anderson* because it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. Because

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[5] *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to prove a Section 2 claim. 512 U.S. at 1011. But *Johnson* was expressly framed as an interpretation of Section 2 of the VRA. And the Court has emphasized that its cases interpreting "the text of § 2" do "not apply to cases in which there is intentional discrimination." *Bartlett* v. *Strickland*, 556 U.S. 1, 19-20 (2009). We thus rely on the *Gingles* preconditions only as a commonsense guide for identifying burden in partisan gerrymandering cases involving *intentional* discrimination.

the deadline applied "unequally" among the political parties—making it easier as a practical matter for the two major parties to place candidates on the ballot—it "burden[ed] the availability of political opportunity" based on the "political preferences" of voters and was therefore unlawful. *Id.* at 793-94. Thus, it could not stand.

Similarly, in *Cook* v. *Gralike*, 531 U.S. 510 (2001), the Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id.* at 514-27. Although "the precise damage the labels may exact on candidates [was] disputed," the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id.* at 525.

Just as the Court could identify concrete burdens in *Anderson* and *Gralike*, similar kinds of burdens are apparent in partisan gerrymandering cases, rendering vote dilution a judicially identifiable injury addressable by First Amendment standards. Evaluating these burdens entails considering all the same factors that mapdrawers themselves consider: how the map has changed the distribution of voters throughout the region, how those voters typically have voted in past elections, and how those changes are likely to impact elections yet to come.

Plaintiffs would surely suffer a justiciable harm if the State's constitution required mapdrawers to ensure a delegation of seven Democrats and one Republican, and if, in turn, the mapdrawers complied and such a delegation were subsequently elected. See Tr. 45:10-48:5, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). That is equally so here, where ensuring a "7-1" delegation was an open and undeniable purpose of the statute enacted.

Pursuant to this First Amendment framework, the question is not whether some characteristic of the district is delineated "extreme" according to one particular statistical metric. Rather, it is simply whether the map's burdens have "ma[d]e some practical difference" for the targeted voters according to well-accepted, traditional First Amendment standards. JS App. 199a. Qualitative analysis of constitutional burdens like this is a mainstay of First Amendment doctrine. *E.g.*, *Rutan*, 497 U.S. at 73-76; *Anderson*, 460 U.S. at 787-89, 792; *Cook*, 531 U.S. at 525. It is assuredly manageable for courts.

This is especially so in view of the need to show specific intent. The practical *burdens* of partisan gerrymanders mirror the *goals* of those who engage in gerrymandering. Courts of course are capable of evaluating whether a state legislature has succeeded in converting a specific intent to impose a particular burden into to the practical circumstances necessary to bring that burden about.

iii. Using this "well developed and familiar" (*Baker*, 369 U.S. at 226) framework, we showed that the gerrymander concretely impeded the ability of plaintiffs and other Sixth-District Republicans to elect a representative of their choice. See pages 8-11, *supra*; JS App. 52a-53a. This self-evident fact was conceded as "obvious" by the State's own expert. 1JA255-56. See also 3JA827 (the gerrymander "improved Democratic prospects"). The vote dilution was so extreme that no Republican has won the district since 2010.

b. Associational burdens

i. "[P]artisan gerrymanders inflict other kinds of constitutional harm as well," including "infringement of [voters'] First Amendment right of association." *Gill*, 138 S. Ct. at 1934 (Kagan, J., concurring). Association-

al injuries dovetail with vote dilution but are "distinct from [it]." *Id.* at 1938. The idea is that "[b]y placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Ibid.*

For example, "[m]embers of the 'disfavored party' * * * deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). From this angle, the complaint "is that the gerrymander has burdened the ability of like-minded people * * * to affiliate in a political party and carry out that organization's activities and objects." *Id.* at 1939.

As the district court held, "the kinds of injury resulting from such associational violations are readily discernable and significant: 'Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.'" JS App. 57a (quoting *Anderson*, 460 U.S. at 792).

That was this Court's approach in both *Anderson* and *Clements* v. *Fashing*, 457 U.S. 957 (1982). In such ballot-access cases, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements*, 457 U.S. at 964. In particular, "classification schemes that impose burdens on new or small political parties or independent candidates" may violate "First Amendment interests in ensuring freedom of association" by concretely inhibiting individuals' "association with particular political parties." *Id.* at 964-65.

So too in *Anderson*: When, by operation of government regulation, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign," a "burden [is] imposed on * * * associational rights." 460 U.S. at 791-92 & 12. Such regulations can impose justiciable burdens by (among other things) "making it virtually impossible for" candidates from disfavored parties to achieve electoral success as a practical matter. *Clements*, 457 U.S. at 965. That is exactly what partisan gerrymandering does.

Against this backdrop, Article III courts have well-accepted standards for evaluating the practical burdens imposed by partisan gerrymandering under the First Amendment—standards that both mirror those used in "ordinary litigation" under the First Amendment (*Anderson*, 460 U.S. at 789) and provide clear guidance to legislators who must conform their conduct to constitutional limitations.

ii. The State contends (Br. 35-36) that associational harms are incapable of assessment according to principled and manageable standards. The State's true position appears to be that any standard in this context must be reducible to a single, arithmetical bright line. But the Court did not require any such bright line in *Anderson*, *Gralike*, or *Clements*.

Under this Court's ordinary approach to constitutional adjudication, it is enough to say that the associational injuries in this case clearly pass muster, leaving to another day the possibility of recognizing others. Judging is a case-by-case endeavor, and the absence of a single, mechanical metric "hardly leaves courts at sea." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The Court has never demanded a universal "'litmus test' that would neatly separate valid from invalid" burdens

as a precondition to the exercise of Article III jurisdiction. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality). It should not start here.

iii. The "undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened" by the gerrymander. JS App. 63a. "Members of the Republican Party in the Sixth District, deprived of their natural political strength by [the] partisan gerrymander, were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Ibid.* See also pages 12-13, *supra*; JS App. 74a (Bredar, C.J., concurring in judgment) ("[T]he 2011 redistricting foiled Republican organizational efforts.").

3. The causation prong is justiciable and satisfied in this case

The State has not argued that the causation prong is nonjusticiable. Nor could it, as courts routinely address whether unconstitutional factors are a but-for cause of official conduct. See *Mt. Healthy City Board of Educ.*, 429 U.S. at 285-87.

* * *

A State may not intentionally "burden[] the availability of political opportunity" using discriminatory candidacy filing deadlines that depress associational activities (*Anderson*, 460 U.S. at 792); it may not "dictate electoral outcomes" using ballot notations that "place their targets at a political disadvantage" (*Cook*, 531 U.S. at 523-25); and it may not "deny a benefit to a person because of his constitutionally protected speech or associations" using patronage practices that favor the members of one political party over another (*Branti*, 445 U.S. at 515).

Neither may a State intentionally do those things by manipulating district lines. What is more, purpose

and burden have long been capable of rational judicial assessment in those varied contexts. They are equally so in this setting.

III. THE STATE'S OTHER OBJECTIONS ARE MISGUIDED

The State offers a potpourri of other arguments that bear on the merits rather than justiciability. They provide no basis for reversal.

A. The First Amendment does not ban politics in redistricting

The State objects (Br. 34-35) to application of the First Amendment framework because, in its view, the First Amendment would forbid "[a]ny degree of partisan intent and almost all political aims of any nature." See also State Br. 45-46. Not so.

1. Pursuing "political aims of any nature" in redistricting does not necessarily require discriminating against citizens because of their voting histories. In fact, this Court has recognized many other important "political considerations" in redistricting that do not. *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Virtually every one of them is permissible under the First Amendment.

The goal of "avoiding contests between incumbent Representatives" (*Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)) entails drawing districts that do not pair two incumbents together into a single district. Such efforts do not run afoul of the First Amendment framework because they do not target voters on the basis of their political views. Yet the dominant party's efforts to avoid pitting its own incumbents against one another is assuredly a matter of obtaining partisan advantage in redistricting.

A mapdrawing effort to "keep [a] constituency intact so the officeholder is accountable for promises made or broken" (*LULAC* v. *Perry*, 548 U.S. 399, 441 (2006)) is also lawful under the First Amendment. It would not require the legislature to evaluate the political character of groups of citizens and attempt on that basis to make it more difficult for those citizens to elect their candidates of choice.

Similarly, decisions to "mak[e] districts compact" and "respect[] municipal boundaries" may reflect lawful political considerations rather than an intent to dilute votes for the opposition party (or to maintain such dilution). *Karcher*, 462 U.S. at 740.

Mapdrawers also often aim to ensure that institutions with special importance to an incumbent remain in the incumbent's district. These efforts (which are frequently responsible for some of the most awkwardly shaped districts) are designed to achieve partisan advantage. In this case, for example, the evidence shows that Fifth District incumbent Steny Hoyer, an alumnus of the University of Maryland, wanted College Park in his district. 3JA665 (¶50). The context suggests that this was to ensure that he would be able to raise funds more effectively from the school's leadership and alumni, as well as more easily bring federal benefits to his constituents there. Similarly, the evidence shows that Second District incumbent Dutch Ruppersberger, then a member of the House Intelligence Committee, wanted Fort Meade and Aberdeen Proving Ground in his district (*ibid.*) for similar reasons. These are permissible considerations.

We have repeatedly made these points before both the district court and this Court, but the State declines to acknowledge them, let alone respond.

2. Setting that aside, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used [with the purpose and effect of] burden[ing] a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). Thus, the State may continue to use data concerning citizens' voting histories and party affiliations without violating the First Amendment if it does so (1) without an intent to burden supporters of the disfavored party or (2) in an appropriately tailored pursuit of a legitimate state interest.

The State's insistence (Br. 37) that the First Amendment would necessarily "invalidate state efforts to draw district lines to achieve proportional representation" is therefore mistaken. Although it is not a question presented here, a State's good faith effort "fairly to allocate political power to the parties in accordance with their voting strength" (*Gaffney*, 412 U.S. at 754) would be permissible—as would pursuit of competitive districts (*e.g.*, Ariz. Const. art. IV, pt. 2, § 1(14)(F)) and remediating past gerrymanders.

Recognizing as much does not require putting every redistricting map, individually, "through the strict scrutiny hoops." Tr. 18:18, *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333). It may instead entail establishing certain safe-harbors and allowing the lower courts to apply them categorically.

That has been this Court's approach in the patronage cases. It has recognized that discrimination in hiring on the basis of political views, while generally impermissible, is acceptable when filling "policymaking positions" (*Elrod*, 427 U.S. at 367 (plurality)), with respect to which "party affiliation is an appropriate requirement for the effective performance of the public office involved" (*Branti*, 445 U.S. at 518). Under this approach, the courts of appeals have recognized that

they "need only apply th[e] *Branti* test" and "do not have to apply strict scrutiny in each individual case." *McCloud* v. *Testa*, 97 F.3d 1536, 1543 (6th Cir. 1996). Accord, *e.g.*, *McEvoy* v. *Spencer*, 124 F.3d 92, 98 (2d Cir. 1997). A similar approach with respect to legislatures' pursuit of balanced maps or competitive districts may be appropriate in this context as well.

In all events, an affirmance would be consistent with *Gaffney*. Whatever the Court may have said there about proportional maps, it sharply distinguished permissible balancing from legislatures' use of redistricting to "minimize or eliminate the political strength of [a] group or party." 412 U.S. at 754. Indeed, according to *Gaffney*, a redistricting plan is constitutionally suspect if "political groups have been fenced out of the political process and their voting strength invidiously minimized." *Ibid.* That is this case.

B. The shape of the immediately prior district enjoys no special standing in the constitutional analysis

The State complains (Br. 39-40) that applying the First Amendment framework to partisan gerrymandering "necessarily hinges on the superior position [that] one party enjoyed under the prior map." As we have explained several times now (*e.g.*, 5JA1183-85; Mot. to Affirm 19, 24-25), that is wrong.

The inquiry that vote dilution poses is whether the disfavored party has been burdened vis-à-vis any reasonably drawn district in the area—not necessarily the immediately prior map. That is, the question is whether the supporters of the disfavored party are sufficiently numerous and geographically compact to form the political majority of a reasonably drawn district in the area (*Cooper*, 137 S. Ct. at 1470), and in turn whether the reason such a district was not drawn

was an intent to dilute their votes or disrupt their associations, so as to "impede the ability of [the disfavored] voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 48). Measured against this properly stated standard, the shape of the immediately prior district enjoys no special standing in the constitutional analysis.

To be sure, the focus below was on the configuration of the immediately prior district—but only because the immediately prior district was proof-positive that Republican voters *were* capable of forming the majority of a reasonably drawn district in the area.

C. Affirming the district court would not unduly entangle the Court in redistricting

At various times, the State (and its amici) have suggested that ruling in plaintiffs' favor will draw this Court into endless partisan gerrymandering challenges. That concern is significantly overstated.

A review of the Court's mandatory docket over the past three-plus decades indicates that there was no appreciable increase in the number of mandatory-docket lawsuits following this Court's recognition of a cause of action for racial gerrymandering in *Shaw* v. *Reno*, 509 U.S. 630 (1993). That is likely because the conditions that give rise to racial gerrymandering are relatively uncommon, and also because this Court's decision tamped down the practice.

So too here. The specific intent requirement serves as an important and effective filter against future challenges to redistricting maps under the First Amendment. As the district court made clear, the legislature's mere awareness of political consequences would not support a claim; a specific intent to target particular citizens is required. JS App. 201a. Cf. *Shaw*, 509 U.S. at 646 (same for race). Yet it is very unlikely that

the specific intent to single out the supporters of a particular political party for disfavored treatment would arise outside of States with single-party control of the governor's mansion and both chambers of the legislature. It also is very unlikely to arise in States that use independent commissions (like California and Washington) or that have adopted strict state constitutional limits on gerrymandering (like Florida and Pennsylvania). And, of course, any allegation of legislative intent would have to be a plausible one. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677-82 (2009).

In the absence of an independent cause of action for partisan gerrymandering, moreover, concerned citizens have not stood silent. Rather, they have funneled their challenges through racial gerrymandering and racial vote dilution claims—an approach made possible "because, of course, 'racial identification is highly correlated with political affiliation.'" *Cooper*, 137 S. Ct. at 1473.

On that basis, congressional lines were challenged (by our count) in 22 States following the 2010 census. Affirming the judgment below is unlikely to encourage a significant expansion of those challenges. Instead, it will simply lead litigants to bring challenges under a different and more apt legal framework.[6]

Moreover, the public will easily recognize and appreciate the need for judicial intervention in those rare cases where legislatures fail to heed this Court's First Amendment teachings: When a legislature sets out to

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[6] Affirming the judgment below would, in this way, discourage an historically unhealthy focus on race in redistricting litigation. Cf. *Bush* v. *Vera*, 517 U.S. 952, 1004 n.2 (1996) (Stevens, J., dissenting) ("[T]he evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years.").

fix elections and hobble the opposition party's ability to organize by targeting citizens for disfavored treatment on the basis of their protected conduct—and when those efforts impose clear, identifiable burdens like those present in this case—it is a plain violation of the law. The intelligent person on the street knows the difference between competition among the political parties in the marketplace of ideas and anticompetitive conduct like gerrymandering, meant to insulate the party in power from such competition.

IV. THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENT FOR PLAINTIFFS

Uncomfortable in their defense of a practice that they acknowledge to be "impermissible" (Br. 27), the defendants change the subject, arguing that the decision below should be reversed because the district court committed numerous procedural errors. But the State's principal contention on this score—that there are genuine factual disputes warranting a trial—was waived below. Even on their merits, none of the State's arguments is availing.

A. The State waived any argument that there are genuine disputes of material fact

For the first time, the State asserts (Br. 50-58) that a trial was necessary to resolve genuine disputes in the evidence. It thus faults (Br. 51) the district court for improperly "resolv[ing] disputed facts pertaining to multiple elements of plaintiffs' claims." But the State has waived that argument by not raising it below.

1. The State did not oppose our motion for summary judgment by asserting that there were genuine disputes necessitating a trial. On the contrary, its cross-motion for summary judgment *admitted* that lawmakers "intended to create a new opportunity for Democratic electoral success" in the Sixth District

(Dkt. 186, at 28) and that Republican voters suffered a "disadvantage in the ability to elect a candidate of [their choice]" as a consequence (*id.* at 39). The State argued only that these (and other) facts were legally insufficient to establish a First Amendment violation. It did not contend in the alternative that, if the district court rejected the State's legal arguments and accepted ours, a trial would be necessary.

2. The State has thus waived any claim that a trial was required. "[A] party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," and "[i]f it does not do so, and loses the motion, it cannot raise such reasons on appeal." *Ames* v. *Nationwide Mut. Ins. Co.*, 760 F.3d 763, 771 (8th Cir. 2014) (quoting *Liberles* v. *Cook County*, 709 F.2d 1122, 1126 (7th Cir. 1983)) (collecting cases).

This familiar rule applies to cross-motions for summary judgment. When a cross-moving party declines to argue that if its own motion is denied, genuinely disputed facts preclude summary judgment for its opponent as well, it waives such argument on appeal. *Cook Inc.* v. *Boston Sci. Corp.*, 333 F.3d 737, 741-42 (7th Cir. 2003); *May* v. *Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986); *Newark Morning Ledger Co.* v. *United States*, 539 F.2d 929, 932-33 (3d Cir. 1976).

That rule is dispositive here. Having declined to argue that there would be a genuine issue of material fact necessitating trial if the court denied its cross-motion, the State cannot raise that argument for the first time on appeal.

3. Another way to characterize the State's waiver is as a submission of the dispute as a "case ready for decision on the merits." *Empleados Del Tribunal Gen-*

eral De Justicia v. *Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.). The State explicitly disavowed (Dkt. 180, at 6) the need for an evidentiary hearing on our motion for a preliminary injunction, which was the same as our summary judgment motion.

When the losing party makes clear to the district court that it "didn't want a trial" (*Cook*, 333 F.3d at 742) and didn't need "additional factual evidence" or "to present witnesses" (*Empleados*, 747 F.2d at 36), courts construe cross-motions for summary judgment in non-jury cases as a submission of the case to the court for final judgment on the papers, in which case clear error review applies on appeal. *Cook*, 333 F.3d at 741-42; *Empleados*, 747 F.2d at 36. See also Mot. to Aff. 28 n.3 (collecting additional cases).

B. The State does not identify any genuine disputes of material fact

In any event, the State's *volte face* concerning the need for a trial is entirely without foundation.

The State allocates most of its argument to the wind-up, explaining at length (Br. 50-54) that judges are not supposed to weigh evidence or draw inferences at the summary judgment stage. But this prolonged treatment misses the point: "On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.'" *Ricci* v. *DeStefano*, 557 U.S. 557, 586 (2009). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Ibid.* Here, the district court's conclusion that it could not rationally have found in favor of the State is fully supported by the record.

The State points to a grand total of three disputes that it now says warranted a trial. None did.

First, the State appears to suggest (Br. 53) that there was a dispute about associational burdens because the plaintiffs have been "politically active post-redistricting." That is a red herring. The point is that plaintiffs' ability to band together with *others* has been inhibited by the gerrymander's associational interruptions, not that they *personally* became disengaged in politics. See JS App. 60a-61a.[7]

Second, the State faults the district court (Br. 57) for "accept[ing] plaintiffs' characterization of 'the mapmakers' intent,' and refus[ing] to accept as true" the State's contention that the Sixth District's southward contortions "were driven by legitimate legislative decisions." No trial was warranted on this issue.

The evidence of intent is overwhelming and entirely one-sided. See pages 6-8, *supra*; JS App. 48a-51a. Conversely, there is literally no evidence to support the State's assertion (Br. 57) that lawmakers drew the Sixth District as they did solely out of respect for the "I-270 corridor economic region." In fact, the evidence flatly refutes it. See pages 13-14, *supra*; JS App. 55a. The district court rejected the State's other explanations because they were irrelevant: Even taking them as true, "none explains the dramatic exchange of populations between the Sixth and Eighth Districts." JS App. 55a. Our alternative map made this clear. See 3JA786-87.

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[7] The State also seems to fault the district court (Br. 55) for failing to consult certain "public record evidence" despite that the State did not bring such evidence to the court's attention. The court had no "duty to sift through the record," let alone the nebulous public record, "in search of evidence to support [the] opposition to summary judgment." *Crossley* v. *Georgia-Pac. Corp.*, 355 F.3d 1112, 1114 (8th Cir. 2004).

Finally, the State asserts (Br. 57-58) that there is a genuine dispute on the element of causation. But that shift is attributable to a change in the court's view of that law, not the evidence. The preliminary injunction decision had erroneously held that plaintiffs had to prove that the gerrymander alone would dictate the outcomes of all elections, past and future. JS App. 100a, 108a-13a. The opinion granting summary judgment corrected that error, holding that our burden was to show only that the plaintiffs "have been placed at a concrete electoral disadvantage" and not "that the line-drawing altered the outcome of an election." *Id.* at 52a.

We made all of these points in the motion to affirm (at 29, 31), but the State persists in its meritless contentions without rejoinder.

C. The State's evidentiary objections are meritless

The State further faults the district court (Br. 54-56) for relying on evidence to which the State had previously objected. That is wide of the mark.

1. With respect to the State's hearsay objections to Strine's and Ropp's testimony, there is nothing unusual about the denial of those objections *sub silentio*. As a general matter, "when a district judge enters an order disposing of a case without expressly ruling on a pending objection," the final judgment "functions as a final order overruling the objection." *Fielding* v. *Tollaksen*, 510 F.3d 175, 179 (2d Cir. 2007). The absence of express discussion is not a "basis for concluding that the district court did not consider [the] objection[]." *Hill* v. *SmithKline Beecham Corp.*, 393 F.3d 1111, 1116 (10th Cir. 2004). Accord, *e.g.*, *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 312 (2d Cir. 2008) (finding no error where "[hearsay] objections were implicitly overruled" by the grant of summary

judgment).[8]

Nor do the State's evidentiary objections hold up on their merits. Under Rule 803(3), neither Strine's nor Ropp's testimony was excludable because each relayed statements concerning the declarants' states of mind and mental feelings—in particular, how they "felt about voting" (State Br. 53).

Neither witness's testimony was offered to establish the truth of the matters asserted. Strine testified that "every time we were out [campaigning]," voters told her "it's not worth voting anymore." JS App. 26a. The testimony was not offered as proof that it literally wasn't worth voting. It was offered instead as evidence of voter sentiment, reflecting depressed voter interest and engagement. See *United States* v. *Brown*, 490 F.2d 758, 762-63 (D.C. Cir. 1973) ("the statement 'X is no good'" is not hearsay when entered as proof of "the declarant's state of mind toward X" because "[w]e do not care whether X is in fact 'no good' but only whether the declarant disliked [X]").

The same is true with respect to Ropp's testimony concerning voter confusion. JS App. 26a-27a.

2. The State's objection to the campaign finance reports (Br. 55-56)—which the district court expressly overruled (5JA1251-52)—borders on frivolous. The reports, which are publicly available on the State's own website, are "unsworn statements declared to be true under penalty of perjury" and thus admissible as "declarations" for purposes of Rule 56. *Williams* v. *Long*, 585 F. Supp. 2d 679, 685 (D. Md. 2008). The reports are also self-authenticating records of regularly con-

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[8] *Norse* v. *Santa Cruz*, 629 F.3d 966 (9th Cir. 2010) involved an improper *sua sponte* grant of summary judgment, when there was general "confus[ion about] precisely what constitute[d] the actual record." *Id.* at 973-974. That does not describe this case.

ducted activity under Rule 803(6). *E.g.*, *Doali-Miller* v. *SuperValu, Inc.*, 855 F. Supp. 2d 510, 515-19 (D. Md. 2012). And, even if they were not, they are subject to judicial notice. *E.g.*, *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 133 (D. Conn. 2007). The reports obviously could have been admitted into evidence at trial. Cf. *United States* v. *Allen*, 10 F.3d 405, 412 (7th Cir. 1993) ("The district court did not abuse its discretion by admitting the [campaign finance] reports.").

The State complains (Br. 56) that it "had no opportunity to probe the * * * veracity" of the reports or to "submit rebuttal evidence." But because the State did not raise that objection below as a basis for excluding the evidence (see Dkt. 215-1), it is waived.

In any event, the State is wrong. Whether "support for [the Republican] party [was] diminished" (Dkt. 68, at 32) was a key element of the case starting with the second amended complaint (3JA645-46 (¶¶112-19)). For just that reason, the State entered other relevant evidence on the topic (*e.g.*, 4JA1059) and had ample opportunity to furnish evidence on party fundraising if it had wanted. Indeed, it had that opportunity in the two months that elapsed between the filing of the supplemental summary judgment briefs and its motion to strike, and again in the three weeks between the filing of its motion to strike and the hearing on the summary judgment motions. The State cannot fault the district court for its own strategic decision to file a dubious motion to strike rather than submitting additional public fundraising data of its own.[9]

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[9] The State did not need formal discovery to submit public fundraising reports in an affidavit. Its attempt to smuggle in such documents for the first time before this Court (Br. 8 & n.5, 56 & n.21) is plainly improper. Cf. Fed. R. App. P. 10(a).

D. The lower court acted within its discretion to enter a permanent injunction

The State says (Br. 58-63) the district court abused its discretion by entering a permanent injunction after so many years of litigation. It also accuses the district court (Br. 63-64) of failing to consider the broader public interests. Neither objection holds water.

1. **a.** The State makes three arguments concerning delay. First, it invokes laches. Br. 60. A party asserting laches must establish prejudice, however. *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966). The State's only effort to do so is its bald assertion (Br. 60) that the passage of time made it difficult "to preserve and access material evidence." Even if it had substantiated that claim, lost evidence would have *helped* the State because it did not bear the burden of proof. See *Costello* v. *United States*, 365 U.S. 265, 282 (1961). Regardless, any non-preservation of evidence is attributable not to delay, but to the State's own failure to issue or enforce litigation hold notices. See Dkt. 153-1 (motion for spoliation sanctions).

b. Second, the State implies (Br. 60-61) that ordering a new map near the end of the decade is "presumpt[ively]" improper. Yet courts order such relief often. *E.g.*, *Common Cause* v. *Rucho*, 2018 WL 4214334 (M.D.N.C. 2018) (injunction entered September 2018), jurisdiction postponed 2019 WL 98539 (U.S. 2019); *Perez* v. *Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017) (injunction entered August 2017), affirmed in part and reversed in part, 138 S. Ct. 2305 (2018); *Diaz* v. *Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (injunction entered February 1997), affirmed, 522 U.S. 801.

The State's contrary cases rest on facts absent here. In *White* v. *Daniel*, 909 F.2d 99, 104 (4th Cir. 1990), "there [were] no elections scheduled before * * *

[the next] census," meaning that the case was effectively moot. In *Skolnick* v. *Illinois State Electoral Board*, 307 F. Supp. 691, 694-95 (N.D. Ill. 1969), the passage of time made correcting the one-person-one-vote claim practically impossible. In *Chen* v. *City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000), the court ruled for the city on the merits because it "had valid reasons to adhere to its prior borders."

c. Finally, the State says this Court's opinion in *Benisek* tied the district court's hands, effectively foreclosing it from ruling in our favor on a permanent injunction. Yet the Court based its affirmance on plaintiffs' "delay in asking for preliminary injunctive relief" and the proximity of the 2018 election. *Id.* at 1943-45. Neither of these considerations is now applicable. JS App. 66a.

The district court—which had a front row seat to all aspects of the litigation for the past four-plus years—found that there were no "dilatory efforts" by either side, attributing the dragging-on of the litigation to "process." JS App. 66a. And as the State has conceded (JS 38-39), "there remain[s] time to implement a new plan for the 2020 election" in an orderly manner. A denial of relief for a "serious constitutional violation" simply because the litigation took years to conclude would "demean[]" plaintiffs' constitutional rights. JS App. 66a. The district court thus did not abuse its discretion by entering a permanent injunction.

2. The State accuses the district court (Br. 63-64) of failing to adequately consider the public interest—in particular "the impact its injunction will have on [other] voters." Yet the district court explained that vindicating an important constitutional right would naturally serve the public's interest and that "redrawing district lines to comply with the Constitution will not sow any additional confusion beyond that caused

by the illegal lines themselves." JS App. 67a. It noted also that there is ample time for the State to enact a new plan. Against this background, it was not an abuse of discretion to hold that an injunction would serve the public interest.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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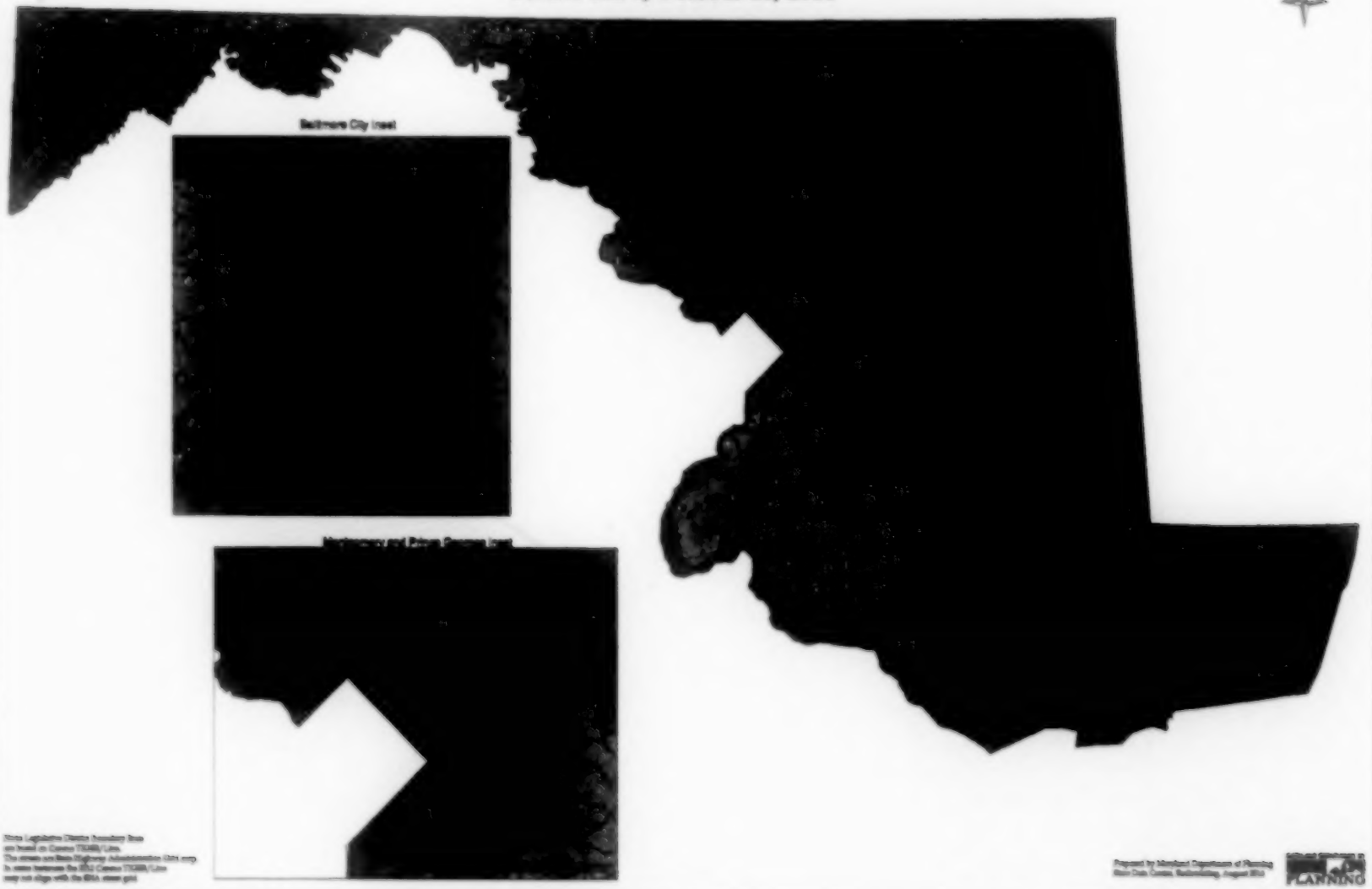
MARCH 2019

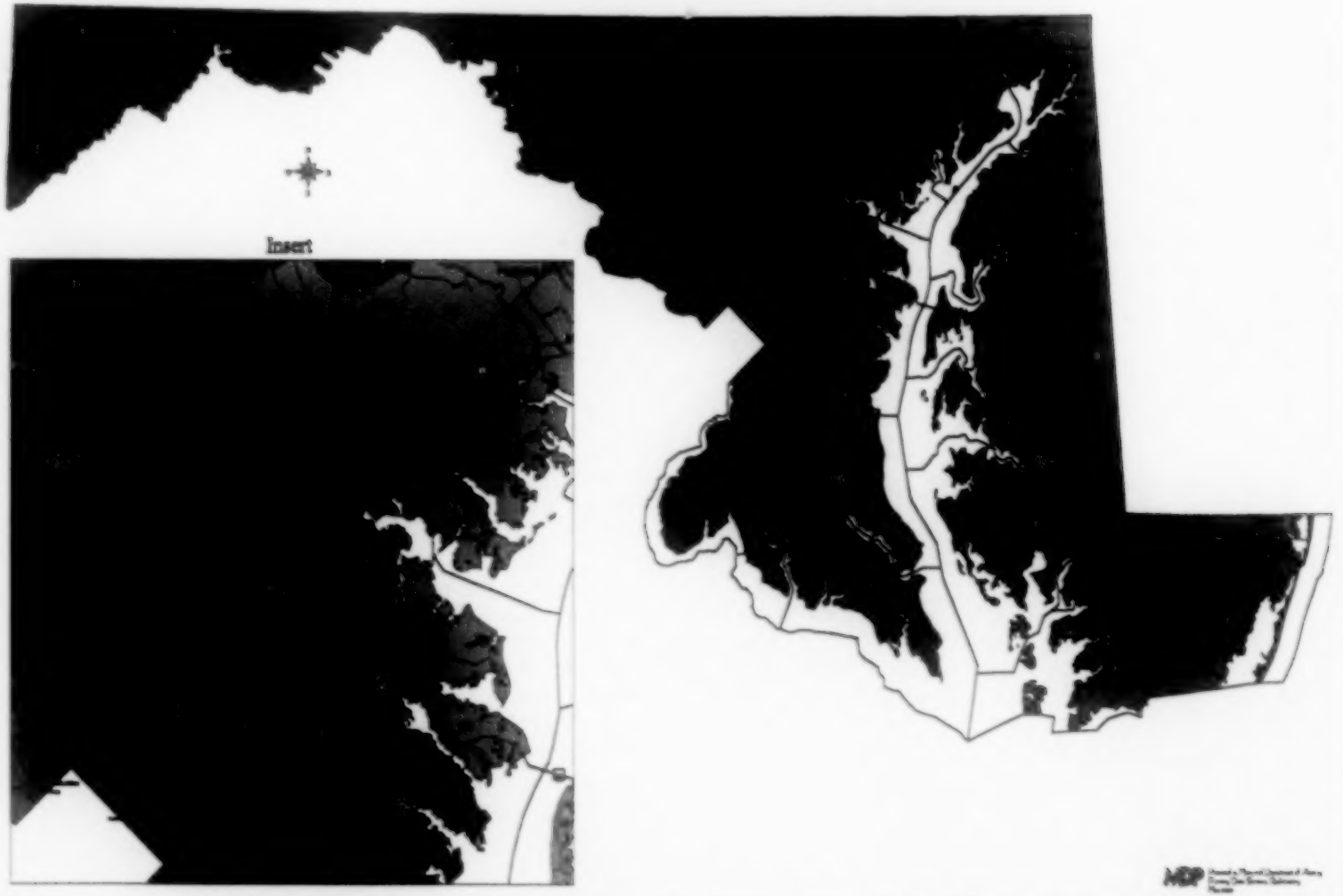
Maryland 2011 Congressional Districts

Senate Bill 1, October 20, 2011



2002 CONGRESSIONAL DISTRICTING PLAN

Senate Bill 805 May 6th, 2002



No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the
United States District Court
for the District of Maryland

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

I. THE FIRST AMENDMENT RETALIATION TEST DOES NOT SUPPLY A "LIMITED AND PRECISE" PARTISAN GERRYMANDERING STANDARD.

Plaintiffs' brief sidesteps the central problem identified in the State's opening brief: plaintiffs' proposed test, as adopted by the district court, does not provide a limited, precise, reliably fair, and politically neutral means of determining the line separating "excessive" political considerations from what is constitutionally acceptable. *See Vieth v. Jubelirer*, 541 U.S. 267, 292-93 (2004) (plurality); *id.* at 316 (Kennedy, J., concurring in judgment); *id.* at 365 (Breyer, J., dissenting). Plaintiffs attempt to avoid the issue in five ways. First, they distance themselves from the retaliation theory they advanced below and persuaded the district court to adopt. Second, they propose that the Court treat redistricting legislation as if it were not subject to the same considerations that apply to all other forms of legislation. Third, they advocate subjecting partisan gerrymandering claims to a truncated version of Voting Rights Act, Section 2 analysis. Fourth, they offer unconvincing assurances that the test adopted below will not produce certain undesirable consequences that flow from what the district court has opined and included in its judgment. And fifth, they argue that the voters' adoption of the redistricting plan by referendum should be disregarded. These

arguments fail to rescue their standard from unmanageability.

A. Plaintiffs Concede That Their Test Is Not "Limited and Precise."

1. The plaintiffs confirm that their First Amendment retaliation test is not "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J.). As explained in the State's opening brief at 34-36, it falls to the injury or "burden" element to separate the acceptable from the excessive in redistricting, a task that element cannot accomplish. In their brief, plaintiffs reaffirm that the required showing for their "representational" or vote-dilution injury is no more exacting, nor illuminating, than "some practical difference" to voters as the result of changed district boundaries. Appellees' Br. 38. Plaintiffs also acknowledge that the associational variant of their First Amendment retaliation standard likewise does not purport to provide any "bright line" or "litmus test," *id.* at 40, that could give practical guidance to courts adjudicating partisan gerrymandering claims and to legislators drawing future district maps. They also offer nothing to address the difficulties of measuring and proving causation of alleged harms to voters' interest in voting and political engagement.

But such guidance is necessary to equip courts and legislators to determine, with reliable consistency, the point where a redistricting plan crosses the line between permissible and "excessive" consideration of partisan political goals, and becomes an "unjustified

abuse of partisan boundary-drawing considerations." *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting). This need exists because the Court has not forbidden all consideration of partisan goals in districting. *Id.* at 355; *see also id.* at 359-60 (explaining how the use of political considerations in redistricting can serve "democratic ends"); *id.* at 361 (explaining that "[t]he need for legislative stability cannot justify entrenchment" in power of the minority).

2. Plaintiffs attempt to compensate for the deficiencies of the vote-dilution formulation by proposing an abridged version of the analysis prescribed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for cases under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Appellees' Br. 34-35. Plaintiffs' proposal is ill-considered for two principal reasons. First, the Court adopted the *Gingles* analysis to implement Congressional intent, as revealed in the text of Section 2 and its legislative history, especially factors discussed in the Senate Report accompanying the 1982 amendments to the Act. *See Gingles*, 478 U.S. at 43-44, 47-51. In more than three decades since *Gingles* was decided, the Court has applied the test only to claims brought under Section 2. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413-23, 423-42 (2006) ("*LULAC*") (addressing separately partisan gerrymandering claims and a Section 2 challenge, without suggesting any affinity between the two).

Second, plaintiffs' modified version of *Gingles* uses only its three "preconditions" and omits the factors that comprise *Gingles*' "totality of the circumstances"

component. That component requires a court to "determine whether members of a racial group have less opportunity than do other members of the electorate," by considering factors that include "'the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.'" *LULAC*, 548 U.S. at 425-26 (plurality op.) (citation omitted). These factors go to the "essence" of a Section 2 claim. *Gingles*, 478 U.S. at 47.

Plaintiffs omit the "totality of the circumstances" component, presumably because they are not members of a racial minority with a history of suffering oppression and exclusion from the political process. As plaintiffs themselves acknowledge, merely satisfying the three *Gingles* preconditions, absent consideration of the "totality of the circumstances," does not suffice to establish a vote-dilution claim under Section 2. Appellees' Br. 36 n.5. There is no reason why it should serve to establish a partisan gerrymandering vote-dilution claim under the First Amendment.

3. Plaintiffs suggest reasons why their test might be "limited" in application, but those suggestions do not instill confidence. For example, plaintiffs assert that "[t]he specific intent requirement serves as an important and effective filter against future challenges to redistricting maps under the First Amendment," Appellees' Br. 46, since "any allegation of legislative intent would have to be a plausible one," *id.* at 47 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-82

(2009)). But, as plaintiffs insisted in the previous appeal, "'[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" *Benisek v. Lamone*, No. 17-333, Appellants' Br. 36 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)). Similarly, a majority of justices in *Vieth* agreed that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent." 541 U.S. at 298 (plurality op.); *id.* at 344 (Souter, J., dissenting) (same). Thus, only in the rare case will a court dismiss as not "plausible" an allegation of partisan legislative intent in redistricting. Consequently, the intent element does not promise to make the test a "limited" one.

Plaintiffs also speculate that "it is very unlikely that the specific intent to single out the supporters of a particular political party for disfavored treatment would arise outside of States with single-party control of the governor's mansion and both chambers of the legislature." Appellees' Br. 46-47. That, too, is not much of a filter because today 36 of the 50 states have "single-party control of the governor's mansion and both chambers of the legislature"; in 48 of the 50 states, a single political party controls both houses of the legislature. National Conference of State Legislatures, "State Partisan Composition" (Feb. 4, 2019), available at http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (last visited Mar. 9, 2019).

B. Plaintiffs Cannot Cure Their Standard's Inadequacies by Relabeling It or Conflating It with Other Types of Claims.

In response to the State's showing that a First Amendment retaliation claim is ill-suited for the redistricting context and has no history in challenges to legislation, Appellants' Br. 44-50, plaintiffs deny that their claim involves "retaliation" as such; suggest that redistricting legislation may be treated differently from all other legislation; and invoke case law not involving First Amendment retaliation. These attempts fail to solve the problem of their standard's unsuitability.

Whatever label plaintiffs might prefer, they are unable to cite any case employing the First Amendment retaliation framework to analyze or invalidate legislation. The closest they come is to cite two cases where it was used to address claims against "multimember political bodies similar to legislatures," Appellees' Br. 31 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)), but those decisions, like other First Amendment retaliation cases, involved challenges to actions taken by government in its *executive* capacity, as the employer that terminated the complainants.

Next, plaintiffs suggest that applying the framework to redistricting legislation would not present the same difficulties that have caused courts to avoid applying it to any other legislation. Plaintiffs say that,

unlike other forms of legislation, redistricting "has nothing to do with lawmakers' advancing policies of general application that they and their supporters prefer but their political opponents do not." Appellants' Br. 28. Plaintiffs cite no authority supporting that distinction, which does not withstand scrutiny. This Court's "precedent teaches that redistricting is a legislative function" that "involves lawmaking in its essential features and most important aspect." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668, 2667 (2015). Like other subjects of legislation, redistricting may involve "adopt[ing] and follow[ing] a policy," *Gaffney v. Cummings*, 412 U.S. 735, 738 (1973), and "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," *Perry v. Perez*, 565 U.S. 388, 393 (2012). An adopted "plan reflects the State's policy judgments" on "how to shift existing [district boundaries] in response to . . . population growth." *Id.* As with other types of legislative policy judgments, "various interests compete for recognition" in redistricting, *Miller v. Johnson*, 515 U.S. 900, 914 (1995), and any choice made in map drawing is likely to have its "supporters" and "opponents," Appellees' Br. 28. Therefore, contrary to plaintiffs' suggestion, applying First Amendment retaliation analysis to redistricting legislation raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid.-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other*

grounds by Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015).

Finally, plaintiffs seek to avoid the problems plaguing the First Amendment retaliation test, by relying on cases not involving retaliation. *See, e.g.*, Appellees' Br. 36-37 (discussing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Cook v. Gralike*, 531 U.S. 510 (2001)); *id.* at 39-40 (referencing *Anderson*, *Gralike*, and *Clements v. Fashing*, 457 U.S. 957 (1982)). These cases offer little aid, however, because they involved challenges to measures that, unlike a redistricting plan, expressly imposed direct, tangible burdens on ballot access or participation in the electoral process. Nothing in Maryland's 2011 redistricting legislation imposes any burden on plaintiffs' ability to cast their votes or the ability of their preferred candidates to run for office.

C. Plaintiffs' Test Would Impair States' Ability to Achieve Proportional Representation and Remedy Past Gerrymanders.

Plaintiffs offer assurances that their test permits proportional districting plans and does not privilege the *status quo ante*, but those assurances do not hold up to inspection. Plaintiffs assert that their test would not "necessarily" invalidate a districting map that seeks to achieve proportional representation, Appellees' Br. 44, but what they mean is such maps will not be invalidated if they survive strict scrutiny, which "almost always, results in invalidation," *Vieth*, 541 U.S. at

294 (plurality op.). They further suggest that, under their test, any hope of averting strict scrutiny of "every redistricting map" may necessitate the future establishment of unspecified "safe-harbors." Appellees' Br. 44. But plaintiffs offer no principled reason why those "safe-harbors" would be necessary or justifiable if, as they contend, their test is currently suitable and manageable. Plaintiffs seek to reassure the Court that under the district court's test "the State may continue to use data concerning citizens' voting histories and party affiliations," *id.* at 44, but they cannot account for the district court's judgment prohibiting any consideration of "how citizens are registered to vote or have voted in the past or to what political party they belong," J.S. App. 79a. Taken together, plaintiffs' assertions confirm that their test would preclude proportional maps of the type this Court approved in *Gaffney* and *Easley v. Cromartie*, 532 U.S. 234 (2001).

Plaintiffs also contend that the district court's test does not require reference to the prior district, but in support they merely repeat their abridged *Gingles* formulation, Appellees' Br. 45-46, which the district court did not adopt or reference. Plaintiffs concede that "the focus below was on . . . the immediately prior district," but they insist that it was only to prove that "Republican voters *were* capable of forming the majority of a reasonably drawn district in the area." *Id.* at 46. The record demonstrates otherwise. Plaintiffs' expert used comparisons to the 2002 version of the Sixth District as the "benchmark" to assess the *intent* of the 2011 mapdrawers, J.A. 772, 773; test the extent to which the

2011 district exhibited respect for traditional districting principles, J.A. 775; evaluate alternative plans that were not adopted, J.A. 1088; and demonstrate the merits of the expert's own proposed alternative district, J.A. 776. Plaintiffs offer nothing to contradict the district court's reliance on the prior district as the measure for the First Amendment violations found. *See* J.S. App. 53a-54a, 61a-63a, 73a-75a. Nor have they refuted the likely consequence: the district court's test would impair states' ability to cure a previous gerrymander.

Nor do plaintiffs even attempt to refute the result their standard would yield whenever legislators faced a choice between equally commendable maps, one favoring the majority party and the other favoring the minority party. *See* Appellants' Br. 42-43 (citing *Benisek v. Lamone*, No. 17-333, oral argument Tr. 14-15 (Justice Alito's hypothetical question)). Evidently, plaintiffs concede that their standard would compel legislators to choose the map favoring the minority party, lest the redistricting plan be found to violate some voters' representational or associational rights. They do not deny that their standard would give rise to competing and contradictory claims of partisan gerrymandering if a redistricting plan changed the political orientation of some districts from Democratic to Republican and flipped other districts in the opposite direction. *See* Appellants' Br. 42.

D. Plaintiffs' Test Fails to Account for the People's Adoption of the Redistricting Plan in the Referendum.

Plaintiffs do not acknowledge that the challenged redistricting legislation was "adopted by the people," Md. Const. art. XVI, § 5(b), by overwhelming vote. But this Court has long recognized "'the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws.'" *Arizona State Legislature*, 135 S. Ct. at 2666 (quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916)); *see id.* at 2668 ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum[.]"). If a partisan gerrymandering standard includes an element of legislative intent, as the plaintiffs' does, then it can hardly constitute a valid analysis if it fails to consider the intent of the people who adopted the redistricting legislation in the referendum. Yet, the plaintiffs' test, adopted by the district court, does not consider the referendum at all.

Plaintiffs argue that "[i]t would not cure an Equal Protection violation to ratify a racial gerrymander in a statewide referendum," Appellees' Br. 33, but they are not asserting an equal protection violation or a racial gerrymandering claim. They are maintaining a First Amendment partisan gerrymandering claim that purports to remedy a "practice [that] enables politicians to entrench themselves in power against the people's will." *Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring). The test for adjudicating such a

claim cannot be limited, precise, clear, manageable, politically neutral, and reliably fair if it fails to acknowledge the "people's will," as expressed by more than 1.5 million votes cast in the referendum. The First Amendment retaliation test here fails to account for the referendum at all and, as explained previously, is incapable of doing so. Appellants' Br. 48-50.

Unable to explain how their theory works in light of the referendum, plaintiffs choose to malign its validity. They suggest that there is some question "whether, as a factual matter, voters *actually* understood what they were being asked to approve," Appellees' Br. 34. But plaintiffs did not seek to litigate that question below. *See* Dkt. 1, 11, 44, 177-1. A court cannot assume that more than 1.5 million voters misunderstood what they were doing when they voted in favor of the redistricting plan.

This Court has rejected reliance on a mere "possibility that voters will be confused as to the meaning of" what appears on the ballot. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454 (2008). Absent proof, an "assertion that voters will misinterpret" the ballot "is sheer speculation" that "'depends upon the belief that voters can be "misled,"'" whereas this Court's "'cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'" *Id.* (citations omitted). This Court presumes "the vast majority of the electorate not only is literate but is informed on a day-to-day basis about events and issues that affect election choices." *Anderson*, 460 U.S. at 797. The Court has also

recognized that "explanatory materials mailed to voters," such as explanatory notices that were mailed to each registered Maryland voter prior to the 2012 referendum pursuant to statute, Md. Code Ann., Elec. Law § 7-105(b), constitute measures that "eliminate any real threat of voter confusion." *Washington State Grange*, 552 U.S. at 456. As in *Washington State Grange*, plaintiffs' attempt to denigrate the referendum "rests on factual assumptions about voter confusion" and "fails for the same reason: In the absence of evidence, we cannot assume that [a state's] voters will be misled." 552 U.S. at 457.

The only "evidence" of voter confusion cited by plaintiffs is an answer to a question posed to the State's expert witness, Dr. Allan Lichtman, more than 4½ years after the referendum vote, Appellees' Br. 34, but the question did not mention that it was about the referendum. Instead, plaintiffs' counsel presented what the attorney described as "one page with one sentence," without indicating that it was the ballot language for the referendum, and asked the witness if he "recognized the sentence." Dkt. 177-49, Tr. 174:16-17. Understandably, the witness answered, "I have no idea what it is. It seems to be sitting in isolation." Tr. 20-21. Later in the deposition, when asked whether the manner of the referendum question's presentation on the ballot "present[ed] any problem," Tr. 178:14-15, Dr. Lichtman answered, "No, this was all over the press. It was a big issue. And, certainly, if people believed that they were being retaliated against for their political views, this was quite a unique and clear forum to

express that." Tr. 178:18-179:1. This testimony is by no means evidence of voter confusion about the 2012 referendum.

II. The District Court Failed to Adhere to the Requirements for Deciding Motions for Summary Judgment.

The district court's disposition of the parties' cross-motions for summary judgment involved more serious departures from the summary judgment standard than those that required both reversal of the ruling on cross-motions for summary judgment and remand for trial in *Hunt v. Cromartie*, 526 U.S. 541 (1999). *See* Appellants' Br. 50-58. Plaintiffs do not acknowledge *Hunt* but, instead, offer three sets of counterarguments, each erroneous. First, they argue that the State's pursuit of a cross-motion for summary judgment constituted a waiver of trial, Appellees' Br. 48-50, a notion that contradicts this Court's resolution of *Hunt* and its ensuing trial. *See Easley*, 532 U.S. 234. Second, they argue that there are no genuine issues of material fact, Appellees' Br. 50-52, but their argument depends on discounting, disbelieving, or disregarding altogether evidence and inferences favoring the State, which a court may not do, as explained in *Hunt*. Finally, plaintiffs argue, based on inapposite lower court decisions, that the district court was free to rely upon, and treat as "undisputed," evidence that was subject to unaddressed evidentiary objections, and that, in any case, the evidence was unobjectionable. Appellees' Br. 52-54. This Court should reject all of their arguments.

A. A Cross-Motion for Summary Judgment Is Not a Waiver of Trial.

Plaintiffs argue that "the State has waived [the] argument" that the district court "improperly 'resolve[ed] disputed facts pertaining to multiple elements of plaintiffs' claims,'" "by not raising it below" and because the cross-motion for summary judgment "did not oppose [plaintiffs'] motion for summary judgment by asserting that there were genuine disputes necessitating a trial." Appellees' Br. 48. Their argument misunderstands both the nature of an appeal and the nature of a cross-motion for summary judgment.

A motion for summary judgment "is not a waiver of the movant's right to a trial—or to argue that factual disputes warrant a trial—in the event the court finds the motion wanting," and "[i]t is not a concession that the same facts might warrant judgment against the movant, or that the movant could marshal no additional evidence or arguments in opposition to the prospect of such an adverse judgment." *Hotel 71 Mezz Lender LLC v. National Ret. Fund*, 778 F.3d 593, 602, 603 (7th Cir. 2015) (citations omitted). "[D]enying the motion normally will leave the movant in essentially the same position, procedurally, that it would have been in had it not requested summary judgment in the first instance." *Id.* at 603. "The principle is the same if both parties move for summary judgment." *Market Street Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991).

As previously explained, Br. in Opp. to Motion to Affirm 11-13, plaintiffs are also wrong in suggesting that the cross-motions should be treated as the equivalent of "submission of the dispute as a 'case ready for decision on the merits,'" Appellees' Br. 49. "The filing of cross motions for summary judgment must be distinguished from the case in which the parties stipulate that the judge may enter final judgment on the record compiled in the summary judgment proceedings." *Market Street Assocs.*, 941 F.2d at 590 (citing cases). Though some appellate courts have opined that, in the absence of such a stipulation, a submission of the case for judgment on the papers may be inferred from the record, "[w]hen determining whether this was the path taken by the parties in non-jury cases," the court must "inquire into the intentions of the parties and the district court judge, as evidenced by the record on appeal." *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 644 (1st Cir. 2000) (citing cases from other circuits). Here the record discloses no such intention. *See* Br. in Opp. to Motion to Affirm 12-13. Plaintiffs' argument that such an intent can be inferred from an agreement to forgo an evidentiary hearing at the preliminary injunction stage, Appellees' Br. 50, misunderstands a preliminary injunction motion. Because the movant bears the burden of presenting evidence sufficient to satisfy the four factors of the preliminary injunction standard, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), it is generally in only the *movant*'s interest to request an evidentiary hearing. Forgoing the typically abbreviated evidentiary hearing on a

motion for preliminary injunction cannot constitute a waiver of trial.

B. Genuine Disputes of Material Fact Preclude Granting Summary Judgment to Plaintiffs.

The lengths to which plaintiffs go to characterize the record as containing no material disputes of fact demonstrate that they, like the district court, fail to abide by this Court's teachings in *Hunt*.[1] When plaintiffs claim there is "no evidence" to contradict their positions, what they mean is that there *is* such evidence, but they and the district court prefer to disregard it, treat it as not credible, assign it less weight, or refuse to draw from it a reasonable inference that would favor the State. But none of those options are available to a court adjudicating a motion for summary judgment. *Hunt*, 526 U.S. at 552.

Perhaps the best illustration is plaintiffs' insistence that "there is literally no evidence to support" the conclusion that the configuration of the Sixth District was "solely" driven by the State's interest in having the "I-270 corridor economic region" represented in a

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[1] Plaintiffs have no support in the record; they assert that the State "admitted" that "Republican voters suffered a 'disadvantage in the ability to elect a candidate of [their choice],'" Appellees' Br. 48-49 (citing Dkt. 186-1 at 39), but the supposed "admission" they quote is merely a description of what *plaintiffs* allege.

single district.[2] Appellees' Br. 51. First, no factor "solely" accounts for the district's boundaries; rather, changes elsewhere in Maryland had a profound impact on the drawing of the Sixth District. *See* Appellants' Br. 11-12, 14. For example, eliminating the Bay Bridge crossing necessitated extending the northern part of the First District westward into areas formerly within the Sixth District. However, the record undeniably shows that voters who attended the GRAC's public hearings expressed the importance of the I-270 corridor, J.A. 845-47, as did contemporaneous reports in media coverage of the redistricting process, J.A. 847; those concerns were heeded by map-drawers, J.A. 938; 710-11. Other sources unconnected to redistricting and this litigation establish that the I-270 Corridor "provides an essential connection between the Washington, DC metropolitan area and central and western Maryland." J.A. 838. Moreover, demographic changes in the two counties connected by I-270, Montgomery and Frederick, made it inevitable that district "borders would change the most out that 270 Corridor." J.A. 40 (O'Malley). In the decade prior to the 2010 Census, Montgomery County experienced the most growth of any county, in absolute numbers, with an increase of 98,436 people, to reach a total population of 971,777.[3] Neighboring

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[2] Plaintiffs claim that "the I-270 story is simply implausible," Appellees' Br. 15, but for that proposition they cite only the report of their expert, Dr. Morrison, J.A. 805-09, which is analyzed and refuted in the report of the State's expert, Dr. Lichtman, J.A. 836-48.

[3] *See* Population Change for Counties in the United States and for Municipios in Puerto Rico: 2000 to 2010 (CPH-T-1),

Frederick County experienced a greater percentage growth, an increase of 19.5%, to reach a total population of 233,385.[4] In light of this evidence, the district court's suggestion that the importance of the I-270 Corridor was only "a post-hoc rationalization," having "utter implausibility," J.S. App. 55a, demonstrates that the court impermissibly "credited appellees' asserted inferences over those advanced and supported by appellants." *Hunt*, 526 U.S. at 552.

C. The District Court Impermissibly Relied on Evidence Subject to Unresolved Objections.

No case cited by plaintiffs, Appellees' Br. 52, contradicts the requirement that "[b]efore ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). Instead, the cited cases differ considerably from the circumstances here. *Fielding v. Tollaksen*, 510 F.3d 175 (2d Cir. 2007), did not involve an evidentiary objection. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111 (10th Cir. 2004), concerned a Rule 56(f) motion for continuance to pursue discovery before responding to motions for summary judgment. In *Major League Baseball Properties, Inc. v. Salvino Inc.*, 542 F.3d 290, 312, 314 (2d Cir. 2008), the appellate

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https://www.census.gov/data/tables/time-series/dec/cph-series/cph-t/cph-t-1.html (last visited Mar. 14, 2019).

[4] *Id.*

court found no genuine issue of material fact because, unlike here, the defendant's evidentiary objections conceded that the facts contained in the pertinent records were undisputed. These cases do not excuse the district court's reliance on disputed material evidence, including lay opinion testimony, without ruling on objections to admissibility.

Plaintiffs suggest that their descriptions of unidentified persons' out-of-court statements were not offered to establish the truth of the matter asserted, because the statements merely expressed voter sentiment, or state of mind. But declarants' statements about sentiment would be relevant only to show *why* those declarants felt as they purportedly did. The "'state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind.'" *United States v. Samaniego*, 345 F.3d 1280, 1282 (11th Cir. 2003).

Plaintiffs do not address all of the grounds for the State's objections regarding campaign finance reports analyzed in attorney Micah Stein's declaration. Comparison of the Stein declaration (J.A. 1206-16) with the underlying data he analyzed shows why the matter cries out for expert testimony about its adequacy. For example, plaintiffs rely on his aggregated totals for the three counties he analyzed—Garrett, Washington, and Allegany—for the proposition that post-redistricting fundraising, as measured by Republican Central Committee receipts, fell during "midterm election years" by

more than 12%, and "during presidential election years" by over 6%. Appellees' Br. 13 (citing J.A. 1216).

The per-county, disaggregated data, contained in an exhibit (Dkt. 210-14), tells a different story: In Garrett County, total receipts did not fall, but *increased*, each election cycle from pre-redistricting 2010 ($6,671) to post-redistricting 2012 ($7,237) to 2014 ($8,114). In Washington County, total receipts fell between 2010 ($21,175) and 2012 ($11,228), but then rebounded again in 2014 ($20,228) to regain almost the same level as 2010 and far higher than 2008 ($14,615). In Allegany County, total receipts for the pre-redistricting 2010 cycle ($11,541) and post-redistricting 2012 ($11,052), differed by less than $500. Dkt. 210-14, 2. In Frederick County, omitted from Mr. Stein's analysis, receipts by the Republican Central Committee for 2012 ($23,831) and 2014 ($21,404) exceeded the total receipts for each of the pre-redistricting cycles of 2010 ($10,940) and 2008 ($19,187). Receipts more than doubled between 2010 and the first post-redistricting election in 2012.[6] These per-county numbers indicate there is fair ground for disagreement about what, if any, meaning can be ascribed to the campaign finance report information.

Plaintiffs also continue to rely on impermissible lay opinion testimony, including a chart, developed by

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[6] Frederick County Republican Central Committee Campaign Reports, MARYLAND CAMPAIGN REPORTING INFORMATION SYSTEM, https://campaignfinance.maryland.gov/Public/ViewFiledReports (search Committee Type Party Central Committee, Candidate/Committee Name Frederick and select Years 2008 through 2014).

Mr. Stein, Appellees' Br. 10, that purports to compare voting results among precincts that were allegedly retained, removed, or added to the Sixth District, an analysis that requires manipulation of precinct and partial precinct data in ways beyond a layperson's abilities. Plaintiffs do not explain why this evidence was appropriate for consideration by the district court, nor why it is appropriate for this Court's consideration. Appellees' Br. 52-54. The plaintiffs' only defense of their reliance on this inadmissible evidence, *see* Fed. R. Evid. 702 (J.A. 1249-50; *see also* Dkt. 215-1), is to suggest that the State should have disregarded the district court's scheduling order and submitted uncontemplated further evidentiary briefing. Appellees' Br. 18. But plaintiffs cannot seriously contend that, by moving to exclude inadmissible lay opinion testimony first offered more than a year after expert discovery had closed, the State somehow forfeited its opportunity to counter that testimony. *Compare* Dkt. 180 (expert discovery closed June 5, 2017) *with* J.A. 1216 (Stein Affidavit dated July 3, 2018).

III. Equitable Principles and the Public Interest Preclude Injunctive Relief.

1. Plaintiffs' own brief demonstrates how the State has suffered prejudice from the plaintiffs' "years-long delay." *Benisek v. Lamone*, 138 S. Ct. at 1944. Like statutes of limitations, laches is associated with three forms of prejudice: "'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Midland Funding, LLC v. Johnson*, 137 S. Ct.

1407, 1418-19 (2017) (Sotomayor, J., dissenting) (citation omitted). Plaintiffs' delay in bringing their November 2013 suit and then in ultimately amending their complaint to add their First Amendment retaliation claim in March 2016—4½ years after enactment of the 2011 redistricting legislation—has resulted in lost evidence, faded memories, and the loss of state witnesses to other employment.

Prior to the 2016 amended complaint, plaintiffs had disavowed any reliance "on the reason or intent of the legislature—partisan or otherwise." Dkt. 11 ¶ 2. Consequently, officials and legislators were not on notice of any need to preserve records related to legislative intent. Dkt. 186-1, 50. Governor O'Malley left office in January 2015. Dkt. 186-1, 50. Due to the change of administration, many state personnel who had been involved in redistricting left state service. *Id.* By the time plaintiffs undertook discovery after the 2016 amended complaint, officials were asked in depositions to recall details of events that had occurred, in some instances, nearly six years before. *Id.* at 49. They struggled at times to do so. *See, e.g.*, J.A. 197, 198, 199 (Miller); Dkt. 177-8, Tr. 123-24 (Hitchcock).

Plaintiffs have repeatedly sought to capitalize on the lack of documentation and faded memories, both in their summary judgment briefing, *see, e.g.*, 177-1, 5-6 (noting Jeanne Hitchcock's failure to recall), and before this Court. When they claim that "there is no evidence that any relevant public comments were actually taken into account by the mapdrawers," Appellees' Br. 4, they are relying on both the lack of documents and

faded memories. For example, former GRAC member Jeanne Hitchcock could recall that GRAC's map "reflected what we heard" from members of the public who attended GRAC's hearings, but when asked about specific alterations made in response to that input, she did not "have a recollection of that specifically." Dkt. 177-8, Tr. 124:4-6, 123:4-5. Plaintiffs compound the prejudice by disregarding testimony of witnesses who did recall events. For example, Yaakov Weissmann, a Maryland legislative staffer tasked with drafting the 2011 redistricting map, testified via declaration that he worked directly with members of the GRAC and attended public hearings, and that former GRAC member Jeanne Hitchcock "would join [the staff] workgroup [drawing the map] to provide feedback, including feedback from the public hearings and other stakeholders."[6] J.A. 937, ¶ 7. Plaintiffs chose not to depose Mr. Weissmann. Instead, plaintiffs preferred to

[6] Plaintiffs attempt to tie Mr. Weissmann to Eric Hawkins, a contractor hired by the Congressional delegation. Appellees' Br. 5. But there is no evidence that Mr. Hawkins ever worked on the adopted Maryland map. Maryland mapdrawers and decisionmakers rejected the Congressional delegation's proposed map. J.A. 937, ¶¶ 8, 9. The two e-mails plaintiffs cite, Appellees' Br. 5 (citing J.A. 823, 825), establish no such connection. They are unrelated exchanges between Mr. Hawkins and Jason Gleason, chief of staff to Representative John Sarbanes. *See also Benisek v. Lamone*, No. 17-333, Appellees' Br. 14 n.10. The only correspondence in the record involving both Mr. Weissmann and Mr. Hawkins (J.A. 1104) shows Mr. Weismann responding to a query from someone else, forwarding a question by Mr. Hawkins. The email exchange concerns only minor adjustments made *after* the GRAC and state workgroup had introduced the plan to the public. J.A. 1104 (dated October 18, 2011, after plan was introduced); *see also* Appellees' Br. 11.

rely on the dearth of surviving documentation and the inability of some witnesses to recall the details of what occurred some half-dozen years earlier.

2. Though plaintiffs claim that courts "often" order a new redistricting map at the end of a decade before an impending census, they cite only three cases, one of which is *Rucho*, No. 18-422, now pending on appeal. Appellees' Br. 55 (citing *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017), *rev'd in part*, 138 S. Ct. 2305 (2018); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y.), *aff'd*, 522 U.S. 801 (1997). None of them involved a finding of "plaintiffs' unnecessary, years-long delay," as here, *Benisek v. Lamone*, 138 U.S. at 1944; and none of them involved enjoining a plan that had been used in four prior Congressional elections, as Maryland's 2011 plan has been. In *Perez*, there had been two prior elections under the enjoined plan. 138 S. Ct. at 2318. In both *Perez* and *Diaz*, the injunction was entered three years before the next census. *Id.*; 978 F. Supp. 96.

CONCLUSION

The Court should reverse and vacate the judgment of the United States District Court for the District of Maryland.

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IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

—v.—

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, ACLU OF NORTH CAROLINA, AND ACLU OF MARYLAND, IN SUPPORT OF APPELLEES

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Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 34

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Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 27

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League of Women Voters of Mich. v. Johnson,
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Lubin v. Panish, 415 U.S. 709 (1974) 35

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003) 10

McCutcheon v. Fed. Election Comm'n,
572 U.S. 185 (2014) ..... *passim*

Miller v. Johnson, 515 U.S. 900 (1995) 22

N.Y. State Bd. of Elections v. Lopez Torres,
552 U.S. 196 (2008) 4, 14

Norman v. Reed, 502 U.S. 279 (1992) 11, 13

Ohio A. Philip Randolph Inst. v. Householder,
No. 18-cv-357, 2019 WL 652980
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Ohio v. Am. Express Co.,
138 S. Ct. 2274 (2018) 16

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972) 5

Purcell v. Gonzalez, 549 U.S. 1 (2006) 7

Red Lion Broad. Co. v. F.C.C.,
395 U.S. 367 (1969) 5

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) 5

Reno v. Bossier Par. Sch. Bd.,
520 U.S. 471 (1997) 22

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 13

Shelby Cty. v. Holder, 572 U.S. 529 (2013) 28

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 5

Stanson v. Mott, 551 P.2d 1 (Cal. 1976) 10

Turner Broad. Sys., Inc. v. F.C.C.,
512 U.S. 622 (1994) 19

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 8

Vieth v. Jubelirer, 541 U.S. 267 (2004) ..... *passim*

Whitford v. Gill, 218 F. Supp. 3d 837
(W.D. Wis. 2016) 17, 19, 26

Williams v. Rhodes, 393 U.S. 23 (1968) 7, 12, 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

U.S. Const., art. I, § 4, cl. 1 9

OTHER AUTHORITIES

The Records of the Federal Convention of 1787
(Max Farrand ed. 1911) 9

Elliot's Debates (James McClellan & M.E.
Bradford eds. 1989) 9

John Hart Ely, *Democracy and Distrust* (1980) 21

Jowei Chen & Jonathan Rodden, *Cutting
Through the Thicket: Redistricting
Simulations and the Detection of Partisan
Gerrymanders*, 14 Election L.J. 312 (2015) 26

Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) 27

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 1.7 million members dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Maryland, ACLU of North Carolina, and New York Civil Liberties Union are ACLU statewide affiliates of the national ACLU. The ACLU of Maryland and ACLU of North Carolina have approximately 42,000 and 30,000 members, respectively. The New York Civil Liberties Union has 170,000 members.

SUMMARY OF ARGUMENT

A fundamental precept of representative democracy is that the government must regulate the electoral process in an even-handed manner. Plainly, a state that barred members of one political party from voting in an election would violate this principle. So too would a state that manipulated voting machines to discount the votes cast for one party by one-third. Nor could a legislature wait until ballots were cast and *then* draw district lines to achieve its preferred electoral outcome. In each

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[1] All parties to the cases have lodged blanket consents for the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

instance, the state's conduct would corrupt the integrity of the electoral process and impair voters' political rights.

Partisan gerrymandering is similarly incompatible with democratic principles. It subverts government's obligation to remain neutral in regulating elections. Although this Court has yet to agree on a standard to discern its limits, there is longstanding consensus that the practice lies beyond the constitutional pale.

The First Amendment requires that government officials neutrally regulate speech or expressive conduct in public forums. That neutrality principle—in the form of a prohibition against content and viewpoint discrimination—is rooted in the commitment to ideological competition as a critical component of self-government. The obligation of state neutrality under the First Amendment supplies a sufficient framework to bar a state from "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

Partisan gerrymandering violates the First Amendment where the state draws districts with the purpose and effect of entrenching—or "freezing"—partisan advantage against likely changes in voter preferences. To make out a prima facie claim, a plaintiff must show: (1) an improper legislative *intent* to entrench a partisan advantage; and (2) an impermissible *effect* of having drawn the district lines in such fashion as to insulate partisan advantage against likely changes in voter preference.

In past cases, showing intent to entrench has not been a doctrinal stumbling block. The desire to squeeze out every last iota of partisan advantage has often been explicit. The difficulty lies in the second part of the proof: how much partisan gain is too much and how is this to be established? This has been the doctrinal stumbling block until now.

What has changed over time is that courts in multiple cases have used familiar evidentiary tools to determine whether a challenged plan so deviates from neutral allocations of electoral opportunity as to entrench incumbent advantage. The courts have looked to a range of validated social science evidence to make this assessment, just as courts do in many other areas of law. There is not one way of proving entrenchment, just as there is not one way of proving disparate effect in a discrimination case or unfair competition in an antitrust action. But the courts have been able to assess multiple empirical tests to identify districts that are such outliers, and so freeze the political process, that they presumptively violate the First Amendment. Once these two elements are met, the burden should shift to the state to demonstrate the legitimacy of the governmental interests justifying the apparent political distortions.

In both cases on review, the courts properly applied the dual threshold inquiry and then found the government's asserted purpose insufficient to overcome the First Amendment command of neutrality. The record evidence showed that Maryland and North Carolina legislators acted with intent to lock in their preferred partisan advantage, and that they accomplished that goal by entrenching

the majority party against the range of likely changes in constituent preference.

ARGUMENT

I. THE STATE MUST REMAIN POLITICALLY VIEWPOINT-NEUTRAL IN ADMINISTERING ELECTIONS.

State officials cannot tailor electoral rules to insulate their majority from changes in voter preferences without violating the First Amendment. That constitutional provision protects the panoply of rights of political expression, including the rights to associate to advance political beliefs, to participate in the electoral process, and to cast a meaningful ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983); *see also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring). It prohibits the government from using its regulatory authority to skew the "marketplace of ideas." This "neutrality principle" underpins democratic self-government, which depends on free and fair electoral contests. As the Court has observed, "the core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

A. The Neutrality Principle Operates as the Principal First Amendment Mechanism to Secure our System of Free Expression.

Justice Holmes famously wrote "that the best test of truth is the power of the thought to get itself

accepted in the competition of the market ...." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). That "theory of our Constitution," *id.*, is now a cornerstone of the First Amendment. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (Breyer, J., dissenting); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Government neutrality regarding the regulation of speech is the doctrinal prerequisite to fair ideological competition. In its early application, the principle—which often takes the form of a prohibition against content discrimination—was most commonly invoked where the state policed expressive access to a public forum. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Mosley*, for example, the Court invalidated a Chicago ordinance that selectively granted access to picket on public sidewalks based on speech content and the speakers' labor union affiliation. The Court explained that the First Amendment and the Fourteenth Amendment's equal protection guarantee prohibited the government from "grant[ing] the use of a forum to people whose views it finds acceptable, but deny[ing] use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96.

This Court has long "rejected government efforts to increase the speech of some at the expense of others." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011). The core principle is that the state may not burden speech based on the viewpoint expressed without offending the First Amendment. No less neutrality is tolerable

when the government regulates the electoral system. The norms that preserve robust discourse in public forums would do little if the First Amendment did not similarly protect the electoral forum. More than a means of choosing officeholders, elections are the quintessential locus for competition in the political marketplace of ideas. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014).

B. The Neutrality Principle Applies to Regulation of the Electoral Process.

The guarantee of government neutrality that undergirds the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," and, generally, to the regulation of the electoral process. *McCutcheon*, 572 U.S. at 191-92 (citation and internal quotation marks omitted). Thus, while states have broad discretion to regulate elections, they must "observe the limits established by the First Amendment." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). This Court has been vigilant about ensuring that laws governing the electoral process comply with the neutrality principle. *See McCutcheon*, 572 U.S. at 191-94; *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 415-16 (2006) (*LULAC*); *Anderson*, 460 U.S. at 788.

For example, this Court has applied careful scrutiny to ensure that, among other regulations,

voter qualifications,[2] regulation of candidates' and parties' access to the ballot,[3] campaign finance regulations,[4] and polling place rules[5] all adhere to constitutional obligations of neutrality. Each of these laws "inevitably affects—at least to some degree—the individual's right to vote and ... to associate with others for political ends." *Anderson*, 460 U.S. at 788. This Court must continue to ensure that states exercise their authority to regulate elections "fair[ly] and honest[ly]," *Eu*, 489 U.S. at 231, with "the aim of providing a just framework within which diverse political groups in our society may fairly compete," *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

There are sound reasons for this Court's insistence on neutrality in the electoral forum. "Confidence in the integrity of ... electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). It "encourages citizen participation in

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[2] *See, e.g., Carrington v. Rash*, 380 U.S. 89, 94, 96-97 (1965) (invalidating Texas law prohibiting servicemembers from voting while on active duty service in the state).

[3] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 24-25, 32 (1968) (invalidating Ohio ballot access restriction that "favor[ed] two particular parties—the Republicans and the Democrats—and ... g[a]ve them a complete monopoly ... on the right to have people vote for or against them").

[4] *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (invalidating statute prohibiting banks and business corporations from engaging in certain campaign speech in referendum elections).

[5] *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding viewpoint-neutral restriction on electioneering within 100-feet of polling place).

the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Conversely, nothing can damage voter confidence as fully as watching the state entrench its preferred candidates or parties in office against the will of "an 'informed, civically militant electorate' and 'an aroused popular conscience.'" *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring). By ensconcing the preferred party in office and "freez[ing] the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-government through elected officials," *McCutcheon*, 572 U.S. at 227, and substantially burdens representational rights protected by the First Amendment.

C. Application of the Neutrality Principle in Regulating Redistricting is Consistent With Core Concerns of the Framers.

State neutrality in regulating the redistricting process is consistent with core principles embraced at the founding. Under the Articles of Confederation, state legislatures both appointed delegates to the Continental Congress and "enjoyed the power to establish qualifications." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 851 n.3 (1995) (Thomas, J., dissenting). The framers rejected that approach. "[I]n perhaps their most important contribution, [they] conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Id.* at 821. That ideal was "most clearly" implemented in the election of

members of the House of Representatives, *id.*, and later expanded to the Senate through the Seventeenth Amendment.

By design and from the outset, the Constitution delegated to the states powers limited to regulating the "Times, Places and Manner of holding [congressional] Elections." U.S. Const., art. I, § 4, cl. 1; *see Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) ("No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment."). That choice reflected fears that greater involvement from state legislatures would temper the federal government's accountability to the electorate.[6] Nothing in the limited "procedural regulations" the framers saw fit to delegate to the states includes "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade ... constitutional restraints." *Cook*, 531

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[6] *See* Elliot's Debates, at 75 (James McClellan & M.E. Bradford eds. 1989) (Madison: "considered an election of one branch ... by the people immediately, as a clear principle of free government [which] had the additional advantage of ... avoiding too great an agency of the state governments in the general one"); 1 The Records of the Federal Convention of 1787, at 50 (Max Farrand ed. 1911) (Wilson: argued "interference between the general and local Governm[ents] should be obviated as much as possible"); *id.* (Madison: "thought ... that the great fabric to be raised would be more stable and durable if it should rest on the ... people themselves, than if it should stand merely on the pillars of the Legislatures"); *id.* at 359 (Rufus King: argued "the Legislatures [would] constantly choose men subservient to their own views as contrasted to the general interest"); *id.* at 358-59 (Hamilton: argued allowing state legislatures to choose members of House of Representatives "would increase that State influence which could not be too watchfully guarded ag[ain]st").

U.S. at 523 (quotation marks omitted). Yet that is precisely what partisan gerrymandering does.

The founders also understood that "[t]he first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). They feared the "principal danger ... [of] the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (citing Federalist Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) (Jefferson)). As members of the Court have recognized, that "unfortunate" possibility is now reality. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring). "Whether spoken with concern or pride ... our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Id.* (citation omitted). Judicial intervention is essential to restore the First Amendment's commitment to democratic self-government.

II. PARTISAN GERRYMANDERING THAT ENTRENCHES THE STATE'S PREFERRED PARTY IN OFFICE SUBSTANTIALLY BURDENS FUNDAMENTAL POLITICAL RIGHTS AND TRIGGERS HEIGHTENED SCRUTINY.

The First Amendment safeguards voters' freedoms to associate with and advocate for a political party, vote for their candidate of choice, express their political views, and participate in the

political process. *See McCutcheon*, 572 U.S. at 191; *Anderson*, 460 U.S. at 787, 793-94. Those rights are "core ... activities" without which a representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

Cognizant that laws regulating the electoral process "will invariably impose *some* burden upon individual voters," this Court has expounded a flexible standard to assess "reasonable, *nondiscriminatory* restrictions" on those core activities. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added and citation omitted). Courts "must first consider the character and magnitude of the asserted injury to the [protected] rights ... that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789; *Burdick*, 504 at 434. The injury (or burden) is then balanced against the state's justification, *id.*, which must be "sufficiently weighty to justify" the burden imposed. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Where, as here, there is a threshold showing that the state has departed from neutrality to penalize citizens because of their political views and associations, the state's regulation must be necessary to meet important interests. *See Anderson*, 460 U.S. at 806; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Norman*, 502 U.S. at 288-89.

Purposeful efforts to entrench a favored party or candidate against shifts in the electorate cannot be subject to the "sliding scale" delineated in *Anderson* and *Burdick*. Partisan gerrymandering gravely undermines "the premise of individual dignity and choice upon which our political system rests." *McCutcheon*, 572 U.S. at 203 (citation and

internal quotation marks omitted). Such targeted state intervention is anathema to the foundational precept that the "[g]overnment is forbidden to assume the task of ultimate judgment" on "conflicting arguments," "lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791-92 n.31. When the states engage in partisan gerrymandering to predetermine the outcome of an election, they render meaningless the right to cast a meaningful vote.

It is difficult to identify a core individual political right that is left untainted by partisan gerrymandering. By weighting the electoral scales, it substantially burdens the rights of any citizens who would choose to "run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon*, 572 U.S. at 191.

Each step in the partisan gerrymandering process offends bedrock First Amendment principles protecting "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively." *Williams*, 393 U.S. at 30 (emphasis added). The process of enacting a partisan gerrymander reveals the punishing burdens it places on individual voters. First, the state engages in redistricting with the intent of drawing a map highly likely to favor candidates of a particular political party, regardless of voters' electoral preference. Second, it uses data on citizens' political preferences to identify voters whose views it wants to elevate and those whose views it wishes to subordinate. *See Ariz. State Leg.*, 135 S. Ct.

at 2658. Third, it allocates voters to specific legislative districts based on that data, with the goal of shielding preferred candidates from meaningful opposition. At each step of the way, the state engages in viewpoint-based discrimination to diminish the voting strength of citizens holding disfavored political views and to insulate the state's preferred party from "the political responsiveness at the heart of the democratic process." *McCutcheon*, 572 U.S. at 227.

When the state entrenches its preferred parties "to the exclusion of others" it "very effective[ly] imped[es] ... associational and speech freedoms ... essential to a meaningful system of democratic government." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (quoting *Elrod*, 427 U.S. at 369-70). This Court has found a substantial burden on the freedom of association where the legislature hampered voters' ability to band together with "like-minded voters to gather in pursuit of common political ends ... [and] to express their ... political preferences." *Norman*, 502 U.S. at 288. Partisan gerrymandering is pernicious for exactly that reason. It limits "independent-minded voters [from] associat[ing] in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794.

To avoid political subordination, citizens may curtail the exercise of their political rights or change them to align more closely with the state's preferences. Citizens may be less likely to join a disfavored party, contribute to or volunteer for candidates with disfavored views, or vote at all. Partisan gerrymandering entangles government in

the "dangerous business [of] ... us[ing] the election laws to influence voters' choices," vesting in the state—instead of the voters—the ultimate judgment concerning "which strengths should be permitted to contribute to the outcome of an election." *Davis v. Fed. Election Comm'n*, 554 U.S. 724,742 (2008).

Unconstitutional partisan gerrymandering is distinct from the "inevitabl[e]" political considerations and partisan effects that follow from neutral state regulation of elections. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Courts cannot and should not intervene in a neutrally-administered system where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward." *Lopez Torres*, 552 U.S. at 208. But when a state redistricts for the purpose of granting its preferred party an entrenched advantage, it disables the competitive mechanism driving the democratic process. It substantially burdens voters' rights to participate in a fair election. *See Williams*, 393 U.S. 31-32; *see also Ariz. State Legislature*, 135 S. Ct. at 2658.

III. THE CHALLENGED PLANS IN NORTH CAROLINA AND MARYLAND WERE EACH ENACTED TO ENTRENCH THE STATE'S PREFERRED PARTY IN OFFICE AND RESULTED IN IMPERMISSIBLE ENTRENCHMENT.

The Court should adopt a burden shifting analysis, familiar from other areas of constitutional law, to determine when redistricting violates the First Amendment by intentionally and effectively entrenching the state's preferred party in office.

To start, plaintiffs must establish a prima facie case of improper partisan gerrymandering. They must show: (1) that the state acted with the intent to entrench the state's preferred political party; and (2) that it accomplished its intent. If plaintiffs establish a prima facie case, the burden shifts to the state to justify its actions. Because partisan gerrymandering directly infringes fundamental First Amendment rights, the state must meet heightened scrutiny. *See supra* Part II.

District courts are responsible for determining whether the parties have met their respective burdens. *See Hunt v. Cromartie*, 526 U.S. 541, 553-54 (1999). As with the "variety" of other "constitutional and statutory disputes" in which this Court "has embraced new social science theories and empirical analyses," the lower courts are up to the task. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 857 (M.D.N.C. 2018). The tools, methods, and metrics used to draw constitutionally suspect maps have become ever more sophisticated. These developments increase *both* the ability of state officials to rig elections, *and* that of courts to identify when they do so. *See Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring) ("[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").

No single empirical test can provide the sole metric to establish partisan gerrymandering. It is the

First Amendment that defines the injury; as in other contexts, empirical analysis merely supplies evidence that a reviewing court may consider and apply.

An instructive analogy from antitrust—the law of commercial competition—can be drawn to the law of political competition. From the limited guidance provided by the antitrust statutes, federal courts developed manageable standards for determining when certain conduct harms competition, the "rule of reason," of which proof of market power is a critical component. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018). "[D]etermining the existence of market power" is a flexible inquiry that requires courts to "examine[] closely the economic reality of the market at issue." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 & n.13 (1992). Thus, this Court has left to factfinders in antitrust cases the flexibility to consider a variety of empirical tests that may assist them in determining whether a firm has a problematic level of market power—including new methods as they become available.[7]

As in antitrust cases, the empirical analyses most probative of whether a challenged plan locks up electoral competition may vary by case and will change and improve as social science evolves. But in both areas, courts can and do routinely consider expert evidence to help determine whether a legal standard has been met—and in particular, to assess

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[7] *See, e.g., In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. CV 14-MD-02503, 2018 WL 563144, at *6-11 (D. Mass. Jan. 25, 2018) (discussing a variety of expert empirical analyses probative of the existence of market power in denying summary judgment and *Daubert* motions).

improper influence in a marketplace, whether electoral or commercial.

While their approaches vary in detail, all five lower federal courts to address partisan gerrymandering claims since this Court's decision in *Arizona State Legislature* have applied similar judicially manageable standards to determine whether a challenged map or district results in the kind of entrenched partisan advantage that the First Amendment proscribes.[8] In each of these decisions, courts carefully considered the full record and a range of expert evidence to assess whether the legal standard was satisfied, and to ensure that their intervention was properly limited. That approach is consistent with the entrenchment standard the Court should embrace.

A. There Is Consensus Among District Courts That the First Amendment Supplies Manageable Standards to Adjudicate Partisan Gerrymandering Claims.

Since this Court wrote in 2015 that "partisan gerrymanders ... are incompatible with democratic principles," *Ariz. State Legislature*, 135 S. Ct. at 2658 (citation and internal quotation marks and alterations omitted), all five federal district courts to

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[8] *See Ohio A. Philip Randolph Inst. v. Householder*, No. 18-cv-357, 2019 WL 652980, at *3-4 (S.D. Ohio Feb. 15, 2019) (*OAPRI*); *League of Women Voters of Mich. v. Johnson*, No. 17-cv-14148, 2018 WL 6257476, at *4, *18 (E.D. Mich. Nov. 30, 2018) (*LWV-Michigan*); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497-98 (D. Md. 2018); *Rucho*, 318 F. Supp. 3d at 838, 860-65; *Whitford v. Gill*, 218 F. Supp. 3d 837, 884, 898 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018).

pass judgment have converged upon a justiciable standard to assess when an apportionment plan violates the First and Fourteenth Amendments.[9]

First, all five courts have required plaintiffs to prove that a challenged map or district was drawn with intent to entrench a partisan advantage.[10] Second, plaintiffs had to prove that the challenged map or district achieved the intended partisan advantage.[11] Third, each court also required proof that the challenged map could not be justified by legitimate, partisan-neutral principles.[12]

Notwithstanding some differences at the margins, there is a consistent recognition in the lower court decisions that a plan violates the Constitution when it uses redistricting methods that are designed to, and predictably do, deviate from the normal distribution of voter preferences to entrench the advantage of one party over another. The lower courts have all relied on expert analysis to help determine—under the totality of the circumstances—whether the challenged redistricting plan so deviated from acceptable redistricting outcomes that it could only be the product of extreme partisan opportunism.

Each lower court relied upon the same types of evidence in determining whether mapmakers sought to favor or punish a particular party to such an extent as to lock up the electoral marketplace. For example, each lower court has looked to analyses

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[9] *See* cases cited *supra* note 8.

[10] *See* cases cited *supra* note 8.

[11] *See* cases cited *supra* note 8.

[12] *See* cases cited *supra* note 8.

generated by the mapmakers to test whether and to what extent proposed maps would yield resilient partisan advantage.[13] They also relied upon expert analyses regarding the resilience of gerrymandered maps to electoral changes.[14] And they have considered the extent to which actual election results in fact rewarded mapmakers' efforts to insulate candidates of the state's preferred party from electoral accountability.[15]

These rulings are consistent with this Court's focus on entrenchment in defining impermissible partisan gerrymandering. *Ariz. State Legislature*, 135 S. Ct. at 2658; *cf. LULAC*, 548 U.S. at 419 ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority."). As the *Rucho* court observed, "by intentionally seeking to entrench a favored party in power and make it difficult—if not impossible—for candidates of parties supporting disfavored viewpoints to prevail, partisan gerrymandering 'seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" 318 F. Supp. 3d at

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[13] *OAPRI*, 2019 WL 652980, at *9-10; *LWV-Michigan*, 2018 WL 6257476, at *2; *Benisek*, 348 F. Supp. 3d at 503-04; *Rucho*, 318 F. Supp. 3d at 869-70; *Gill*, 218 F. Supp. 3d at 891.

[14] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *7-8; *Benisek*, 348 F. Supp. 3d at 507; *Rucho*, 318 F. Supp. 3d at 876; *Gill*, 218 F. Supp. 3d at 894.

[15] *OAPRI*, 2019 WL 652980, at *11; *LWV-Michigan*, 2018 WL 6257476, at *3; *Benisek*, 348 F. Supp. 3d at 519; *Rucho*, 318 F. Supp. 3d at 884-85, 894-95; *Gill*, 218 F. Supp. 3d at 853.

800-01 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). Correspondingly, by entrenching a preferred party, the state also locks out voters who favor other candidates or parties from the political system. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

The entrenchment standard proposed by amici places a heavier burden on plaintiffs alleging partisan gerrymandering claims than the standard set by some courts to consider this issue. The proof of a defendant's intent to *entrench* a partisan advantage in the proposed test requires more than mere intent to disfavor certain voters because of their voting history or partisan affiliation. *See, e.g.*, *Benisek*, 348 F. Supp. 3d at 515. A focus on entrenchment captures the unlawful *intent* at issue in each of these cases. It assesses whether the state seeks to shield a preferred party from accountability to the electorate by diluting the voting strength of opposing parties and their members. And entrenchment also identifies the *effect* that an unlawful partisan gerrymander achieves—namely, a deviation from neutral districting principles that resists likely shifts in the electorate. So defined, the entrenchment standard aligns with, but lends greater clarity to the "tangible and concrete adverse effect" measure that some courts have employed. *See, e.g.*, *id.* Amici's proposal builds on the way in which at least five district courts have utilized manageable standards for weighing evidence. The problem of partisan gerrymandering can and should be solved by the customary development of evidentiary law, not by dictating that any single method of proof be

sufficient for all such challenges. Precisely because an effective, invidious partisan gerrymander is a self-perpetuating problem designed to prevent correction through the political process, the courts are not only "conspicuously well situated" to correct it—they are the only ones that can do so.[16]

B. Courts Are Well-Suited and Equipped to Determine Whether the State Acted With Intent to Entrench a Partisan Advantage.

1. Courts May Determine Intent to Entrench Through Direct or Circumstantial Evidence.

Partisan gerrymandering aims "to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. To make a prima facie claim, plaintiffs must therefore establish, first, that the state purposely and improperly set out to disadvantage one party and make its plan non-responsive to electoral shifts.

A state acts with an intent to entrench when it draws an apportionment plan deliberately to ensure that the partisan composition of the legislature will not be responsive to changes in voter preferences under the likely range of electoral scenarios. More than the mere *consideration* of politics, *see Vieth*, 541 U.S. at 315 (Kennedy, J., concurring), an intent to *entrench* exists where lines are drawn for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State*

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[16] *OAPRI*, 2019 WL 652980, at *6-7 (quoting John Hart Ely, *Democracy and Distrust* 102-03 (1980)).

Legislature, 135 S. Ct. at 2658. Any redistricting plan drawn by a legislature will be created with knowledge of the political distribution of voters. However, a state legislature cannot draw lines with the purpose of shielding candidates of its preferred party from changes in the associational choices of the citizenry.

Courts are well-equipped to undertake this inquiry through direct or circumstantial evidence. Determining motive in the context of redistricting has never proved beyond the competence of courts. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488-89 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Contemporaneous statements of decision-makers, for example, may serve as evidence of improper purpose. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69, 1475 (2017). Procedural irregularities—such as exclusion of the minority party from deliberations or "excessive weight on data concerning party voting trends," *Vieth*, 541 U.S. at 322 (Stevens, J., dissenting)—may also support a finding of intent. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (explaining that the use of detailed racial data in the districting process supported finding of discriminatory intent).

A documented history of reliance on improper purposes can also support a finding that a similar intent played a role in present redistricting. For example, in *Miller*, the Court focused on Georgia's past interactions with the Department of Justice regarding Voting Rights Act preclearance, which made clear that race was the predominant factor in the state's redistricting. 515 U.S. at 917-18. A state's history of partisan entrenchment can thus

support a finding of intent to entrench the party favored by the present redistricting map, especially where past plan performance is known and there is evidence decisionmakers seek to repeat it.

2. Plaintiffs Below Proved That Both North Carolina and Maryland Acted with Intent to Entrench Partisan Advantage.

The records from North Carolina and Maryland establish that each challenged plan was enacted with impermissible intent to entrench the state's preferred party in the challenged districts, as well as statewide. Map proponents made little effort to conceal their intent to entrench fellow partisans in office.

North Carolina. In North Carolina, Senator Rucho and Representative Lewis, redistricting committee co-chairs, directed Dr. Hofeller, their mapmaking consultant, to ensure an overwhelming Republican advantage, regardless of changes in the partisan preferences of voters. *Rucho*, 318 F. Supp. 3d at 803-05. They made clear that their "'primary goal' was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" *Id.* at 880 (quoting Hofeller Dep. 123:1-7). Hofeller received essentially all of the criteria he used to draw the challenged map from Rucho and Lewis and created a "near-final" version of the challenged plan before the redistricting committee even held its first meeting. *Id.* at 806. In designing the map, Hofeller relied on a bespoke metric to test maps based on whether Republicans could achieve a durable partisan advantage in ten districts. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 601-02, 641 (M.D.N.C. 2018), *vacated and*

remanded for further consideration in light of Gill, 138 S. Ct. 1916, 138 S. Ct. 2679 (2018). Both Lewis and Hofeller testified that they reviewed draft plans to assess their likely durability against potential electoral swings. *Rucho*, 318 F. Supp. 3d at 870.

Republican legislators dominated the redistricting process, which lacked meaningful input from Democratic legislators or the public. *Rucho*, 318 F. Supp. 3d at 868-69. During the process, Lewis remarked that the redistricting committee should focus on preserving the 10-3 Republican advantage because "he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 808 (alterations omitted). The plan passed by party-line votes at every stage. *Id.* at 808-09.

Maryland. Democrats drafting the challenged apportionment plan at issue in *Benisek* also made clear their intent to entrench their partisan advantage in the Sixth District and thereby ensure Democratic success in all but one of the remaining districts. 348 F. Supp. 3d at 502. Governor O'Malley, the Democrat who led the redistricting process, testified that "part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." *Id.* To that end, Maryland Democrats engaged and instructed a consultant to draw a map that "maximized 'incumbent protection' for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican." *Id.* at 502-03. Those were their only instructions. *Id.* at 503.

The process in Maryland also effectively excluded the out-party, Republicans. The Governor-

created Redistricting Advisory Committee held ostensible public hearings to solicit comment, but the real work on the plan was done by "staffers to the State's most senior Democratic leaders" working with hired mapmaking consultants. *Benisek*, 348 F. Supp. 3d at 504-05. Those mapmakers used a performance metric to evaluate whether potential plans produced a sufficiently large and durable Democratic advantage. *Id.* at 503.

C. Plaintiffs Below Proved That Both North Carolina and Maryland Achieved Their Intent to Entrench A Partisan Advantage.

In addition to an intent to entrench, plaintiffs asserting a partisan gerrymandering claim must show that the state's actions had their desired effect. Entrenchment is manifest where a challenged plan significantly deviates from the normal range of redistricting distributions to the benefit of the party controlling the process. The constitutional inquiry is not whether a map results in one-party rule or fails to achieve proportional representation, but whether the state significantly deviates from sound districting principles to "freeze[] the status quo ... [against] the potential fluidity of American political life." *Jenness*, 403 U.S. at 439.

1. Entrenchment Can Be Assessed Through Discernible Deviations in Normal Ranges of Partisan Balance.

A state presumptively violates the First Amendment when an intent to entrench incumbent political advantage dominates its redistricting

process, and when the resulting districting plan succeeds in that entrenchment. Maps that materially deviate from normal districting principles and ensure incumbent advantage against the range of likely political swings in the electorate impermissibly entrench partisan advantage. Evidentiary proof of the dominant partisan intent and the resulting departure from normal districting practices then shifts the burden of production to the state to justify the challenged plan as necessary to legitimate state ends.

As the orders under review and other recent decisions show,[17] there are numerous methods of identifying suspect departures from neutrality. One method that has gained acceptance among social scientists and the lower courts is to compare the challenged plan against hypothetical maps generated using neutral redistricting criteria (e.g., equipopulation, nondiscrimination requirements, compactness, and contiguity). Experts can identify whether and to what extent a challenged map evinces entrenchment effects by (1) generating a large set of hypothetical maps based on established neutral criteria; (2) identifying the median in the distribution of hypothetical maps; and (3) determining whether the challenged map produces a partisan balance that deviates significantly from that median to the advantage of the state's preferred party.[18] Several lower courts[19] (including *Rucho* as

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[17] *See, e.g., OAPRI*, 2019 WL 652980, at *9-14; *LWV-Michigan*, 2018 WL 6257476, at *7-9; *Gill*, 218 F. Supp. 3d at 898-906.

[18] *See* Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 332 (2015) ("If the parti-

discussed *infra*) have considered this method among several others for comparing a challenged plan's partisan balance to a neutral baseline.

Under the entrenchment benchmark, the First Amendment only bars plans that yield the state's preferred outcome by deviating materially from expected possible distributions of electoral outcomes, as demonstrated by a variety of evidentiary tests, and always accruing to the benefit of the party in power. Thus, the inquiry would protect against imbalances that "compromis[e] the political responsiveness at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, while allowing other redistricting outcomes that reasonably reflect a state's partisan balance.

Such a standard mirrors those that courts apply to pattern-or-practice discrimination claims under the civil rights laws. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Title VII cases, for example, call on courts to identify a baseline for the relevant workforce in a given geographic market against which to measure the composition of an employer's

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sanship of a proposed plan lies in the extreme tail of the distribution of simulated plans or outside the distribution altogether, courts can make relatively strong inferences about the plan's partisan effect and intent."); *see also* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351, 360, 362-64 (2016) (positing comparison of challenged map against distribution of millions of alternative maps).

[19] *OAPRI*, 2019 WL 652980, at *11, *16-17; *LWV-Michigan*, 2018 WL 6257476, at *7-8.

workforce. *See Hazelwood*, 433 U.S. at 307; *see also id.* at 311-12. As in Title VII cases, courts presiding over gerrymandering cases may then determine whether available evidence demonstrates an entrenched "gross disparity" between the settled baseline and the challenged system. *Id.* at 307-08.

In both partisan gerrymandering and pattern-or-practice cases, the law does not guarantee proportionality. *See LULAC*, 548 U.S. at 419; *Hazelwood*, 433 U.S. at 307. But in both types of cases, evidence of "gross statistical disparities" between the challenged conduct and neutral conditions can constitute prima facie evidence of intent and effect. *Hazelwood*, 433 U.S. at 307-08; *cf. Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (holding that evidence of stark impact of facially neutral law may be determinative of intent and effect).

A state's intentional entrenchment of its favored party on viewpoint-based grounds violates the First Amendment whether it has effect in a single election, or continues over time. The constitutional harm accrues at the moment the state breaches its duty to neutrally act. After-the-fact evidence of multiple electoral outcomes is not necessary to establish improper entrenchment. Plaintiffs can and must be able to immediately challenge a state's use of sophisticated technology to generate maps that lock out opponents of the state's preferred party from meaningful participation in the democratic process. If injured voters are required to wait until even a single election—let alone multiple elections—has passed before bringing a challenge, officials elected under an unconstitutional map gain

illegitimate "advantages of incumbency." *Shelby Cty. v. Holder*, 572 U.S. 529, 572 (2013) (Ginsburg, J., dissenting). Even worse, those officials would have an incentive to drag out already protracted litigation to prolong their tenures. With manageable metrics now available, courts have a constitutional obligation to permit voters to act quickly to preserve the integrity of elections and their First Amendment rights.

2. Both North Carolina and Maryland Effectively Entrenched a Partisan Preference.

The courts below correctly found that apportionment plans in both North Carolina and Maryland had the effect of entrenching each state's preferred party in office.

North Carolina. The district court found that North Carolina effectively entrenched a Republican majority. That finding is well-supported by actual election results as well as the testimony of three expert witnesses employing six established methods for analyzing the challenged map using current and historic election results. Moreover, the district court's finding of diminished political activity—including in fundraising, attracting candidates, and turning out voters—by Democrats reinforce the finding of an entrenchment effect. *Rucho*, 279 F. Supp. 3d at 679-80.

First, the November 2016 election, the only election to take place under the challenged plan at that time, confirmed that the state achieved its goal of electing ten Republicans to Congress, despite winning only 53% of the vote for congressional

candidates. *Id.* at 657. The district court's findings are also supported by the results of the two elections held under the 2011 plan, which yielded a grossly disproportionate Republican advantage, and led Lewis and Rucho to instruct Hofeller to make preserving that advantage the goal of the 2016 map. *Id.* at 667.

Second, the district court found that sensitivity testing performed by plaintiffs' expert demonstrated that under the challenged map in the 2016 election, even if "Democrats obtained a statewide, uniform swing of even six points—taking [the] Democratic share of the two-party vote to 52.7%—*no seats would change hands relative to the actual 2016 results*," i.e., Democrats still would have won only three seats. *Id.* at 658 (internal quotation marks omitted).

Third, the district court's finding of entrenchment was supported by three expert analyses of partisan asymmetry, each showing a significant advantage for Republicans over Democrats in terms of their ability to translate votes into Congressional seats. *See id.* at 661 (efficiency gap); *id.* at 664-65 (partisan bias); *id.* at 665-66 (mean-median analysis). Each analysis compared the challenged plan against national and/or historical state benchmarks, and showed that the North Carolina map exhibited an extreme bias in favor of Republicans.

Finally, two experts—Drs. Mattingly and Chen— each used different methods to compare the challenged plan against thousands of hypothetical maps generated using partisan-neutral criteria, revealing an entrenchment effect so extreme that it

could be explained only by intent to secure partisan advantage. Each expert tested hypothetical maps with actual election data to determine how many maps drawn with politically neutral criteria could achieve the same partisan composition of the North Carolina congressional delegation as the challenged map, i.e., a 10-3 Republican advantage. Mattingly found that 99% of 24,518 simulated maps would have led to the election of fewer Republicans than the challenged map and that even slight changes to the challenged map would yield significant changes in the partisan composition of North Carolina's congressional delegation. *Id.* at 643-45. In comparing the challenged plan to three sets of 1,000 hypothetical maps—each set drawn with partisan-neutral criteria purportedly used to draw the challenged map—Chen found not a single map resulting in the achieved 10-3 Republican advantage. Instead, 94.5% of the simulated plans would have yielded between two and four fewer Republicans than the challenged map; and most maps would have yielded either 6 or 7 Republicans. *Id.* at 646, 666-67. Both Mattingly and Chen concluded that the challenged map was an extreme outlier that had an adverse effect on supporters of non-Republican candidates, and that such an outcome could only be explained by the object of partisan entrenchment. *See id.* at 644, 646, 667, 669-70.

Altogether six analyses from three experts supported the same conclusion—one confirmed by the results of the 2016 election. The challenged map entrenched Republicans in power against even significant swings in favor of Democrats, exactly the stated objective of the incumbents in charge of the process.

Maryland. The district court's findings make clear that the challenged map was highly likely to achieve the effect intended by its Democratic sponsors—a finding further confirmed by actual election results from three cycles.

The district court relied upon two measures of impermissible effect generated prior to an election being held under the challenged plan. The first, the Partisan Voter Index (PVI), is a "well-respected" measurement of a congressional district's likely partisan performance published by the Cook Political Report, an independent non-partisan newsletter. *Benisek*, 348 F. Supp. 3d at 507. As a result of 2011 redistricting, the Sixth District's PVI changed from a "Solid Republican" rating to "Likely Democratic" before the 2012 election. *Id.* Academic research shows that Republicans win districts with a "Solid Republican" rating 99.7% of the time and Democrats win districts with a "Likely Democratic" rating 94% of the time. *Id.*

The district court also relied upon the Democratic Performance Index (DPI), the proprietary measure of partisan performance used by the Democrats' redistricting consultant, NCEC Services, Inc., to conclude that the challenged plan left Republicans in the new Sixth District with "no real chance" of electing their preferred candidate. *Id.* at 503, 519. NCEC's data showed that in the 2016 election, Democrats "almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%." *Id.* at 503. The challenged map changed the Sixth District from a DPI under 40% to 53%. *Id.* at 507.

The significant net increase of Democrats in the new Sixth District also demonstrates an entrenchment effect. *Id.* at 519. The challenged apportionment had the effect of changing the ratio of registered Republicans to Democrats from 1.3:1 to "nearly the exact inverse" in the Sixth District, providing an advantage that the DPI and PVI both showed was highly likely to be insurmountable for Republicans. *Id.*

The *Benisek* court properly stressed that under the standard it applied, plaintiffs "need not show that the linedrawing altered the outcome of an election" or that the challenged district "was *certain*" to deny them the opportunity to elect their candidate of choice. *Id.* Nonetheless, that the Democratic candidate won the challenged district in each of the three election cycles following the challenged apportionment confirms Democrats did not merely gain an opportunity to compete in the Sixth District, but insulated the Democratic candidate from accountability to voters. *Id.* at 519-20. Further findings that Republicans showed lower turnout, diminished fundraising, and voter disaffection also support the finding of partisan entrenchment. *Id.* at 523-24. Once again, intent and effects converge to create a willfully distortive political map.

In both cases before this Court, the quantity, variety, and consistency of the evidence supporting the district courts' findings of discriminatory effect are sufficient to satisfy any standard, particularly when coupled with the overwhelming evidence of overt intent to achieve just this goal. No party below, in either case, could make any claim that this wa

not the precise aim of the redistricting process under challenge.

D. After a Prima Facie Showing, the Burden Shifts to the State to Demonstrate That Its Plan Was Necessary to Meet Legitimate Interests.

Once plaintiffs make a prima facie case of partisan entrenchment, the burden must shift to the state to establish that its redistricting plan was necessary to meet legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty." (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973))); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (explaining that partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). This Court has identified various such interests, including "traditional districting principles such as compactness and contiguity," "maintaining the integrity of political subdivisions," or maintaining "the competitive balance among political parties." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (internal quotation marks and alterations omitted).

Once it asserts that it pursued legitimate interests, the state must prove that the map it drew was necessary to satisfy them. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State

may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974). The state must show that other maps could not have met its legitimate interests.

The record is clear that neither challenged apportionment is necessary to advance the purportedly legitimate purposes claimed by either state.

North Carolina. Both Chen's and Mattingly's analyses demonstrate that the challenged map is such an extreme statistical outlier that its effects cannot possibly be explained by the pursuit of interests other than the entrenchment of partisan advantage. *Id.* at 670-71. Furthermore, the state's claim that Democrats were naturally "packed" into certain areas of the state was undermined by their own expert witness, who testified that the challenged map split several densely Democratic areas. *Rucho*, 279 F. Supp. 3d at 669-70. The district court properly rejected the state's attempts at justification.

Maryland. The state's proffered justifications strain credulity given direct evidence of intent to install a Democrat in the new Sixth District. Even if it were necessary to move the eastern boundary of the new Sixth District to keep the new First District from crossing the Chesapeake Bay, there is no reason that this change would coincide with a massive net influx of tens of thousands of Democrats at the same time that state Democratic leaders expressly called for a redistricting plan that brings the district under Democratic control. *See* Section III.B.2 *supra*. The district court's finding that the state's justifications

for the challenged district were implausible are well-supported and entitled to deference.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

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Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AND THE DISTRICT OF MARYLAND

BRIEF FOR THE AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE SUPPORTING APPELLEES

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517 U.S. 899 (1996) 27

Shaw v. *Reno*,
509 U.S. 630 (1993) 27

Simon & Schuster, Inc. v.
Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 19

Sorrell v. *IMS Health Inc.*,
564 U.S. 552 (2011) 22, 23

Cited Authorities

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Stromberg v. *California*,
283 U.S. 359 (1931) 5-6, 18

Tashjian v. *Republican Party of Conn.*,
479 U.S. 208 (1986) 12

Terminiello v. *City of Chicago*,
337 U.S. 1 (1949) 7

United States v. *Stevens*,
559 U.S. 460 (2010) 29

U.S. Telecom Ass'n v.
Federal Commc'ns Comm'n,
855 F.3d 381 (D.C. Cir. 2017) 7

Vieth v. *Jubelirer*,
541 U.S. 267 (2004) 16, 19, 25

Walker v. *Texas Div.*,
Sons of Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015) 5

Weinberger v. *Wiesenfeld*,
420 U.S. 636 (1975) 27

Wesberry v. *Sanders*,
376 U.S. 1 (1964) 1

Williams v. *Rhodes*,
393 U.S. 23 (1968) 23

Page

Other Authorities

U.S. Const. Amend. I ..... *passim*

D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671 (2013) 23

John Hart Ely, *Democracy and Distrust* (1980) 24, 25, 28

Lake Research Partners & WPA Intelligence, Memorandum to Interested Parties, *Partisan Redistricting—New Bipartisan Poll* (Sept. 11, 2017), https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting.FINAL_.2.09082017%20%28002%29.pdf 8

Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L.J. 1121 (2007) 5

INTEREST OF AMICUS CURIAE[1]

The American Jewish Committee ("AJC") is a nonpartisan global advocacy organization with more than 125,000 members and supporters and 34 offices worldwide. It was founded in 1906 to protect the civil rights of American Jews and all Americans. AJC works closely with multinational institutions, governmental agencies, civil society groups, and Jewish communities to uphold and defend democratic principles and combat bigotry and fractionalization. AJC has long acted on the principle that individual rights are best protected in a functioning representative democracy in which our government officials are subject to contested elections and accountable to their constituents. Because partisan gerrymandering of the sort involved in these cases threatens to undermine democratic accountability, it compromises the values central to AJC's mission.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In *Wesberry* v. *Sanders*, this Court noted that "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 376 U.S. 1, 17 (1964). The principal way in which the People express their political preferences is, of course, at the

1. Counsel for all parties have consented to the filing of this brief. Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amicus*, or its members or counsel, made a monetary contribution to the preparation or submission of this brief.

ballot box. This Court has rightfully been vigilant when government authorities have sought to dilute the franchise in violation of the Equal Protection Clause.[2] But partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), also violates First Amendment rights, and the harms implicated go beyond those experienced on election day.

Both district courts below found that the majority parties in the North Carolina and Maryland legislatures intended to subordinate adherents of the rival political party and to entrench themselves—textbook cases of partisan gerrymandering. See Rucho J.S. App. 287–288; Benisek J.S. App. 48a–51a.

The courts below also concluded that the partisan gerrymandering effected by the majority parties in North Carolina and Maryland not only intentionally diluted the voting power of the adherents of the minority party in the legislature, but also thereby systematically burdened those political minorities' abilities to express themselves, associate with like-minded others, and advocate for their views. This Court has already determined that such partisan gerrymandering is incompatible with democratic principles. *Arizona State Legislature*, 135 S. Ct. at 2658 (citation omitted). These harms are redressable—and

2. See, *e.g.*, *Baker* v. *Carr*, 369 U. S. 186, 206 (1962); see also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 495 (2006) (Roberts, C.J.) (noting that the same techniques at work in partisan gerrymandering, when deployed against certain identifiable racial and language minority groups, "dilute minority voting power").

should be redressed—as First Amendment violations for the reasons that follow.

I. Partisan gerrymandering undermines democracy by subverting the public's expectation that the government will be accountable to the People. It not only insulates the majority party from accountability at the polls, but also stifles the public debate that is indispensable to meaningfully contested elections. When the majority in the legislature need not fear the outcome of the next election, it is perceived to be—and, as the empirical literature shows,[3] becomes in fact—less responsive to the electorate. And, when the majority party takes advantage of its legislative dominance to draw district lines with the specific intention of entrenching its own power, polarization and extreme partisanship result.

What incentive does the public have to actively participate in the political marketplace of ideas if electoral and policy outcomes appear to be predetermined by district lines? And what incentive is there to organize in opposition to the majority if the party in power has drawn the map to enhance its own voice and to diminish that of those who hold different political views? Such lack of government neutrality offends the principles that animate the First Amendment.

II. Fortunately, the First Amendment also provides the framework for addressing these harms. In particular, applying this Court's jurisprudence on associational burdens and the flexible test adopted in *Anderson* v. *Celebrezze* would allow this Court to distinguish between partisan gerrymandering intended to subvert and burden

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3. See sources cited p. 8 n.8, *infra*.

opposing political viewpoints and valid redistricting exercises in which political affiliation is considered for legitimate purposes.

Furthermore, other lines of First Amendment doctrine reflect the need to protect minority views from retaliation, viewpoint discrimination, and speaker-based discrimination. These protections have long been regarded as key to safeguarding the marketplace of ideas. The same concerns that have moved this Court to intervene in those contexts previously are present in the cases before it now.

III. Partisan gerrymandering invariably undermines the ability of the voters to remedy this issue themselves. In the absence of judicial intervention, then, partisanship becomes further entrenched and democracy erodes. This Court has the necessary competence—and the constitutional obligation—to step in before the ongoing malfunction of the marketplace of ideas turns into a durable market failure.

Therefore, AJC urges this Court to uphold the district courts' decisions in these cases and hold that the partisan gerrymander carried out by the legislatures in North Carolina and Maryland violate the First Amendment.

ARGUMENT

I. Partisan Gerrymandering Undermines Public Trust in Representative Democracy.

The background principles that animate this Court's First Amendment jurisprudence underscore that our

democracy suffers as a result of partisan gerrymandering. Our system of government is premised on the notion that citizens may effect change by electing new officials who "through words and deeds will reflect [the] electoral mandate" of the public. *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). A corollary of that premise is that "the voters should choose their representatives, not the other way around." See *Arizona State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)).

Partisan gerrymandering interferes with electoral accountability by diluting the votes of minority party-supporters, making it substantially harder for them to elect their preferred candidates and thereby enact their favored policy choices.[4] Partisan gerrymandering also compromises the exercise of First Amendment liberties that guarantees government accountability beyond election day.

The "fundamental principle of our constitutional system" is that "the opportunity for free political discussion" is necessary to ensure "that government may be responsive to the will of the people." *Stromberg* v.

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4. As scholars have noted, "the fact that it requires a shift in voter sentiment of historic proportions to cause a small change in partisan distribution of House seats shows how far we have strayed from the simple idea that elections are supposed to provide a check on the government by offering a meaningful threat to remove legislators from office in ordinary, not just extraordinary, times." Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L.J. 1121, 1135 (2007).

California, 283 U.S. 359, 369 (1931). And while the First Amendment certainly protects the speech of the "lonely pamphleteer,"[5] it also protects the national tradition of political associations in which citizens "band together in promoting among the electorate candidates who espouse their political views," *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Yet a major effect of partisan gerrymandering is to undermine that ability of citizens to band together.

This Court has already acknowledged that targeted speech suppression undermines the promise of government accountability. "[W]henever [a] constituent can be restrained in any manner from speaking, writing, or publishing his opinions," particularly when those opinions are critical of government conduct, we worry that "public functionaries" may in effect be "absolved from their responsibility to their constituents." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 297 (1964).

The same is true when a clever legislature finds a way to burden opponents' speech and expressive association without overtly making it unlawful. Public officials in charge of drawing the district lines have the ability to disrupt collective organization and chill their would-be opposition by drawing districting maps that seek to entrench themselves in power. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

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5. See *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972).

The effects here are all the more constitutionally troubling because, by Appellants' own admissions, they burden the speech and associational rights of political minorities "in order to enhance the relative voice" of the party in power, a concept that is "wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976); see also *U.S. Telecom Ass'n* v. *Federal Commc'ns Comm'n*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The First Amendment operates as a vital guarantee of democratic self-government.").[6] This outcome not only injures the Appellees—it also creates polarized political echo chambers in which citizens lack the opportunity to hear diverse political perspectives and engage in robust public debate of the underlying policy issues.

Throughout its existence, AJC has been an active participant in the marketplace of ideas. It has observed first-hand that vigorous, bipartisan dialogue has the power to bridge divides and meaningfully advance the interests of otherwise disempowered minorities.

By entrenching the power of the majority party, North Carolina and Maryland have attempted to create a "standardization of ideas * * * by legislatures * * * [and] dominant political or community groups." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 5 (1949). "There is no room under our Constitution" for such a result, *id.* at 4, whether it is accomplished by suppressing dissenting or provocative voices or by gerrymandering opponents into political insignificance. As this Court has held, when there is "an attempt to give one side of a debatable public question

6. See Rucho J.S. App. 159, 251; Benisek J.S. App. 49a–50a.

an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785–786 (1978). And even more detrimentally to our representative democracy, this lack of government neutrality undermines public confidence that the government remains responsive and accountable to the People.[7]

Indeed, beyond its demonstrable practical effects on officials' responsiveness to opposing-party constituent demands,[8] partisan gerrymandering irreparably damages the *perception* of government accountability by creating an expectation that political outcomes are

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7. In a recent poll, 69% of likely voters for 2018, across party lines, signaled that they found it "very concerning" that "partisan gerrymandering and manipulation of district lines" deprives voters of their right to hold their representatives accountable, with 89% of respondents finding that prospect at least "concerning." Lake Research Partners & WPA Intelligence, Memorandum to Interested Parties, *Partisan Redistricting—New Bipartisan Poll*, at 6 (Sept. 11, 2017), https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting.FINAL_.2.09082017%20%28002%29.pdf. Similarly, strong majorities of respondents were very concerned that "[p]oliticians in partisan-rigged districts do not accurately reflect the interests of their constituents" (65%), that such politicians are more loyal to their party than their constituents (68%), and that dominant political parties could become entrenched even when political opinions in a state or district are no longer in agreement (64%). *Ibid.*

8. As Appellees have argued, empirical literature has shown that "gerrymandering sharply skews legislatures (and the laws they pass) in favor of the line-drawing party (and against the will of the electorate)." See League of Women Voters Mot. to Affirm 6 (citing Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017)).

predetermined by district lines. The resulting loss of the public's confidence that it is possible to bring about political change and electoral turnover through the normal channels of the marketplace of ideas—not only at the ballot box but in the long road to the election—has significant effects on the exercise of First Amendment freedoms. Partisan gerrymandering operates to dissuade members of the public at large from participating in politics more generally and disrupts the ability of political parties and their members to effectively advocate for their agendas. See *Gill* v. *Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring).

These are not injuries in search of a constitutional theory—these are classic First Amendment violations.

II. The Application of Well-Settled First Amendment Doctrine Provides the Rule of Decision Here.

Traditional First Amendment principles dictate the conclusion that partisan gerrymandering of the kind in which the legislative majorities in North Carolina and Maryland engaged here unconstitutionally burdens protected expressive conduct.

A. Partisan Gerrymandering Burdens the Associational Rights of Parties and Their Members.

Partisan gerrymandering burdens the associational rights of political parties and their members by allowing an incumbent party to burden its opponents' ability to organize and thus mount an effective challenge to that party's rule. Where the associational rights of political

parties are burdened, this Court has frequently stepped in to protect those rights, even where state legislatures have a competing interest in managing the electoral process. This Court should intervene here as well.

It is undisputed on the records before the Court that partisan gerrymandering has impeded the ability of the *Rucho* and *Benisek* political parties and the voter-plaintiffs affiliated with them to associate successfully.

The district court in *Rucho* found that individual plaintiffs testified to harms including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates"—in other words, a decreased ability "of their party to perform its core functions"—that amounted to violations of their First Amendment right to associate. Rucho J.S. App. 70–72. The court also found ample evidence of associational injuries suffered by the organizational plaintiffs.[9]

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9. For example, the North Carolina Democratic Party testified that it was difficult to "raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races" in districts gerrymandered to prevent Democratic victories. Rucho J.S. App. 71–72. It was likewise difficult to recruit candidates to run in these districts because "'the deck seem[ed] to be stacked'" against them. *Id.* at 72 (quoting the deposition of George Wayne Goodwin on behalf of the North Carolina Democratic Party). The court found that this and similar harms amounted to burdens on Common Cause and the League's right "to associate for the advancement of political beliefs." *Id.* at 74 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)).

The *Benisek* court found the plaintiff members of the Republican party suffered similar harms. The court considered testimony of individual plaintiffs facing "new difficulties in their organizational efforts as a result of the redistricting." Benisek J.S. App. 26a. For example, one voter who consistently voted for Republican candidates described speaking to people in the Sixth District who felt it was no longer worth voting after the redistricting. *Id.* at 26a, 62a. The court also drew from data to corroborate individual plaintiffs' testimony—evidence showed a decline in Republican participation at the polls as well as decreased fundraising. *Id.* at 28a, 62a–63a.

In each of these cases "the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

1. The Burdens Imposed on Appellees' Associational Rights Are Severe and Unconstitutional.

This Court has struck down similar attempts by the legislature to disadvantage members of political parties and other groups by imposing severe burdens on their associational rights. In *California Democratic Party* v. *Jones*, for example, this Court concluded that mandating blanket primaries unconstitutionally burdened the associational rights of political parties. Writing for the majority, Justice Scalia explained that "the First Amendment protects the freedom to join together in furtherance of common political beliefs." 530 U.S. at 574 (citation and internal quotation marks omitted). The

imposition of restrictions, such as blanket primaries, effectively quashes the ability of the party and "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ibid.* Those same harms are implicated by the partisan gerrymandering before this Court. That Appellees remain free to register with the minority party does not alleviate the "substantial restraint" on their "exercise of the constitutionally protected right of free association" imposed by partisan gerrymandering. *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973); see also Benisek J.S. App. 62a (describing "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters").

This Court's jurisprudence acknowledges that the harms at issue here go to the core of Appellees' associational rights. In *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, this Court struck down a requirement that the Democratic National Party Convention admit delegates selected in violation of party rules. 450 U.S. 107, 123 (1981). In so holding, this Court explained that granting states the power to place delegates in a National Convention over party objections would prevent the Party from "screening out those whose affiliation is . . . slight, tenuous, or fleeting," thereby inhibiting its ability to politically associate to advance its primary objectives. *Ibid.* (alteration omitted).[10]

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10. Accord, *e.g.*, *Cousins* v. *Wigoda*, 419 U.S. 477, 489–490 (1975) (explaining that parties are entitled to some control over the manner by which convention delegates are chosen); *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213, 229 (1986) (holding the same with respect to primary elections).

Here, as in *La Follette*, the partisan gerrymanders have inhibited the ability of the *Benisek* and *Rucho* organizational and voter-plaintiffs to associate to advance their primary objectives—namely, to promote the success of candidates who will advance their preferred policy objectives. See Rucho J.S. App. 69–72, 74; Benisek J.S. App. 61a–64a. That these gerrymanders did so by systematically undermining the minority parties' ability to affiliate in the first place, as opposed to by interfering with the parties' mechanisms for screening weak affiliations as in *La Follette*, only strengthens the case for judicial review. "By placing a state party [and its supporters] at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Appellees seek a remedy against a legislative action that "substantially abridged [their] ability to associate *effectively* with the party of [their] choice." *Kusper*, 414 U.S. at 58 (emphasis added).

In *NAACP* v. *Alabama ex rel. Patterson*, this Court held that the First Amendment is violated where legislative actions burden an organization's ability to recruit members. 357 U.S. 449, 462–463, 466 (1958). The NAACP was at risk of being ousted from the state of Alabama and enjoined from advancing its organizational interests because it refused to disclose its membership lists. *Id.* at 453–454. Noting that the NAACP had made an uncontroverted showing that requiring disclosure of the identity of its rank-and-file members would burden its ability to recruit, this Court held that the burdens on the associational rights of the NAACP and the individuals affiliated with it were unconstitutional. *Id.* at 462–463, 466. So, too, here: Both sets of appellants describe

difficulty recruiting members and, in North Carolina, partisan gerrymandering was found to have compromised parties' ability to recruit candidates for office.[11]

2. Even if the Associational Burdens Were Less Than Severe, Partisan Gerrymandering Would Still Fail the Flexible Test This Court Designed in *Anderson* v. *Celebrezze*.

The Court need not conclude that the associational burdens here are severe, or that strict scrutiny is required, to uphold the decisions below.[12] In *Anderson* v. *Celebrezze*, this Court acknowledged that "[c]onstitutional challenges to specific provisions of a State's election laws * * * cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." 460 U.S. 780, 789 (1983) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). Recognizing the need for holistic inquiry, this Court devised a flexible test that, if applied here, would allow it to weigh different factors to better distinguish between valid redistricting exercises and partisan gerrymandering violative of the First Amendment. In *Anderson*, this Court applied "an analytical process that parallel[ed] its work in ordinary litigation" by "first consider[ing] the character and magnitude of the asserted injury to the [plaintiff's First and Fourteenth Amendment] rights" and weighing those rights against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Ibid.*

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11. Rucho J.S. App. 72.

12. Indeed, the *Rucho* court applied the intermediate scrutiny standard and found that the North Carolina plaintiffs satisfied it. Rucho J.S. App. 286.

Although neither of the district courts below explicitly applied the *Anderson* framework to the partisan gerrymanders before them, both courts analyzed the burdens placed on political activity in a fact-sensitive and nuanced way that is completely consistent with this Court's flexible test. Were this Court to adopt the *Anderson* framework for partisan gerrymandering claims, it would find that Maryland and North Carolina cannot offer any legitimate justifications for the burdens they imposed on Appellees other than their naked desire to disadvantage the political opposition.[13] See Rucho J.S. App. 110 ("Legislative Defendants do not argue—and never have argued—that the 2016 Plan's express partisan discrimination advances *any* democratic, constitutional, or public interest."); Benisek J.S. App. 48a–50a ("[W]ith respect to the mapmakers' intent, the process described in the record admits of no doubt. * * * Democratic officials * * * worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat.").

B. Partisan Gerrymandering Also Flouts Other First Amendment Principles.

The Partisan gerrymandering in which the North Carolina and Maryland legislatures engaged here is also entirely inconsistent with other core First Amendment principles.

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13. The argument that an intent to help one party is not the same as an intent to harm the other was properly rejected by one of the district courts in this case. As that court explained, "[t]he First Amendment does not—indeed, cannot—distinguish between these intents because they are one and the same when applicable to two-party elections." Benisek J.S. App. 50a.

1. Partisan Gerrymandering Amounts to Unconstitutional Retaliation Against Minority Party Voters for Their Political Views Manifested in Their Past Electoral Choices.

Partisan gerrymandering "burden[s] or penalize[es]" individuals "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." See *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Fortunately, this Court can draw from a robust judicial tradition of protecting individuals from impermissible government disfavor or retaliation on account of their political affiliation to remedy these harms.

Indeed, this Court's First Amendment jurisprudence teaches that the government cannot exercise its discretion in a "narrowly partisan or political manner." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 870–71 (1982) (joint opinion of Brennan, Marshall, Stevens, and Blackmun, JJ.). That rule is based on the recognition that a single discretionary decision that burdens a person who holds different political views[14]

14. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (applying the First Amendment to prohibit government employers from making "promotion, transfer, recall, and hiring decisions involving low-level public employees * * * based on party affiliation and support"); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 715, 717 (1996) (holding that contractors, like government employees, are protected by the First Amendment from patronage dismissals because such dismissals inappropriately subject government employment "to the express condition of political beliefs or prescribed expression" and burden the right to political association).

could chill all his co-partisans. That rationale applies with all the more force to a decision by a government body to draw district lines that burden all adherents of the opposing party across the state, chilling all of its would-be supporters.

The records before this Court show that the message was heard loud and clear. The *Rucho* voter-plaintiffs tasked with "canvassing and get-out-the-vote efforts" had difficulty getting fellow Democrats to vote because "they felt their vote didn't count." Rucho J.S. App. 70. The *Benisek* plaintiffs, who attempted to encourage fellow Republicans to vote in the Sixth District, found that people generally felt that it was "not worth voting anymore," and "[felt] disenfranchised." Benisek J.S. App. 26a. The redrawn district lines resulted in widespread "confus[ion] about the candidates." *Id.* at 27a. As a result, individuals who had associated with a minority party were discouraged from expressing themselves through the electoral process, thereby insulating the incumbent party from the need to be responsive to the electorate.

In *Elrod* v. *Burns*, this Court protected government employees from being penalized on the basis of their political affiliation, holding that patronage dismissals severely curtail "the individual's ability to act according to his beliefs." 427 U.S. 347, 355–356 (1976). As in *Elrod*, the cases before this Court present government action that has the impermissible and undemocratic effect of "tip[ping] the electoral process in favor of the incumbent party" by burdening the right to political speech and association. *Compare ibid.*, *with* Rucho J.S. App. 70 (explaining that the *Rucho* voter-plaintiffs suffered "decreased ability to mobilize their party's base, persuade independent voters

to participate, attract volunteers, raise money, and recruit candidates"). This effect enables the incumbent party to rely on indirect regulation of political association to "produce a result which it could not command directly," in violation of the First Amendment. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted).

2. Partisan Gerrymandering Unconstitutionally Favors Majority Political Viewpoints over Others.

By favoring one set of political beliefs over another, partisan gerrymanders also collide with the First Amendment's prohibition on viewpoint discrimination. Indeed, though this Court has held that a state may restrict speech when necessary to advance a significant and legitimate state interest, there are some interests "such as a desire to suppress support for a minority party" that are "plainly illegitimate." *Members of the City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).[15] The two cases before this Court are partisan gerrymanders motivated *solely* by such "plainly illegitimate" interests as party entrenchment and the "desire to suppress support for a minority party." *Ibid.* Appellants concede as much. See Benisek J.S. App. 12a (quoting Governor O'Malley's Deposition confirming that he "set out to draw the borders in a way that was favorable to the Democratic party"); Rucho J.S. App. 221 ("[T]he General Assembly expressly drew the 2011 plan 'to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate.'") (quoting the deposition of one of the principal mapmakers, Dr. Hofeller).

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15. See also *Stromberg*, 283 U.S. at 369–370.

Time and time again, this Court has recognized that "governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537–538 (1980) (quoting *Police Dep't. of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972)). By extension, the government cannot constitutionally regulate speech in ways that favor some viewpoints over others. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 804. The alternative "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," an outcome that the First Amendment "places * * * beyond the power of the government." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). This background prohibition is so essential to First Amendment jurisprudence that viewpoint discrimination is presumptively unconstitutional. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

Partisan gerrymandering, like direct viewpoint discrimination, threatens to drive the minority political view out of the marketplace of ideas by diminishing the voice of the disfavored political party in favor of the majority's view. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.").

The First Amendment safeguards these minority views from regulation designed to weaken them well before they are pushed out of the marketplace. By discriminating in the drawing of the redistricting maps and ultimately imposing an electoral penalty, partisan

gerrymandering inexcusably burdens Appellees' choice to advocate for minority party positions and candidates free from government disfavor. Here, the effects of partisan gerrymandering have already taken hold. The time for judicial vindication is now. Indeed, the principle of viewpoint neutrality "protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

The mapmaking at issue here functions in the same way as a subsidy to benefit one viewpoint over another, something this Court has held violates the First Amendment.[16] Here, "[t]he direct result" of identifiably associating with, endorsing the views of, or voting for the minority parties "is a state-provided * * * subsidy to a political rival" in the form of a gerrymandered map. See *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 742 (2011) (Roberts, C.J.). And while there is some precedent for *viewpoint-neutral* government

16. See *Rosenberger*, 515 U.S. at 834 (discussing *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)); see also *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'") (citation omitted); *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.").

subsidies surviving First Amendment challenge, "none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech" more effectively. *Id.* at 743.

3. Partisan Gerrymandering Imposes Discriminatory Burdens on the Basis of a Speaker's Identity as a Minority Party Adherent.

By imposing burdens based on the political affiliation—that is, the partisan identity—of the voter, partisan gerrymandering amounts to impermissible content-discrimination based on the identity of the speaker.

In each of the cases before this Court, the incumbent party drew district lines on the basis of the ascertainable partisan identity of voters with the goal of decreasing the electoral clout of the minority party. See Rucho J.S. App. 159 (quoting Representative David Lewis, one of two officials responsible for the redistricting plan, during a debate on the proposed map, stating "that he believed 'electing Republicans is better than electing Democrats,' and therefore that he 'drew this map in a way to help foster' the election of Republican candidates"); Benisek J.S. App. 21a (quoting talking points for Senate President Thomas V. Miller stating that "[i]n the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity"). These actions amount to the very same speaker-based, indirect censorship traditionally forbidden by the First Amendment, and should not be allowed to stand here.

"Premised on mistrust of governmental power," the First Amendment precludes officials from distinguishing among different speakers—or choosing favorites—out of concern that speaker-based regulations may be "instruments to censor," much like viewpoint restrictions. *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340–341 (2010). This Court has stepped in to protect against impermissible disfavor in cases comparable to the ones before it now.

For example, in *Citizens United*, this Court held that corporations are entitled to fund independent political broadcasts related to elections because political speech—an "essential mechanism of democracy" that functions as "the means to hold officials accountable to the people"—"must prevail against laws that would suppress it by design or inadvertence." *Id.* at 339. In so holding, the Court concluded that "[t]he First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech," *id.* at 364, because such distinctions "are all too often simply a means to control content," *id.* at 340. The concern is particularly acute where, like here, "[t]he State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 580 (2011).

Here, the majority party-controlled legislatures of North Carolina and Maryland did just that. That the disfavored speakers in the cases now before this Court are not subject to a complete ban does not change the outcome. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content" via targeting of certain speakers. *Id.* at 566.

The partisan gerrymanders burden the political expression of minority parties and their adherents while leaving that of the party in power and its supporters undisturbed and therefore amplified. "This the State[s] cannot do." *Ibid.*

III. Claims of Partisan Gerrymandering Are Justiciable.

A. Courts Should Intervene Because Partisan Gerrymandering Raises the Distinct Possibility That a Legislature Has Entrenched Itself and Is No Longer Accountable to the People.

This Court has used the metaphor of the marketplace of ideas to describe the "[c]ompetition in ideas and government policies" that "is at the core of our electoral process and of the First Amendment freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968). The marketplace metaphor is particularly appropriate here, for the harms of partisan gerrymandering described in Parts I and II are akin to market capture. See D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 692 (2013) ("What is most disturbing about political gerrymandering * * * is not that it discriminates against some discrete group, but rather that insiders capture and manipulate the very processes from which they draw their legitimacy."). As this Court has recognized, without a functioning marketplace of ideas, "the public could not freely choose a government pledged to implement policies that reflect the people's informed will." *Sorrell*, 564 U.S. at 583.

Because partisan gerrymandering makes it harder to vote the legislatures who adopted the offending

district lines out of office, it is appropriate for the courts to intervene. See *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring) ("[O]nly the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.").

In a different context that is instructive here, Chief Justice Warren noted that "the presumption of constitutionality" that often attaches to congressional or other legislative action, is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969). When a challenge calls into question that "basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." *Id.* Nor can it support any hope for a political remedy for the political process gone awry.

Partisan gerrymandering results in a malfunction of the political marketplace of ideas that is so pervasive that even advocates of minimalist or restrained approaches to judicial review would favor judicial intervention. See John Hart Ely, *Democracy and Distrust* 103 (1980) (recommending an approach in which courts intervene "when the 'market,' in our case the political market, is systemically malfunctioning"); *id.* at 117 (noting that voting rights cases "involve rights (1) that are essential to the democratic process and (2) whose dimension cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo"). The current landscape is the epitome of the "*process* * * * undeserving of trust" that characterizes market malfunction. *Id.* at 103. Here, "the ins [i.e., the political parties in control] are choking off the channels of political change to ensure that they will stay in and the outs will stay out," *and* "though

no one is actually [that is to say, literally] denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility." *Ibid.*

As AJC can attest from its decades of advocacy work around the world, a malfunctioning political process is detrimental to minority populations and can operate to "deny[ ] that minority the protection afforded other groups by a representative system." See *ibid.* That the minorities in question are the two major political parties only speaks to the precision and effectiveness of the partisan gerrymandering threat to the normal channels of the political process. Fortunately, "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." *Id.* at 183. And unlike elected politicians whose very own continuance in office may be at stake in the future of partisan gerrymandering, judges are well-positioned to command the trust of the public that they will be neutral arbiters.

B. Our Federal Courts Have Expertise in Ascertaining Legislative Intent.

In order to determine that redrawn maps violate the First Amendment, it may be necessary to determine legislative intent. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the *purpose* and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.") (emphasis added). Given the myriad legitimate considerations—

political and otherwise—that go into redistricting,[17] discerning improper legislative intent may prove essential to creating a manageable legal framework for the analysis of partisan gerrymandering. Fortunately, courts are well-equipped to identify illicit legislative intent.

In a hyper-politicized climate, the determination of legislative intent is not always difficult. Here, for instance, the intent to draw legislative maps on the basis of party affiliation is transparent. The district court in *Benisek* found the record to be "replete with direct evidence" of "the specific intent to flip the Sixth District from safely Republican to likely Democratic." Benisek J.S. App. 49a–51a. Similarly, the district court in *Rucho* found that "Plaintiffs adduced more-than-sufficient evidence to prove that, in enacting the 2016 Plan, the General Assembly predominantly intended to 'subordinate' the interests of entities and voters who supported, or were likely to support, non-Republican candidates. Rucho J.S. App. 287–288.

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17. As this Court held in *Karcher* v. *Daggett*, "[a]ny number of consistently applied legislative policies" may qualify as rational, legitimate state interests in the redistricting context, "including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. 725, 740 (1983). Some of those redistricting objectives may require limited, nondiscriminatory use of political affiliation data—particularly when it comes to incumbency protection, a valid purpose when undertaken "in the limited form of avoiding contests between incumbent[s]." *Bush* v. *Vera*, 517 U.S. 952, 964 (1996) (citation and internal quotation marks omitted; alteration in original).

But even in more challenging cases, there is nothing unusual about courts assessing legislative intent. Courts are experienced in examining a factual record and identifying impermissible intent behind statutes. As this Court has noted, "the mere recitation of a benign * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975). Moreover, this Court has time and again considered a legislature's motive in drawing congressional maps. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Shaw* v. *Hunt*, 517 U.S. 899 (1996); *Hunt* v. *Cromartie*, 526 U.S. 541 (1999). In *League of United Latin American Citizens*, this Court reiterated that "[i]t is undeniable that identifying the motive for making [the] basic decision [of the state in drawing a new congressional map] is a readily manageable judicial task." 548 U.S. at 457.

The courts play an important role in ferreting out statutes with impermissible invidious intent. Because "a denial of constitutionally protected rights demands judicial protection," *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964), that is the role the Court should assume here.

C. This Court Has Not Hesitated to Intervene When Comparable First Amendment Liberties Are at Stake.

In protecting First Amendment values in politically polarized contexts, courts not only protect the speaker herself but also safeguard against the chilling of those who, upon witnessing such use of government power, may choose to be silent rather than risk the consequences. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 800–801.

Additionally, these impositions unfairly amplify views that accord with the State's own. See *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2377 (2018) (explaining that the imposing a burden on a "curiously narrow subset of speakers * * * run[s] the risk that the state has left unburdened those speakers whose messages are in accord with its own views") (citation and internal quotation marks omitted). As this Court has shown in its myriad cases addressing these kinds of harms, it is willing and able to step in to address these harms.

To be sure, holding that partisan gerrymandering is justiciable here may invite further disputes about partisan gerrymandering, causing the Court to enter the thicket. This Court is familiar with this conundrum, as it confronted a similar situation before adopting the one-person, one-vote standard. Then, as now, for the Court "to stay out of the area altogether * * * would have meant * * * that the ins would simply have gone on maintaining their positions." Ely 124. Such an outcome in the malapportionment context would have been "no more compatible with the underlying theory of our Constitution than taking away some people's votes altogether." *Ibid.* The same is true here, because, as shown above, "partisan gerrymanders * * * are incompatible with democratic principles." *Arizona State Legislature*, 135 S. Ct. at 2658 (alteration and citation omitted).

CONCLUSION

This Court has recognized that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. The same is true of the "ability of citizens to band together" for political ends. *Jones*, 530 U.S. at 574. The partisan gerrymandering cases before this Court present serious First Amendment harms that are not susceptible to a political solution and that threaten the democratic experiment as a whole.

Upon which branch of government, if not the judiciary, can the people rely when partisan vitriol threatens to stifle the electoral voice of the minority and infringe upon the right to politically associate? Indeed, Article III courts have confronted these questions so many times and in such varied contexts, that they have developed sophisticated, detailed frameworks to remedy First Amendment violations. "The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *United States* v. *Stevens*, 559 U.S. 460, 470 (2010) (Roberts, C.J.) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803)). It is up to the courts to enforce these limits.

For the reasons urged herein, we respectfully ask that the judgments of the courts below be affirmed.

Respectfully submitted,

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Nos. 18-422, 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, *et al.*, *Appellants*,
v.
COMMON CAUSE, *et al.*, *Appellees*.

LINDA H. LAMONE, *et al.*, *Appellants*,
v.
O. JOHN BENISEK, *et al.*, *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF FOR *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; COUNTY OF SANTA CLARA; DEMOCRACY 21; DEMOS; FRIENDS OF THE EARTH; GOVERNMENT ACCOUNTABILITY PROJECT; LEAGUE OF WOMEN VOTERS, MARYLAND CHAPTER; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL FEDERATION OF DEMOCRATIC WOMEN; NORTH CAROLINA JUSTICE CENTER; ONEVIRGINIA2021: VIRGINIANS FOR FAIR REDISTRICTING; AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF APPELLEES

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OTHER AUTHORITIES

John Adams, *Thoughts on Government* (1776), *in* 1 The Founders' Constitution (Philip B. Kurkland & Ralph Lerner eds., 1987) 10

Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting* (Nov. 20, 1772), *reprinted in* 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970) 9

The Declaration of Independence (U.S. 1776) ... 2, 9

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) (A. Hamilton) 11, 14

Richard H. Fallon, Jr., *Judicially Manageable Standards & Constitutional Meaning*, 119 Harv. L. Rev. 1275 (2006) 30

Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997) 18

The Federalist No. 10 (James Madison) (P.F. Collier & Son ed., 1901) 12, 13

The Federalist No. 37 (James Madison) (P.F. Collier & Son ed., 1901) 11

Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929 (1951) 20

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 11

Robert G. Natelson, *Guarantee Clause, The Heritage Guide to the Constitution*, The Heritage Foundation, http://www.heritage.org/constitution#!/articles/4/essays/128/guarantee-clause (last visited Feb. 24, 2019) 10

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 30, 31

President George Washington, *Farewell Address to the People of the United States* (1796), *reprinted in* S. Doc. No. 106-21, 2d Sess., 14 (2000) 13

Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 Harv. J. L. & Pub. Pol'y 573 (2017) 10, 11, 12

STATEMENT OF INTEREST[1]

Amici Curiae are organizations that pursue public policy goals through the American political system, and governmental entities that ensure public health and safety within the framework of laws developed through that system. Because they work extensively in, and are deeply affected by, the political system and the laws developed through that system, *amici* rely upon fair elections to ensure that elected policy makers represent and are meaningfully accountable to their constituents. Accordingly, they are particularly concerned about partisan gerrymandering, that is, the drawing of district lines to subordinate adherents of one political party and entrench the rival party in power. *Amici* submit this brief to offer an analysis of how severe partisan gerrymandering, as occurred in North Carolina and Maryland, contravenes fundamental, long-standing American democratic values and requires a judicial response to ensure that American government will continue to operate by the consent of the people.

A full list of *amici*, with descriptions of each organization, is attached as an Appendix to this brief.

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[1] Letters from the parties consenting generally to the filing of briefs by *amici curiae* are on file with the Court. Pursuant to Supreme Court Rule 37.6, no part of this brief was written by counsel for any party, and no person or entity other than *amici* and their counsel made any monetary contribution to its preparation or submission. *Amicus* League of Women Voters of Maryland joins this briefly solely with respect to the *Lamone v. Benisek* case, since the League's state affiliate is a party in the *League of Women Voters of North Carolina v. Rucho* case.

SUMMARY OF ARGUMENT

> Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

The Declaration of Independence para. 2 (U.S. 1776).

This is the bedrock principle of American democracy: government by the consent of the governed. It was implemented in 1787 through the Elections Clause of the Constitution:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

U.S. Const. art. I, § 2, cl. 1.

Four score and seven years after the Declaration, when President Lincoln sought to reunite the country in a "new birth of freedom" following the Civil War, he encapsulated the core of American democracy as "government of the people, by the people, for the people."

Consistent with the vision of Lincoln and the Founders, this Court has often considered how actions that create an unfair advantage in the electoral process undermine this foundational principle of American democracy. As early as 1964, this Court recognized that district lines can be drawn in ways that jeopardize government by the people, just as much as outright prohibitions on voting:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964). Thus, in the "one person, one vote" cases, the Court held that "[w]eighting the votes of citizens differently, *by any method or means*," is not justifiable. *Id.* (emphasis added). The Court required proportional district sizes at all levels of government, including state legislative districts (*Reynolds*), U.S. Congressional districts (*Wesberry v. Sanders*, 376 U.S. 1 (1964)), and local government districts (*Avery v. Midland Cty.*, 390 U.S. 474 (1968)).

This Court similarly held that redistricting plans cannot dilute voting power based on the race of voters. *See Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973); *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2658 (2015), this Court defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." In that case, this Court held that the Constitution, and specifically the Elections Clause, "act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to

entrench themselves or place their interests over those of the electorate." *Id.* at 2672.

In the cases now before the Court, the lawmakers who crafted the redistricting plans explicitly conceded their intent to gerrymander for partisan benefit. In both cases, the plans successfully created a partisan electoral advantage. Thus, this Court now confronts two intentional and highly effective partisan gerrymanders that have undermined the will of North Carolina's and Maryland's voters.

This Court has long recognized that severe partisan gerrymanders are "incompatible" with "democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality op.). As evident in the cases *sub judice*, incumbent lawmakers use increasingly sophisticated techniques to redraw electoral districts to entrench their power. Using map-drawing software, highly detailed data about voting patterns, and sophisticated statistical analyses and tools, incumbents "crack" and "pack" electoral districts to ensure continued control over legislatures and congressional districts under virtually any conceivable voting pattern. Voters no longer choose their representatives; party leaders and their consultants craft maps that predetermine representatives, depriving the people of a meaningful voice in government.

In *Carpenter v. United States*, this Court recognized that while the "progress of science" can provide those in power with "new tool[s] to carry out [their] important responsibilities[,]" such tools "risk[] Government encroachment of the sort the Framers . . . [sought] to prevent" and require the Court to expand its conception

of the Fourth Amendment to prevent those harms. 138 S. Ct. 2206, 2223 (2018) (citing Justice Brandeis's dissent in *Olmstead v. U.S.*, 277 U.S. 438, 473–74 (1928)). Just as the *Carpenter* decision safeguarded Fourth Amendment rights in the face of new technological tools and risks, so can the Court safeguard the constitutional integrity of the electoral process in the face of other new technologies.

The Court is not being asked to resolve a "political" question here. Claims of election manipulation have long been held to be justiciable because the Court has the authority to ensure that elections comport with the Constitution. These cases come before the Court in a pair, one partisan gerrymander favoring Republicans and the other favoring Democrats. Setting legal standards for adjudicating such cases will reinforce this Court's traditional role as an independent, nonpartisan arbiter, capable of ensuring free and fair elections conducted in accordance with our constitutional standards, while remaining outside the political process of deciding the outcomes of elections.

The questions before this Court are clear: Will this Court continue the unfinished work that previous Courts advanced when they developed legal standards in other election manipulation cases? Will it protect voters' rights from denial and debasement through the drawing of legislative district lines designed to entrench a ruling party? Will it preserve our "government of the people, by the people, for the people?"

STATEMENT OF FACTS

The facts in North Carolina and Maryland present obvious cases of "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature*, 135 S. Ct. at 2658. In both states, the redistricting was done by a single party holding exclusive control over drawing and implementing the redistricting plans. With the assistance of outside consultants who specialized in achieving partisan advantage, and using highly sophisticated technology, each party successfully created precise and durable maps that would ensure the entrenchment of the party in power for at least the next decade.

In North Carolina, State Senator Robert Rucho and State Representative David Lewis retained Dr. Thomas Hofeller to create North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan"), with the explicit goal of providing a maximal and sustainable advantage to Republicans. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 869 (M.D.N.C. 2018). Dr. Hofeller, a redistricting expert from the Republican National Committee, admitted that his "primary goal" was to draw district lines so as "to create as many districts as possible in which GOP candidates would be able to successfully compete for office" and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 803. The mapmakers admitted that they were creating a "political gerrymander" in order to "help foster" the election of Republicans, because "electing Republicans is better than electing Democrats." *Id.* at 870.

In Maryland, Governor Martin O'Malley testified that he "set out to draw the borders in a way that was favorable to the Democratic party" when creating Maryland's 2011 congressional districting plan. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502 (D. Md. 2018). Governor O'Malley readily admitted that "our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them." *Id.* Eric Hawkins, an analyst from a political consulting firm to Democratic organizations, acknowledged that he was given the dual goals of protecting Maryland's incumbent Democratic Representatives and changing the overall make-up of the congressional delegation "from six Democrats and two Republicans to seven Democrats and one Republican." *Id.* at 503.

In both states, the gerrymanders were specifically drawn to create maximum partisan advantage while minimizing potential risks. In North Carolina, Representative Lewis stated that he intended to "draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Rucho*, 318 F. Supp. 3d at 808 (alterations in original). In Maryland, Governor O'Malley testified that he considered gerrymandering to flip either the First or the Sixth District to Democratic control, but decided to go for the Sixth because a gerrymandered First District "would have to jump across the Chesapeake Bay." *Lamone*, 348 F. Supp. 3d at 502.

The plans were unqualified successes. The North Carolina gerrymander produced ten Republican seats out of North Carolina's thirteen-seat congressional delegation, precisely as intended. 53.22% of North Carolina voters statewide voted for Republican congressional candidates, yet North Carolina's delegation remained 76.9% Republican. *Rucho*, 318 F. Supp. 3d at 884. Democratic voting strength was "packed" into three districts, in which Democrats won by overwhelming majorities; Republican voting strength was "cracked" across ten districts, in which Republicans won by "safe" but not overwhelming majorities, so that Republican votes that could be used in other districts would not be "wasted." *Id.* In Maryland, the existing Democratic districts remained safe, while the Sixth District was "flipped" from a district that had previously elected a Republican candidate by a 28% margin in 2010 to one that elected a Democratic candidate in 2012 by a 21% margin. *Lamone*, 348 F. Supp. 3d at 499–501.

ARGUMENT

I. Election Manipulation Through Partisan Gerrymandering Violates Fundamental American Democratic Principles of Representativeness and Accountability in Government.

Representative democracy was the animating value of the Founders. Election manipulation through partisan gerrymandering undermines faith in America's most basic civic principle: the right of the people to elect their representatives and to ensure that

their elected representatives remain accountable to them.

A. Our Founders Established a Government Built Upon the Consent of the Governed.

The United States of America exists because the Founders rebelled against a British government that did not represent the citizenry. Americans objected to acts of the British Parliament such as the Currency Act of 1764, the Sugar Act of 1764, the Stamp Act of 1765, and the Tea Act of 1773. In each case, the core of the protest was the lack of American representation in the Parliament that passed these laws. Samuel Adams explained that the protest was an assertion of the people's right to adequate representation in their government. *See generally* Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting* (Nov. 20, 1772), *reprinted in* 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970).

Members of Parliament were not elected by, and did not represent, the people they governed. This conflicted with the Founders' core value, that "Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." The Declaration of Independence para. 2.

Our Founders created a new government in which representatives would be chosen "by the People." U.S. Const. art. I, § 2, cl. 1. They adopted a Constitution that guaranteed every state "a Republican Form of Government . . . ." U.S. Const. art. IV, § 4. As the Heritage Foundation explains, the importance and

meaning of the Guarantee Clause to the participants in the constitutional debate of 1787–1788 was that "republican government was government accountable to the citizenry." Robert G. Natelson, *Guarantee Clause, The Heritage Guide to the Constitution*, The Heritage Foundation, http://www.heritage.org/constitution#!/articles/4/essays/128/guarantee-clause (last visited Feb. 24, 2019).

Two core principles of a republican form of government are representativeness and accountability. The adoption of these core principles was the critical difference between American and British philosophies of government. The British system of government relied on social hierarchy. The ruling class and the people were represented separately. Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 Harv. J. L. & Pub. Pol'y 573, 576 (2017). American government, by contrast, was designed to represent the interests of the people, not preserve the status of a ruling class. *See* John Adams, *Thoughts on Government* (1776), *in* 1 The Founders' Constitution 108 (Philip B. Kurkland & Ralph Lerner eds., 1987) (a representative assembly "should think, feel, reason, and act like" the "[p]eople at large").

"Representativeness" does not mean that elected representatives must reflect the political make-up of the citizens in strict proportionality, but that the citizens must be able to elect their representatives free of the control of a ruling class:

> [T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in

> proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*] (A. Hamilton). In other words, representativeness means that individuals' votes must result in meaningful representation.

Our Founders also understood that representativeness in government is intertwined with accountability.[2] Once representatives are elected to office, they must be accountable to the citizenry, rather than being afforded tools to entrench their power regardless of the voters' will. In Federalist 37, James Madison explained: "[T]he genius of republican liberty seems to demand . . . not only that all power should be *derived from the people*, but that those intrusted with it should be *kept in dependence on the people*." The Federalist No. 37, at 192 (James Madison) (P.F. Collier & Son ed., 1901) (emphases added). A representative government "is futile if legislators are not responsive to the constituents that they represent." Whittington, *supra*, at 580. Citizens must have not only the right to elect their representatives, but a meaningful ability to remove them in future elections. Indeed, "[t]he crucial

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[2] Contemporary academics agree that a republican government "is one in which the people control their rulers." *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

function of the people in a democracy is not to make policy but to determine to whom 'the reins of government should be handed.'" *Id.* at 581 (citation omitted).

B. Our Founders Warned That Factions and Partisanship Had the Potential to Threaten Representative Democracy.

Our Founders understood that representativeness and accountability could not be taken for granted and foresaw that a representative democracy contained within it the seeds of its own potential destruction. The liberty provided by free association and democracy naturally leads like-minded citizens to band together to pursue their shared values. Collective political action benefits democracy, but can become dangerous factionalism when the power of a particular faction to pursue its parochial interests undermines the people's right to fair and meaningful representation.

James Madison warned of the dangers of "faction"—"a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"—but believed that our Constitution would restrain such dangers. The Federalist No. 10, at 45 (James Madison) (P.F. Collier & Son ed., 1901). In fact, Madison regarded this as one of the greatest virtues of the Constitution: "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." *Id.* at 44. While Madison understood that the root

causes of factionalism could not be eradicated (and indeed, should not, since such causes were the natural and unavoidable byproducts of liberty, freedom of thought, and freedom of association), Madison also understood that excess factionalism must be restrained by republican government: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* As he left office, George Washington likewise warned future generations that, left unchecked, political parties could

> serve to organize faction; to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

President George Washington, *Farewell Address to the People of the United States* (1796), *reprinted in* S. Doc. No. 106-21, 2d Sess., 14 (2000), https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

C. This Court Has Long Recognized the Centrality of Representativeness and Accountability to American Values.

Almost 200 years ago, Chief Justice Marshall summarized the essence of American government: "The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819); *see also Duncan v. McCall*, 139 U.S. 449, 461 (1891) (a "distinguishing feature" of the republican guarantee is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (defining a republican form of government as "one constructed on [the] principle, that the Supreme Power resides in the body of the people"), superseded in part by U.S. Const. amend. XI.

Examining provisions such as the Qualifications Clause, the Court has long held that a "fundamental principle of our representative democracy is . . . 'that the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting *Elliot's Debates*, *supra*, 257 (A. Hamilton)). In reaching this conclusion, the Court agreed with John Wilkes' address to the Parliament in 18th-century England: "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights,

that it ought to be considered as one of the most sacred parts of our constitution." *Powell*, 395 U.S. at 534, n. 65 (quoting 16 Parl. Hist. Eng. 589–90 (1769)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798, 820–21 (1995) ("an aspect of sovereignty is the right of the people to vote for whom they wish" and "the right to choose representatives belongs not to the States, but to the people"). In *Thornton*, the Court explained that the "Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *Id.* at 821; *see also id.* at 791 ("[W]e recognized [in *Powell*] the critical postulate that sovereignty is vested in the people" and that they have the right to choose their representatives "freely").

This Court has therefore long recognized that, by the design of the Framers, representativeness and accountably are the heart of American democracy. This Court is now once again called upon to protect and defend these core values of our Constitution.

II. The Court Should Continue to Safeguard the People's Right to Vote Free from Election Manipulation.

The redistricting plans in North Carolina and Maryland were designed to manipulate congressional elections for partisan advantage and, therefore, reduce or eliminate citizens' ability to elect representatives whom they could hold accountable. Such behavior is antithetical to the ideals upon which the United States was founded. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), this Court has recognized its

constitutional role, under the Founders' system of checks and balances, to exercise independent oversight over the constitutionality of the acts of other branches of government: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." As the District Court stated in *Rucho*, there is "no basis to disregard that obligation here" where the issue is as fundamental as the right to free and fair elections. 318 F. Supp. 3d at 843.

Despite the fact that the North Carolina and Maryland gerrymanders are wholly inconsistent with American democratic values, Appellants and others claim that this Court is powerless to do anything about it because:

- Judicially manageable standards have not been discovered by which partisan gerrymandering can be adjudicated;
- Such cases present a non-justiciable political question; and
- Adjudicating partisan election manipulation cases would damage the status and integrity of this Court.

Amici address each of these objections in turn. None should prevent this Court from fulfilling its obligation to safeguard the American electoral system from naked partisan manipulation. While *amici* do not address which of the multiple proposed standards should be adopted by this Court, and leave it to the parties and

other briefs to address those merits questions, *amici* respectfully submit that the Court can and should hold that the partisan gerrymandering plans from North Carolina and Maryland present constitutionally justiciable questions for which the Court can and should set standards for adjudication.

A. This Court Can Develop Judicially Manageable Standards to Adjudicate Partisan Gerrymandering Claims.

The *Rucho* Appellants argue that even though the Court has consistently recognized that severe partisan gerrymanders are incompatible with core American democratic principles, it should do nothing to protect those principles, because it is too difficult to craft a sufficiently precise standard by which to resolve all future cases. *Amici* do not share Appellants' pessimism about the Court's ability to "say what the law is." *Marbury*, 5 U.S. at 177.

i. The Court routinely develops doctrinal tests and remedies to enforce the Constitution.

Judicially manageable standards for enforcing constitutional rights are rarely embedded in the text of the Constitution itself. This Court routinely frames and devises tests or standards used to implement constitutional norms. In the Equal Protection context, for example, the Supreme Court has instructed lower courts to apply differing levels of scrutiny depending on

the classifications at issue.[3] The Court has also developed context-specific formulas to evaluate particular governmental conduct under the Equal Protection Clause, such as the permissibility of facially neutral classifications that disproportionately impact minorities, or the consideration of race when creating voting districts.[4] The Court has similarly developed doctrinal tests to enforce other constitutional rights, such as the factors governing a procedural due process analysis, the totality-of-the-circumstances test that applies to a probable cause determination, the "critical stage" test for determining when the right to counsel attaches, the *Blockburger* test to determine when the Double Jeopardy Clause is implicated, and so on.[5] In First Amendment jurisprudence, the Court has created myriad tests to evaluate governmental action, including the *Brandenburg* test to evaluate

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[3] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (use of race must be justified by a compelling state interest); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (statutes of limitations applied to paternity suits must be substantially related to important governmental interests); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (where there is no constitutionally suspect classification, action must be rationally related to a legitimate state interest).

[4] *See Washington v. Davis*, 426 U.S. 229, 239–42 (1976); *Miller*, 515 U.S. at 916.

[5] *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Illinois v. Gates*, 462 U.S. 213 (1983); *Massiah v. United States*, 377 U.S. 201 (1964); *Blockburger v. United States*, 284 U.S. 299 (1932). *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 67–101 (1997).

inflammatory speech, the *Hurley* test to ascertain expressive conduct, and the tests developed to delineate the limits of free exercise, as first articulated in *Sherbert v. Verner* and later modified in *Employment Division v. Smith*.[6]

The Court has likewise been both prudent and creative when formulating remedies to constitutional violations, such as, for example, *Miranda* warnings to protect against self-incrimination, the exclusionary rule to enforce the Fourth Amendment, and the use of school bussing to accomplish desegregation.[7]

These judicially created tests and remedies were not "discovered." They took years, sometimes centuries,[8] to develop and evolve. The Court continually reviews and refines them as needed to protect the laws and liberties safeguarded by the Constitution, and to respond to modern challenges to established principles. *See, e.g.*,

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[6] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

[7] *See Miranda v. Arizona*, 384 U.S. 436 (1996); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Milliken v. Bradley*, 433 U.S. 267 (1977).

[8] It took nearly 200 years to establish the current constitutional limits on the government's power to punish speech that is "seditious" and "subversive." For example, the incitement test first urged by Judge Learned Hand in his 1917 opinion in *Masses Publishing Company v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd* 246 F. 24 (2d Cir. 1917), did not become incorporated into the Supreme Court's First Amendment jurisprudence until 1969, when it decided *Brandenburg v. Ohio*, 395 U.S. 444.

Carpenter, 138 S. Ct. at 2213–15 (advances in technology, such as "more sophisticated surveillance" and the "immense storage capacity" and tracking capabilities of cell phones, have led the Court to "expand[] [its] conception of the [Fourth] Amendment to protect certain expectations of privacy"); *United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990) (courts need to "develop" standards "for determining whether a bill is 'for raising Revenue' or where a bill 'originates,'" but finding "no reason that developing such standards will be more difficult in this context than in any other"); *Oregon v. Kennedy*, 456 U.S. 667, 675–79 (1982) (rejecting prior formulations for determining when the Double Jeopardy Clause applies and adopting a more "manageable" test). "[T]he mechanisms for orderly change" constitute the "very heart of the process by which justice can be achieved through law." Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929, 937 (1951).

These judicially created tests were not formulated with the type of precision the *Rucho* Appellants contend is required in order to be "judicially manageable." Balancing tests play a prominent role in constitutional law, despite being "incapable of precise definition or quantification into percentages because [they] deal[] with probabilities and depend[] on the totality of the circumstances." *Maryland v. Pringle*, 540

U.S. 366, 371 (2003).[9] Judicial tests also often rely upon broad notions of "fairness" and "justice."[10]

The *Rucho* Appellants argue that it will be impossible for lower courts to fairly determine "how much politics is 'too much.'" Appellants' Br. in No. 18-422 ["*Rucho* Br."] 1; *see also* Appellants' Br. in No. 18-726 ["*Lamone* Br."] 33 (casting District Court's test as "a standardless excessiveness inquiry"). But the Court has never held that legal standards must be so exact as to permit mechanical application by the lower courts. In *Reynolds*, the Court recognized it was "a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 578. The Court trusted lower courts to discharge their duty and uphold the Equal Protection Clause by ensuring that states "make an honest and good faith effort to construct districts" by applying the legal standard announced in *Reynolds*, despite the lack

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[9] *See, e.g., United States v. Banks*, 540 U.S. 31, 36 (2003) ("[W]e have treated [Fourth Amendment] reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.").

[10] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (suggesting that "fairness and justice" determine when a taking has occurred); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (the existence of personal jurisdiction turns on "traditional notions of fair play and substantial justice" (citation omitted)).

of mathematical precision. *Id.* at 577. Most recently, in *Timbs v. Indiana*, No. 17-1091, 586 U.S. ___ (2019) (slip op., at 2), the Court held that the Eighth Amendment's Excessive Fines Clause applies to state conduct, and left it to lower courts to decide when a state's civil asset forfeiture crosses the line into being "excessive" and "grossly disproportionate." The Court has always relied on the ability of the lower courts to faithfully apply guidelines and standards set forth in its decisions. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–65 (2005) (Scalia, J.) (highlighting various situations in which specific implementation of guidelines set forth by this Court is entrusted to the discretion of the lower courts and other government officials).

ii. The Court has historically rejected justiciability arguments and developed manageable standards to uphold a fair election process.

This Court is adept at creating and refining manageable standards that preserve our nation's fundamental promise of a government of, by, and for the people. It has faced similar challenges to the justiciability of cases involving elections, but has, over time, consistently concluded that its duty to protect and defend constitutional guarantees cannot be curtailed by the difficultly of the task of developing such standards.

In *Giles v. Harris*, 189 U.S. 475, 487 (1903), the Court determined that it lacked jurisdiction to intervene on behalf of a class of African Americans in

Montgomery County, Alabama who were denied the right to register to vote, because "equity cannot undertake . . . to enforce political rights . . . ." In *Colegrove v. Green*, 328 U.S. 549, 556 (1946), the Court likewise concluded that it should not "enter th[e] political thicket" and address Illinois's malapportioned congressional districts.

With time, and a deeper understanding of the consequences of nonintervention, the Court's views evolved. In *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960), the Court held that it could adjudicate claims challenging the redrawing of municipal boundaries that disenfranchised nearly all African-American residents of City of Tuskegee, by excluding them from the newly defined city.

Two years later, the Court likewise held that malapportionment cases were justiciable and not political questions. *Baker v. Carr*, 369 U.S. 186, 232 (1962). It took another two years for the Court to announce standards for adjudicating such cases. *Wesberry*, 376 U.S. at 7–8; *Reynolds*, 377 U.S. at 577. The Court continued to refine those standards in cases such as *Fortson v. Dorsey*, 379 U.S. 433 (1965), *Gaffney v. Cummings*, 412 U.S. 735 (1973), and others. In addition to the malapportionment cases, the Court continued to redress racial gerrymandering by rejecting plans that draw district lines that dilute voting power based on the race of voters. *See, e.g., White*, 412 U.S. at 765–70.

Thus, the Court has often considered how manipulation of elections undermines American democracy and proceeded, step by step, to develop

standards for adjudicating such cases. Over time, the Court provided manageable guidance in malapportionment cases and remedies for racially motivated attacks against participation in elections. Partisan election manipulation is amenable to exactly the same treatment.

In *Fortson v. Dorsey*, the Court recognized that a redistricting scheme may not "comport with the dictates of the Equal Protection Clause" if it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439. Years later, in *Davis v. Bandemer*, 478 U.S. 109, 124 (1986), the Court reaffirmed the justiciability of partisan gerrymanders and the Court's role in ensuring that "each political group in a State should have the same chance to elect representatives of its choice as any other political group." A plurality concluded, however, that the Indiana Democrats challenging that gerrymander had failed to prove an Equal Protection violation. *Id.* at 136.

Fifteen years ago, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a majority of the Court declined to disturb the central justiciability holding of *Bandemer*. In a controlling concurrence, Justice Kennedy held that, despite the justiciability of their claims, the appellants could not prevail because "in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights . . . ." *Id.* at 313. Yet all of the Justices reaffirmed that "severe partisan gerrymanders," as Justice Scalia, writing for the

plurality, phrased it, threaten basic democratic values. *Id.* at 292, 311–312, 317, 331, 356.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court recognized the need to "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." 135 S. Ct. at 2672. There is a conflict of interest "inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *Id.* (alterations in original) (citation omitted). That conflict of interest undermines the core values of representativeness and accountability that the Constitution was designed to ensure.

Most recently, in *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018), the Court took another step toward "safeguard[ing] against manipulation of electoral rules[,]" *Arizona State Legislature*, 135 S. Ct. at 2672, by providing guidance for establishing standing in challenges to partisan gerrymanders. The *Rucho* and *Lamone* cases now present the Court with the opportunity to advance the work this Court has already begun by articulating standards for adjudicating such claims.

iii. Judicially manageable standards for adjudicating a partisan gerrymandering claim exist.

Modern technological advances, most notably the use of computerized analysis of voting patterns, have allowed partisan election manipulation to become more extreme and durable in its entrenchment of those in

power, whether by way of the Republican gerrymander in *Rucho* or the Democratic gerrymander in *Lamone*. Armed with these tools to all but ensure permanent entrenchment that overrides the will of their constituents, the *Rucho* Appellants ask this Court to permanently foreclose judicial review. They argue that because the Court has not yet agreed upon a legal standard, it will never be able to do so.

However, as Justice Kennedy emphasized in his concurrence in *Vieth*, the passage of time is not a basis for determining that no judicially manageable standards can exist: "by the timeline of the law 18 years is rather a short period" since the Court had issued its decision in *Bandemer*, and the fact that the lower courts did not discover a better standard during that time only reflects the fact that "the lower courts could do no more than follow *Davis v. Bandemer* . . . ." 541 U.S. at 312. Justice Kennedy explained that Appellants' heavy burden is not just to prove that a claim currently has no workable standard, but to prove the "categorical negative" that "no standard could exist." *Id.* at 311.[11] Appellants can make no such showing here.

Both the *Rucho* and *Lamone* District Courts did precisely as Justice Kennedy asked: they developed

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[11] As the *Rucho* District Court observed, "[A] majority of the Supreme Court never has found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." 318 F. Supp. 3d at 842, n.19.

workable and replicable legal standards.[12] *Rucho*, 318 F. Supp. 3d, at 866–67, 949, 950; *Lamone*, 348 F. Supp. 3d at 515. They did so armed with tools that the *Bandemer* and *Vieth* courts did not have: The very same technology (computers, sociological methods, statistical analysis, metrics to measure partisan symmetry, etc.) used to gerrymander for partisan advantage can also be used to determine the existence of such partisan gerrymandering, measure its impact, and adjudicate these claims. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 805 (Dr. Hofeller created the "aggregate variable" "to predict partisan performance" in North Carolina); *Lamone*, 348 F. Supp. 3d at 503 (Mr. Hawkins used the "Democratic Performance Index" to predict partisan performance in Maryland).

Judicially manageable standards to adjudicate severe partisan gerrymandering not only exist, but have been articulated by the District Courts in their opinions below, which draw directly from this Court's teachings. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 929 (partisan gerrymander violates the First Amendment when: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the

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[12] In fact, legal standards for adjudicating partisan election manipulation cases have been articulated under the Equal Protection Clause, the First Amendment, and § 2 and § 4 of Article I. The *Rucho* Appellants argue that this multiplicity of theories, combined with this Court's failure to adopt a controlling test, means that there can never be a single legal test for adjudicating such claims. *Rucho* Br. 47. In doing so, they ignore that an action can, of course, be unconstitutional for multiple reasons.

districting plan in fact burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan"); *id.* at 861 (partisan gerrymander violates the Equal Protection Clause if (1) it was passed with "discriminatory intent," and (2) it produces "discriminatory effects," that (3) cannot be attributed to "another legitimate redistricting objective"). These standards are comparable in scope, substance, and manageability to other tests adopted by this Court. This process—lower courts expanding upon and developing the teachings of this Court—is entirely consistent with the way legal tests and standards develop through constitutional and common law jurisprudence.

If, however, this Court finds that the District Courts applied erroneous standards, the remedy should be to correct the standard and remand for further proceedings. The Court need not choose between demanding an unrealistic level of "precision" and concluding that no meaningful standard can possibly exist. "Abdication of responsibility is not part of the constitutional design." *Clinton v. New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

iv. The Court can provide guidance on the types of evidence that can be used to establish an unconstitutional partisan gerrymander.

Judicially manageable tests should not be confused with the types of evidence used to prove a violation of these standards. As is evident from the robust record below, there is a great deal of sophisticated evidence that can be used to provide proof of unconstitutional election manipulation, such as the efficiency gaps, computer models, and technical tools used to create the gerrymander; evaluations of partisan asymmetry; etc. Indeed, it is the advances in technology that both make partisan gerrymandering such a threat to democracy and that distinguish the recent spate of cases from the Court's previous consideration of the issue.

Modern redistricting software enables pinpoint precision in designing districts, allowing mapmakers to render extreme and durable partisan districts that still conform to traditional districting requirements, such as contiguity and compactness. But these same advancements in technology can provide objective evidence of what entrenched legislators intended to achieve when drawing these maps, and how successful they were in achieving their partisan goals.

In *Rucho*, for example, the District Court found that the empirical analyses plaintiffs relied on

> provide *evidence* that the 2016 Plan violates a number of well-established constitutional standards—that the government act impartially,

> not infringe the right to vote, not burden individuals based on the exercise of their rights to political speech and association, and not allow state legislatures to dictate electoral outcomes or interpose themselves between the voters and their representatives in Congress.

318 F. Supp. 3d at 853 (emphasis in original). This Court "long has relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law[,]" particularly in the Equal Protection context. *Id.* (emphasis in original).

To the extent that the Court has concerns about the reliability or relevance of certain types of evidence offered by litigants to prove (or disprove) that a legal standard has been met, the solution is to provide guidance about what kind of evidence is most material or probative. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . Departures from the normal procedural sequence might also afford evidence that improper purposes are playing a role."). Through such guidance, this Court can "promote the equal treatment of like cases, enhance predictability, foster judicial restraint by limiting judges' discretion, and encourage judicial steadfastness by providing judges a 'solid shield' when they resist popular pressures." Richard H. Fallon, Jr., *Judicially Manageable Standards & Constitutional Meaning*, 119 Harv. L. Rev. 1275, 1284, n. 34 (2006) (citing Antonin

Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-80 (1989)).

B. Adjudication of Severe Partisan Gerrymanders Is Not Barred by the Political Question Doctrine.

The *Rucho* Appellants argue that "the framers delegated the delicate task of federal oversight of state regulations concerning congressional elections to Congress, not federal courts" and that this delegation means the courts have no role to play. *Rucho* Br. 31. This argument misstates the respective roles of the co-equal branches of government. The states have the authority to choose the time, place, and manner of elections; Congress has the authority to make laws regulating such activities; and the judiciary has the authority to determine whether such activities comport with the Constitution. This responsibility has rested with the federal courts since *Marbury v. Madison*. 5 U.S. at 177–78 ("It is emphatically the province and duty of the judicial department to say what the law is. . . . The judicial power of the United States is extended to all cases arising under the constitution.").

Appellants are attempting to re-litigate precisely the arguments rejected in *Baker v. Carr*, and in numerous cases since. As stated in *Baker*:

> An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature. The first cases involved the redistricting of States for the purpose of electing Representatives to the Federal Congress. When

> the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, s 4, of the Federal Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction . . . .

369 U.S. at 201. *Baker* established that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'" *Id.* at 209 (citation omitted).

This Court again considered and rejected such arguments in *Reynolds v. Sims* when it held: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." 377 U.S. at 566. The same argument was also rejected in *Wesberry v. Sanders*: "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." 376 U.S. at 7.

As discussed above, the intent and effect of the partisan gerrymanders at issue was to undermine the ability of North Carolina's and Maryland's citizens to elect accountable representatives. It therefore endangers the American concept of governmental power derived from the consent of the governed. Over fifty years ago, the Court provided judicial review for a redistricting claim because "a denial of constitutionally protected rights demands judicial protection . . . ." *Reynolds*, 377 U.S. at 566. For the more than fifty years since *Reynolds*, the Court has consistently

reaffirmed its jurisdiction to determine whether a manipulation of the electoral process violates the Constitution.[13]

The Court should not cast aside such long-standing constitutional protections of our electoral processes. The need for judicial protection is just as critical today in these cases. Severe partisan gerrymanders cannot be resolved by the democratic political process, because, by their very nature, they subvert the democratic political process. Without this Court's intervention, our system will devolve into precisely what our Founders declared our independence from: government administered by an entrenched ruling class, rather than by the consent of the people.

C. Judicial Inaction in Partisan Election Manipulation Cases Would Damage the Status and Integrity of the Court.

At oral argument in *Gill v. Whitford*, Chief Justice Roberts articulated what he perceived to be the "main problem" with partisan election manipulation cases: The Court will be perceived as picking one political party or the other in each individual case, thus enmeshing itself in political elections and causing "serious harm to the status and integrity of the decisions of this Court in the eyes of the country." Tr. of Oral Arg. 36–38, 138 S. Ct. 1916 (2018).

Amici have no interest in enlisting the Court in determining election outcomes. Instead, *amici* ask the Court to enforce the rules of elections so that they are

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[13] *See Rucho*, 318 F. Supp. 3d at 847 (collecting cases).

conducted in a manner consistent with the Constitution. The citizens of the United States view the Court, and *amici* believe that the Court views itself, as obligated to safeguard the rule of law and to protect citizens' constitutionally guaranteed political rights against politicians' attempts to render those rights meaningless. As this Court recognized in *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973): "[V]oting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government." Claims of election manipulation have long been understood to be justiciable, not because the Courts have a right to interfere with elections, but because they have a duty to protect elections from interference.

Moreover, *amici* respectfully submit that inaction by the Court would run the same risk. The concern about the perception of the Court enmeshing itself in political elections must be balanced against the countervailing concern that the Court may suffer similar serious harm to its status and integrity if it is perceived as incapable of safeguarding the most fundamental cornerstone of republican democracy: free and fair elections untarnished by naked partisan manipulation. The Maryland and North Carolina gerrymanders come before the Court together, each major political party complaining of severe partisan gerrymandering by the other. The Court is not being asked to "pick[] one political party or the other." Both parties agree that partisan gerrymandering is

improper, at least when they find themselves on the losing end of such a gerrymander. Nevertheless, given the current legal uncertainty, each party continues to employ the practice when it believes it can benefit from it, and will bring claims when it is negatively impacted.

Setting legal standards for adjudicating these claims will reinforce this Court's role as an independent and nonpartisan arbiter. The Court will not be siding with one political party or the other, but siding, as it always must, with the core American value of ensuring a free and fair election process that fulfills the promise of a government by the consent of the governed.

Adjudicating these cases is unlikely to result in an "onslaught of litigation," as the *Rucho* Appellants suggest. *Rucho* Br. 1. It is precisely the lack of such standards that has prompted the recent slew of partisan gerrymandering cases. As occurred in other election manipulation cases, once this Court sets appropriate standards, efforts will be made to comply with those standards. For example, after the Court articulated the "one person, one vote" standard in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), Georgia could have modified the County Unit System, but instead chose to move to using a simple popular vote system in primary elections. States have made similar efforts to comply with the racial gerrymandering standards articulated in *Shaw v. Reno* and *Miller v. Johnson*.

Similar effects have been seen in other areas: efforts at education integration following *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955); the development of

standard warnings to criminal defendants after *Miranda v. Arizona*, 384 U.S. 436 (1966). Here, the knowledge that their redistricting plans will be subject to judicial review will counterbalance legislators' impulse to gerrymander for their own partisan benefit. The risk of having their redistricting plans struck down as unconstitutionally partisan will make partisan gamesmanship less likely.

III. This Court Should Declare the North Carolina and Maryland Gerrymanders Unconstitutional To Ensure That the American Promise of Representative Democracy Is Fulfilled.

The records in the two cases before the Court make clear that these partisan gerrymanders present exactly the type of redistricting schemes that violate core American democratic values of representativeness and accountability. By their own admission, the drafters of these plans sought to put their own political preferences ahead of the political will of the people. In the judgment of the drafters in North Carolina, "electing Republicans is better than electing Democrats." *Rucho*, 318 F. Supp. 3d at 809. The drafters in Maryland "set out to draw the borders in a way that was favorable to the Democratic party." *Lamone*, 348 F. Supp. 3d at 502. Such plans serve only to "subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Legislature*, 135 S. Ct. at 2658, and for the reasons explained in the decisions below, were properly deemed unconstitutional.

If this Court fails to set limits on partisan election manipulation schemes like North Carolina's 2016 Plan or Maryland's 2011 Plan, the promise of government by the people enshrined in the Declaration of Independence, the Constitution and the Gettysburg Address will suffer greatly. Because the very nature of the problem is a political system that has been rigged to resist the will of the people as expressed in elections, and because partisan election manipulation offends basic constitutional rights and principles, this Court is uniquely positioned as the only American institution that carries both the ability and the responsibility to safeguard our foundational American democratic ideals.

At Gettysburg, President Lincoln encapsulated the vision of our Founders as a "government of the people, by the people, for the people." It now falls to this Court to ensure that a "nation so conceived and so dedicated, can long endure."

CONCLUSION

The judgments of the courts below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX: List of *Amici Curiae*

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all backgrounds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Its founding charter, which proclaimed that ADL's mission would be "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens," guides ADL's work to this day. ADL believes that the Constitution requires that each person in our nation receive equal treatment under the law, and that severe partisan gerrymanders undermine the right of every voter to have a meaningful say in the democratic political process.

The **County of Santa Clara** ("County") is a charter county organized and existing under the laws of the State of California. Its mission is to protect the health, safety, and welfare of 1.9 million County residents. As an entity subject to federal law, as well as a governmental entity with a responsibility to protect the welfare of its residents, the County has a strong interest in promoting and protecting core democratic principles at the local and national levels. The County also administers local, state, and federal elections.

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics, to ensure the integrity and fairness of our elections and government decisions, and to promote citizen

participation in the political process. It supports campaign finance, voting, redistricting and other political reforms to ensure that American democracy is representative and accountable, conducts public education efforts for these ends, participates in litigation involving the constitutionality and interpretation of campaign finance and other democracy reform laws, and works for the proper and effective implementation and enforcement of those laws. Democracy 21 has participated as counsel or *amicus curiae* in many cases before this Court involving the constitutionality of campaign finance and other government reform laws.

Demos is a national public policy organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. Demos works to advance voting rights and curb the undue influence of big money in politics, in addition to promoting economic opportunity and racial equity. Severe partisan gerrymandering undermines Americans' right to full and equal participation in our democracy, and therefore directly threatens Demos' goals. Demos has regularly submitted briefs as *amicus curiae* to this Court, and appeared as counsel before the Court in the October 2017 Term in *Husted v. A. Philip Randolph Institute*, No. 16-980.

Friends of the Earth ("FoE") is a non-profit organization, founded in 1969, with offices in Washington, D.C. and Berkeley, California. FoE has close to 300,000 members in all 50 states. FoE's mission is to defend the environment and champion a healthy and just world. FoE works to create, maintain,

and enforce stronger and more effective environmental laws and policies. As part of that mission, FoE's democracy campaign fosters more responsive democratic political institutions by opposing (a) gerrymandering and voter suppression methods that suppress the voice of American voters, and (b) the use of unrestricted money in politics to unfairly influence the public agenda, especially environmental concerns.

The **Government Accountability Project** ("GAP") is a non-profit, non-partisan public interest organization that promotes government and corporate accountability by litigating whistleblower cases, publicizing whistleblowers' concerns, and developing legal reforms to support the rights of employees to use speech rights to challenge abuses of power that betray the public trust. Representative democracy, like whistleblowing, is a mechanism to promote institutional accountability. Severe partisan gerrymandering undermines a functional and fair government accountable to the people. GAP, as an organization committed to protecting civil society from the effects of an unaccountable government—corruption, illegality, abuses of authority, and dangers to public health, safety and the environment—joins this brief.

The **League of Women Voters, Maryland Chapter** ("LWVMD") is a nonpartisan, nonprofit corporation organized under the laws of the State of Maryland. LWVMD works with and through 16 local leagues around the state and is part of the League of Women Voters of the United States, which has 700

state and local leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. LWVMD reaches more than 375,000 residents annually and works to expand informed, active participation in state and local government, giving a voice to all Marylanders. LWVMD joins this brief solely with respect to the *Lamone v. Benisek* case, since the League's state affiliate is a party in the *Rucho* case.

The **National Council of Jewish Women** ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with its Principles and Resolutions, NCJW joins this brief.

The **National Federation of Democratic Women** is a grassroots organization giving voice to women in the Democratic Party. It is made up of member states who have statewide organizations recognized by their state party and who adhere to the bylaws of the NFDW in conformity with the Democratic National Committee. Its mission is to unite Democratic women, cultivate Democratic women candidates and activists, and support candidates and elected officials who advocate for the rights of women and the ideals of the Democratic Party.

The **North Carolina Justice Center** is a leading research and advocacy nonprofit organization. Its mission is to eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services and fair treatment it needs to achieve economic security. Achieving its mission requires the full and free participation of all North Carolinians in our democracy. The Justice Center joins in this brief because severe partisan gerrymandering burdens its efforts to create a North Carolina that works for all.

OneVirginia2021: Virginians for Fair Redistricting ("OneVirginia2021") is a nonprofit corporation organized to initiate a comprehensive effort to remove partisan gerrymandering from the redistricting process in Virginia. OneVirginia2021 pursues reform through public education, participation in litigation, and other means. Severe partisan gerrymandering undermines our democratic institutions, weakens the rule of law, violates the rights of citizens to Equal Protection, and allows the government to disadvantage voters whose political views differ from those of incumbent legislators. OneVirginia2021 is committed to electoral districts that fairly represent the viewpoints of all voters, no matter where they fall on the political spectrum.

The **Southern Poverty Law Center** is a nonprofit civil rights organization dedicated to advancing and protecting the voting rights of all citizens, especially racial minorities and those living in economically disadvantaged communities. The SPLC advocates on behalf of individuals and groups to help ensure their

full and equal participation in our democracy, including at the state and other local levels. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. The organization's lawsuits have toppled institutional racism in the South, and it continues to work towards expanding the franchise to those traditionally excluded from the political process based on their race, color, national origin, and economic status. As part of its work, SPLC has filed multiple *amicus curiae* briefs in the Supreme Court of the United States and the United States Courts of Appeals.

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Arizona State Legislature v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015) 26, 29, 31

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 30

Colegrove v. *Green*, 328 U.S. 549 (1946) 34

Colorado Republican Federal Campaign Committee v. *FEC*, 518 U.S. 604 (1996) 32

Cook v. *Gralike*, 531 U.S. 510 (2001) 27

Davis v. *Bandemer*, 478 U.S. 109 (1986) 31

Evenwel v. *Abbott*, 136 S. Ct. 1120 (2016) 7

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 30

Gill v. *Whitford*, 138 S. Ct. 1916 (2018) 32

Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 28

Larios v. *Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) 32

League of United Latin American Citizens v. *Perry*, 548 U.S. 399 (2006) 8, 32, 33

McCulloch v. *Maryland*, 17 U.S. 316 (1819) 26

Miller v. *Johnson*, 515 U.S. 900 (1995) 9

Powell v. *McCormack*, 395 U.S. 486 (1969) 29

Reynolds v. *Sims*, 377 U.S. 533 (1964) 29, 30

TABLE OF AUTHORITIES—Continued

Page(s)

Schuette v. *Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) 32

Shaw v. *Reno*, 509 U.S. 630 (1993) 14

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 26, 30

United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 33

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 29, 31, 33, 34

Wesberry v. *Sanders*, 376 U.S. 1 (1964) 26

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 32

DOCKETED CASES

Moreno v. *Gessler*, No. 11 Civ. 3461 (D. Colo.) 8, 11

CONSTITUTIONAL PROVISIONS

U.S. Const.
Preamble 26
art. I, § 2, cl. 1 27
art. I, § 2, cl. 3 27
art. I, § 3, cl. 1 25

OTHER AUTHORITIES

Adams, Bruce, *Toward a System of "Fair and Effective Representation": A Common Cause Report on State and Congressional Reapportionment* (1977) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Aguilera, Abigail, *Drawing the Line:* Whitford *v.* Gill *and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. Cin. L. Rev. 775 (2018) 32

Akron Beacon Journal Staff, *Ohio's 14th Congressional District race: Andrew Jarvi, Dave Joyce, Michael Wager*, Akron Beacon Journal (Oct. 19, 2016), https://www.ohio.com/akron/news/politics/ohio-s-14th-congressional-district-race-andrew-jarvi-dave-joyce-michael-wager 15

Amash, Justin, Twitter (May 25, 2017) 18

Berman, Mitchell N., *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005) 18, 29

Bipartisan Policy Center, Commission on Political Reform, *Governing in a Polarized America* (2014), http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/BPC%20CPR%20Governing%20in%20a%20Polarized%20America.pdf 22

Blumenauer, Earl & Jim Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003), http://www.nytimes.com/2003/07/08/opinion/redistricting-a-bipartisan-sport.html?mcubz=0 ..... 13, 20

TABLE OF AUTHORITIES—Continued

Page(s)

Brasch, Sam, *Anti-Gerrymandering Effort Sails Through The Colorado Capitol On Its Way To The Ballot*, Colorado Public Radio (May 7, 2018), https://www.cpr.org/news/story/anti-gerrymandering-effort-sails-through-the-colorado-capitol-on-its-way-to-the-ballot 34

Burke, Cathy, *Rep. Rod Blum: I'll Walk the Walk on Term Limits*, Newsmax (May 29, 2015), http://www.newsmax.com/Newsmax-Tv/rod-blum-term-limits-iran/2015/05/29/id/647607 12

Charles, Guy-Uriel & Luis E. Fuentes-Rohwer, *Judicial Intervention As Judicial Restraint*, 132 Harv. L. Rev. 236 (2018) 35

Congressional Institute, *Congress of Tomorrow Project - Introduction*, https://www.congin st.org/congress-of-tomorrow-project-introd duction/ (visited Mar. 8, 2019) 14

Cox, Adam B., *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409 (2004) 19, 23

Debates on the Federal Constitution (J. Elliot ed., 1876) 27, 28, 29

Duncan, Dustin, *Group seeks to change redistricting*, The Southern Illinoisan (Mar. 23, 2014), thesouthern.com/news/local/group-seeks-to-change-redistricting/article_9e9e1 bf7-04c3-5d74-bb5a-a89ed72dfb75.html 24

TABLE OF AUTHORITIES—Continued

Page(s)

Eilperin, Juliet, *The Gerrymander That Ate America*, Slate (Apr. 17, 2006), www.slate.com/articles/news_and_politics/politics/2006/04/the_gerrymander_that_ate_america.html 21

Ely, John Hart, *Democracy and Distrust: A Theory of Judicial Review* (1980) 33

Federalist No. 10 (Madison) 27

Federalist No. 37 (Madison) 27

Federalist No. 40 (Madison) 25

Federalist No. 52 (Madison) 27

Federalist No. 56 (Madison) 10, 29

Federalist No. 57 (Madison) 26, 29

Fleury, Kathleen & Virginia M. Wright, *A Chat With Olympia Snowe*, Downeast (Oct. 2014), www.downeast.com/olympia-snowe-interview/ 12

Gallagher, Mike & Ro Khanna, *Two congressmen offer a bipartisan plan to 'drain the swamp'*, USA Today (June 1, 2017), https://www.usatoday.com/story/opinion/2017/06/01/two-congressmen-offer-bipartisan-plan-drain-swamp/102189506/ 13

Gallup, *Update: Americans' Confidence in Voting, Election* (Nov. 1, 2016), http://www.gallup.com/poll/196976/update-americans-confidence-voting-election.aspx 23

TABLE OF AUTHORITIES—Continued

Page(s)

Greene, Jamal, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021 (2005) 29

Grossman, Perry, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017) http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/fixing_gerrymandering_affects_who_is_sent_to_office_and_how_they_govern.html 14

Harger, Jim, *Is the GOP throwing Justin Amash under the bus?*, Michigan Live (June 24, 2011), http://www.mlive.com/news/grand-rapids/index.ssf/2011/06/post_178.html 18

The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html 23

Hayden, Maddy, *Pearce talks endangered species, Trump*, Carlsbad Current-Argus (Aug. 18, 2016), http://www.currentargus.com/story/news/local/2016/08/18/pearce-talks-endangered-species-trump/88954948/ 16

Hill Staff, *Wamp backs Dem redistricting plan*, The Hill (June 23, 2005), http://www.thehill.com/capital-living/food-and-drink/23053-wamp-backs-dem-redistricting-plan 19

TABLE OF AUTHORITIES—Continued

Page(s)

Ingraham, Christopher, *One easy way to end gerrymandering: Stop letting politicians draw their own districts*, Wash. Post (June 2, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/02/one-easy-way-to-end-gerrymandering-stop-letting-politicians-draw-their-own-districts/?utm_term=.79d19851ada4 24

Israel, Gideon, *A Matter of Principles: Mark Meadows Speaks Conservatism*, Mida (July 2, 2017), http://mida.org.il/2017/02/07/matter-principles-mark-meadows-speaks-conservatism 18

Issacharoff, Samuel & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004) 8, 23

Iyer, Sundeep, *Redistricting and Congressional Control Following the 2012 Election*, Brennan Center for Justice (Nov. 28, 2012), https://www.brennancenter.org/analysis/redistricting-and-congressional-control-following-2012-election 10

Johnson, Jenna, *Is This How Maryland's 3rd Congressional District is Supposed to Look?*, Wash. Post (Sept. 21, 2014), https://www.washingtonpost.com/local/md-politics/in-maryland-anti-gerrymandering-activists-take-message-to-their-target/2014/09/21/2f3dce36-4180-11e4-9a15-137aa0153527_story.html?utm_term=.4b3cf65f916f 10

TABLE OF AUTHORITIES—Continued

Page(s)

Joseph, Cameron, *Jordan in redistricting crosshairs after bucking Boehner*, The Hill (July 28, 2011), http://thehill.com/blogs/ballot-box/house-races/174211-jordan-in-redistricting-crosshairs-after-bucking-boehner 17

Lapowsky, Issie, *Good News: Midterm Voters Drew the Line on Gerrymandering*, Wired (Nov. 7, 2018), https://www.wired.com/story/midterm-elections-2018-voters-draw-gerrymandering-line/ 24

Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, *in* 1 *The Founders' Constitution* 252 (Philip B. Kurland & Ralph Lerner eds., 1987) 26

Levinson, Daryl L. & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311 (2006) 14

Mann, Thomas E. & Norman J. Ornstein, *It's Even Worse Than It Looks* (2012) 18

Marcos, Cristina, *Lawmakers set up bipartisan Problem Solvers Caucus for new Congress*, The Hill (Feb. 3, 2017), http://thehill.com/blogs/floor-action/house/317764-bipartisan-lawmakers-set-up-problem-solvers-caucus-for-new-congress 16

TABLE OF AUTHORITIES—Continued

Page(s)

Pearson, Rick, *House Members Blast Illinois' New District Map in Court*, Chi. Trib. (Nov. 18, 2011), http://articles.chicagotribune.com/2011-11-18/news/ct-met-illinois-congressional-redistricting-20111118_1_new-map-democratic-map-roskam 9

Pildes, Richard, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L. J. 2505 (1997) 32

Polsby, Daniel D. & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991) 19

Potter, Trevor & Marianne H. Viray, *Election Reform: Barriers to Participation*, 36 U. Mich. J.L. Reform 547 (2003) 22

Press Release, Rep. Alan Lowenthal, *Congressman Lowenthal Leads Bipartisan Amicus Brief to Supreme Court Defending Voters' and States' Rights* (Jan. 26, 2015), https://lowenthal.house.gov/news/documentsingle.aspx?DocumentID=398562 11

Press Release, Rep. Carlos Curbelo, *Curbelo, Deutch Welcome 50 Members to Bipartisan Climate Solutions Caucus* (July 25, 2017), https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1603 16

TABLE OF AUTHORITIES—Continued

Page(s)

Press Release, Rep. Jim Cooper, *Cooper, Tanner Work to Stop Gerrymandering* (Apr. 21, 2010) https://cooper.house.gov/media-center/press-releases/cooper-tanner-work-to-stop-gerrymandering 15

Raviv, Adam, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001 (2005) 13, 15

Reagan, Ronald, *Remarks at the Republican Governors Club Annual Dinner* (Oct. 15, 1987), http://www.presidency.ucsb.edu/ws/?pid=33559 5

The Records of the Federal Convention of 1787 (Farrand ed. 1911) 25

Ripon Advance News Service, *Fitzpatrick leads bipartisan resolution calling on House to end political gerrymandering*, The Ripon Advance (May 11, 2017), https://riponadvance.com/stories/fitzpatrick-leads-bipartisan-resolution-calling-house-end-political-gerrymandering/ 21

Schuck, Peter H., *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325 (1987) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Steinhauer, Jennifer, *Hello, Illinois? Your Congressman Is Getting Off the Phone*, N.Y. Times (Apr. 24, 2012), http://www.nytimes.com/2012/04/25/us/politics/hello-illinois-rep-tim-johnson-is-on-the-line.html?mcubz=0 9

Stewart, Kyle, *Hurd Defends District Lines in Court*, Roll Call (July 17, 2017), https://www.rollcall.com/news/politics/hurd-defends-district-lines-court 17

Tarr, G. Alan & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877 (2006) 13, 15

Wood, Gordon S., *The Creation of the American Republic 1776-1787* (1998) 25

Zheng, Lili, *Reform seeks public input on redistricting in Md.*, WMDT (Nov. 1, 2016), www.wmdt.com/news/maryland/reform-seeks-public-input-on-redistricting-in-md-1/137894158 23

IN THE

Supreme Court of the United States

Nos. 18-422, 18-726

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE[1]

Amici curiae are current and former Members of the House of Representatives from both major political parties—20 Republicans and 20 Democrats. Amici hail from over 20 States, representing every corner of our Nation: from Florida to Maine; from the Great Lakes to the Great Plains to the West Coast and in between. Despite many political and regional differences, amici are united in the belief that, in our system of government, power flows from the People to their political representatives and not the other way around. Amici are equally united in the belief that removing the most extreme forms of partisan manipulation from the legislative redistricting process is essential to ensuring principled and constituent-first representation.

Amici understand the nature of the redistricting process from first-hand experience. They know what it means to represent the people of a community in what Madison called the "popular branch" of our federal government, and they have seen first-hand how districting decisions affect the incentives a Member experiences. Amici hope that by describing their experiences they will help the Court understand why basic, enforceable constitutional limits on extreme partisan gerrymanders will make Congress better serve the People and thus more faithfully fulfill its constitutional role.

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made any monetary contribution to its preparation and submission. All parties have filed blanket consents with the Court.

Amici are the following Members and former Members of the U.S. House of Representatives, in alphabetical order:

1. Rep. Mark Amodei (R-Nev.)
2. Rep. Don Beyer (D-Va.)
3. Fmr. Rep. Rod Blum (R-Iowa)
4. Rep. Earl Blumenauer (D-Or.)
5. Rep. Brendan Boyle (D-Penn.)
6. Fmr. Rep. William Brock (R-Tenn.)
7. Fmr. Rep. Russ Carnahan (D-Mo.)
8. Fmr. Rep. Mike Castle (R-Del.)
9. Fmr. Rep. William Clinger (R-Penn.)
10. Rep. Jim Cooper (D-Tenn.)
11. Fmr. Rep. Carlos Curbelo (R-Fla.)
12. Rep. Ted Deutch (D-Fla.)
13. Fmr. Rep. Vic Fazio (D-Cal.)
14. Rep. Brian Fitzpatrick (R-Penn.)
15. Fmr. Rep. Dan Glickman (D-Kan.)
16. Rep. Josh Gottheimer (D-N.J.)
17. Rep. Raul Grijalva (D-Ariz.)
18. Fmr. Rep. Richard Hanna (R-N.Y.)
19. Rep. Andy Harris (R-Md.)
20. Fmr. Rep. David Jolly (R-Fla.)
21. Rep. Marcy Kaptur (D-Ohio)
22. Rep. Dan Kildee (D-Mich.)
23. Rep. Peter T. King (R-N.Y.)

24. Fmr. Rep. Steven Kuykendall (R-Cal.)
25. Fmr. Rep. Larry LaRocco (D-Idaho)
26. Rep. Dave Loebsack (D-Iowa)
27. Rep. Alan Lowenthal (D-Cal.)
28. Fmr. Rep. Pete McCloskey (R-Cal.)
29. Rep. Greg Meeks (D-N.Y.)
30. Fmr. Rep. Connie Morella (R-Md.)
31. Rep. Chellie Pingree (D-Maine)
32. Rep. Tom Reed (R-N.Y.)
33. Fmr. Rep. Claudine Schneider (R-R.I.)
34. Fmr. Rep. Chris Shays (R-Conn.)
35. Fmr. Rep. Peter Smith (R-Vt.)
36. Fmr. Rep. Olympia Snowe (R-Maine)
37. Rep. Thomas Suozzi (D-N.Y.)
38. Fmr. Rep. Richard Swett (D-N.H.)
39. Fmr. Rep. Zach Wamp (R-Tenn.)
40. Fmr. Rep. Lynn Woolsey (D-Cal.)

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, addressing an annual gathering of the Republican Governors Association, President Ronald Reagan decried partisan gerrymandering. President Reagan explained that what the country needed was "an end to the antidemocratic and un-American practice of gerrymandering congressional districts."[2] He was right. Yet, three decades later, amici and their constituents continue to experience the corrosive effects of partisan gerrymandering. Since President Reagan's call to action, both major political parties have used partisan gerrymandering with ever-greater frequency and efficiency, hurting voters of all stripes and undermining faith in our institutions of government. Amici therefore believe that the need is greater than ever to enforce basic constitutional boundaries on the worst forms of partisan gerrymandering.

This brief makes three overarching points.

First, extreme partisan gerrymandering harms our political system, and harms the functioning of the House of Representatives in particular. It puts raw partisan position ahead of the maintenance of coherent political communities and sensibly shaped districts based on traditional districting criteria. A cascade of negative results follows: artificially drawn "safe" districts tend to make general elections less competitive and give party insiders, or small groups of "base" primary voters, much greater influence than the general electorate; political parties gain power to obstruct independent, constituent-first representation; compro-

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[2] Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987).

mise becomes politically impossible even when Representatives on both sides of the aisle share areas of principled agreement and even when the voters want it; and the People grow frustrated with the capacity of the House to govern effectively, causing disillusionment with and disengagement from our democratic processes.

Second, extreme partisan gerrymandering cannot be reconciled with the Framers' conception of the House of Representatives as directly accountable to the People. The premise of extreme partisan gerrymandering is that politicians choose their voters rather than voters choosing their representatives. That stands on its head the Framers' understanding that the House was to be the institution most directly connected to and representative of the People themselves.

Third, this Court has a crucial role to play in fixing the problem. The cycles of extreme partisan gerrymandering are self-perpetuating, with partisanship and mistrust begetting still greater partisanship and mistrust. This Court's role in our constitutional order includes safeguarding the fundamental predicates of the political process when necessary. The modicum of judicial involvement required here—recognizing basic constitutional safeguards against the worst partisan gerrymanders—will allow the political process to begin to correct itself. Such involvement is fully consistent with the Court's constitutionally assigned role.

Partisan gerrymandering makes it more difficult for Members to do the one job voters expect above all: delivering results for their constituents. We can and must do better.

ARGUMENT

I. EXTREME PARTISAN GERRYMANDERING UNDERMINES THE HEALTHY FUNCTIONING OF THE HOUSE

Members of the House must be free above all else to follow the desires of their constituents. But partisan gerrymandering creates obstacles to that fundamental pursuit. It subverts traditional districting criteria that tie members to coherent political communities. It undercuts the types of principled, bipartisan or nonpartisan cooperation that most voters crave. And it makes the People feel like their government is rigged against them.

A. Partisan Gerrymandering Subverts Traditional Districting Criteria

Traditional districting principles, such as compactness, regularity, and maintenance of communities of interest, have long played a critical role in fostering coherent political communities with shared identities, concerns, and interests. *See, e.g.*, *Evenwel* v. *Abbott*, 136 S. Ct. 1120, 1124 (2016). Extreme partisan gerrymandering subverts these traditional principles and the local identities and communities they respect and promote. By definition, the dominant consideration in a partisan gerrymander is benefit to the party drawing the lines, even at the expense of the needs of existing communities.

Traditional districting principles help ensure that districts have coherent geographic and political identities, and thus help maintain a deep connection between a Member and his or her constituents. As Representative Scott Tipton, Republican of Colorado, has explained, it is important for a district to have coherent identity. Discussing his district, Representative Tipton said that issues affecting the state's rural communities,

such as water issues, give his district a common language and an "essence."[3] Representative Tipton credits the strong identity of his district as encouraging political competition and warding off needless partisanship. In Colorado's Third Congressional District, he explained, "we've elected Republicans, we've elected Democrats." "[I]rrespective of ... heritage," "irrespective of geography," "irrespective of party[:] we elect the person."[4]

Traditional districting criteria also aid effective representation by helping Members work more effectively with local officials in serving their constituents.[5] In Colorado, that might mean working with county governments, which administer major federal programs such as Medicaid and food stamps.[6] In other States, those principles might ensure strong relationships with the cities and towns that are included within a Member's district.

Without constitutional limits on partisan gerrymandering, traditional districting principles can be subverted whenever a single political party gains control of the redistricting process and seeks to maximize its political advantage no matter the cost. *See, e.g.*, *League of United Latin Am. Citizens* ("*LULAC*") v. *Perry*, 548 U.S. 399, 481 (2006) (Stevens, J., concurring in part and dissenting in part) (political gerrymander-

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[3] Tr. of Testimony of Rep. Scott Tipton ("Tipton Tr.") 1321, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 17, 2011).

[4] *Id.* at 1334, 1338.

[5] *E.g.*, Tr. of Testimony of Rep. Michael Coffman (R-CO) 2573-2574, *Moreno* v. *Gessler*, No. 11 Civ. 3461 (D. Colo. Oct. 21, 2011).

[6] *Id.* at 2572.

ing "subordinate[s] traditional politically neutral districting principles ... to political considerations." (original brackets omitted) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995))). A map drawn solely to achieve partisan ends undermines the benefits that come from compact districts that respect existing geographic and political boundaries such as county lines.

Consider, for example, Representative John Shimkus, Republican of Illinois. The 2011 redistricting process dramatically changed his district. Representative Shimkus's hometown of Collinsville, with a population of just 25,000, was divided among three congressional districts.[7] And the area of his district was massively expanded to include all or part of *33 counties*. This geography makes it much more difficult for Representative Shimkus to interact with constituents across the district—nearly impossible, for example, to hold town halls in every community across the district in the same way that he could in a district that was drawn using traditional principles.[8]

Or consider amicus Representative Andy Harris, Republican of Maryland. Representative Harris's district had long been centered on Maryland's Eastern Shore, a coherent geographic, economic, and cultural region defined by the Chesapeake Bay, which separates it from the rest of the state. In 2010, as part of a map

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[7] Pearson, *House Members Blast Illinois' New District Map in Court*, Chi. Trib. (Nov. 18, 2011).

[8] *See also* Steinhauer, *Hello, Illinois? Your Congressman Is Getting Off the Phone*, N.Y. Times (Apr. 24, 2012) (former Rep. Tim Johnson (R-IL) lamenting that Illinois' "grossly gerrymandered congressional map" would have forced him into a district in which "two-thirds of the voters have never been represented by" him).

that was later challenged in one of the cases now before the Court, 135,000 people from areas on the Bay outside of Annapolis and Baltimore were pulled out of the district and replaced by about 115,000 people in north central Maryland, a landlocked area on the other side of Baltimore along the Pennsylvania border. This change served partisan ends—*i.e.*, packing a higher percentage of Republican voters into Representative Harris's district—by diluting the district's coherent, Eastern-Shore-based identity.[9]

Districting changes that interfere with the relationships between Members and the communities they serve are not fair to anyone—and especially not to the voters.[10]

Traditional districting considerations are meant to reinforce the role of representatives as leaders in and members of particular political and geographic communities. That is how representation works best in our democracy. As Madison wrote, a Representative should possess "a local knowledge of their respective districts" and remain "acquainted with the interests and circumstances of his constituents." Federalist No. 56. Representative Tipton echoed that idea in discuss-

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[9] Johnson, *Is This How Maryland's 3rd Congressional District is Supposed to Look?*, Wash. Post (Sept. 21, 2014).

[10] Partisan gerrymanders also frequently lead to incumbents running in what are effectively new districts drawn with no particular goal beyond partisan ends. Sometimes that means that two incumbents' districts have been smashed together, eliminating established political communities and forcing experienced Representatives to run against one another. *See* Iyer, *Redistricting and Congressional Control Following the 2012 Election*, Brennan Center for Justice (Nov. 28, 2012) (finding that, in 2012, 40 incumbents, evenly split by party, left office at least in part due to districting changes).

ing how he got into politics. He was taught that there is a "public responsibility to participate," which means citizens going to "precinct caucuses and county assemblies, because that's how the process works. You had an opportunity to be able to see who was going to cast your vote in the state legislature and Congress and the city council."[11]

Traditional districting principles reflect that sense of participation and community identity. But extreme partisan gerrymanders sacrifice those values in favor of whatever map will most benefit the party in power.[12]

B. Partisan Gerrymandering Devalues Pragmatic Problem-Solving And Constituent-First Representation In The House

Extreme partisan gerrymandering also rewires a district's internal political dynamics—pushing Members towards the ideological poles, encouraging Members to eschew principled, bipartisan compromise, and transferring power from voters to political parties. These shifts undercut the cardinal rule of serving as a representative of the People: Standing with one's constituents, regardless of the partisan calculus.

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[11] Tipton Tr. 1315.

[12] As Representative Rodney Davis (R-IL) has explained, extreme partisan gerrymanders make it unnecessarily difficult to "form districts that better reflect the interests of [the] citizens." Press Release, Rep. Alan Lowenthal, *Congressman Lowenthal Leads Bipartisan Amicus Brief to Supreme Court Defending Voters' and States' Rights* (Jan. 26, 2015).

1. Partisan gerrymandering creates artificially uncompetitive districts

One of the most baleful consequences of extreme gerrymandering is that it entrenches "safe" districts, that is, districts in which general elections are rendered uncompetitive due to partisan line-drawing. This is achieved through "packing" a disfavored party's supporters into a small number of districts, thus creating majorities for the dominant party in many or all of the remaining districts and thus "cracking" the disfavored party's support in those districts. Regardless of the statewide totals, the line-drawing party can use these techniques to make itself the presumptive victor in a majority of the state's districts. As a result, as amicus former Representative Rod Blum, Republican of Iowa, explained, in the 2016 election cycle "you probably ha[d only] 25-35 congressional districts that [we]re actually competitive."[13] Amica former Senator and Representative Olympia Snowe, Republican of Maine, was even more pessimistic in advance of the 2014 elections, explaining that "as few as seven seats are considered to be tossups in this election" due largely to partisan gerrymandering.[14]

Representatives Mike Gallagher (R-WI) and Ro Khanna (D-CA) have explained that politicians should not be "allowed to gerrymander their districts and choose their own voters" in this manner precisely because "[t]he less competitive a district becomes, the

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[13] Burke, *Rep. Rod Blum: I'll Walk the Walk on Term Limits*, Newsmax (May 29, 2015).

[14] Fleury & Wright, *A Chat With Olympia Snowe*, Downeast (Oct. 2014).

more general elections become formalities."[15] In a "safe" district, with the general election result foreordained, the focus of political activity shifts to the primary election of the dominant party. Power thus shifts from the general electorate to party insiders with influence over the nomination process and to lower-turnout primary elections that principally attract a relatively small number of "base" voters.[16] As a result, as amicus Representative Earl Blumenaue (D-OR) explained in an op-ed with then-Representative Jim Leach (R-IA), "[p]rimary elections in districts that are overwhelmingly Republican produce candidates generally to the right of the average Republican, while more liberal Democrats usually emerge from primaries in districts that are overwhelmingly Democratic."[17]

The elevation of primaries over the general election can effectively make Representatives responsive to a minority rather than a majority of voters in their districts. As Representatives Darin LaHood (R-IL) and Dan Lapinski (D-IL), explained in 2017, "as a result

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[15] Gallagher & Khanna, *Two congressmen offer a bipartisan plan to 'drain the swamp'*, Journal Sentinel (June 1, 2017).

[16] *See* Tarr & Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Rather, legislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system.").

[17] Blumenauer & Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003); *see also, e.g.*, Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (2005) ("[P]oliticians who are elected to office only have to cater to voters from one party, and such politicians—either out of conviction or out of political prudence—tend to fall further from the ideological center than do politicians who have to reach out to voters from both parties to get elected.").

of years of gerrymandering congressional districts, some of our elected public servants are winning their offices by a minority of a minority of a minority."[18] This dynamic can change Members' political incentives. A Member in a "safe" district has strong incentives to appeal to party insiders, or to highly partisan primary voters who hold the key to re-election. As Representative David Price (D-NC) noted, those incentives "really affect[] the way members behave once they come [to Congress]. I've heard some guys say they might be more moderate, but they just can't be .... It all adds up to pretty extreme behavior. The gerrymandering really exacerbated that."[19]

The result is a phenomenon that amici see all too often: intense pressure to be driven by partisanship over all other considerations, leaving more moderate voters—voters from the party that drew the district lines, independent voters, *and* voters from the disfavored party (including those who could have been cross-over voters)—feeling voiceless and unrepresented in the House.[20] Amicus Representative Jim Cooper

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[18] *Congress of Tomorrow Project - Introduction*, Congressional Institute.

[19] Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017).

[20] This Court has recognized a similar dynamic in the context of racial gerrymandering. *Cf. Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) ("When a district obviously is created solely to effectuate the perceived common interests of one [] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."). So have prominent legal scholars. *See* Levinson & Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2335 (2006) ("The absence of a general election

(D-TN) laid bare the broad scope of the problem: Gerrymandering, he explained, "is not only unfair to independent voters, but *all voters*, because it creates a Congress of highly-partisan representatives when most Americans are centrists."[21]

Competitive districts, by contrast, tend to produce more constituent-centered representation. A competitive district, as Representative David Joyce (R-OH) has explained, "forces you to evaluate each piece of legislation and not just answer to the fringes of the parties."[22] Winning in a politically competitive district demands that Members actively engage with, and craft policy positions designed to help, a broad cross-section of their constituents from across both parties.[23] Former Representative Steve Pearce, also a Republican, noted that representing his competitive New Mexico

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threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners."); *see also* Tarr & Williams, *Introduction*, 37 Rutgers L.J. at 878 ("Partisan gerrymandering encourages extreme partisanship and extreme positions.").

[21] Press Release, Rep. Jim Cooper, *Cooper, Tanner Work to Stop Gerrymandering* (Apr. 21, 2010) (emphasis added).

[22] Akron Beacon Journal Staff, *Ohio's 14th Congressional District race: Andrew Jarvi, Dave Joyce, Michael Wager*, Akron Beacon Journal (Oct. 19, 2016).

[23] *See* Adams, *Toward a System of "Fair and Effective Representation": A Common Cause Report on State and Congressional Reapportionment* 24 (1977) ("Safe districts remove the incentive to grant political concessions to constituent interests ... or create electoral coalitions [that] ensure representation of diverse points of view."); Raviv, *Unsafe Harbors*, 7 U. Pa. J. Const. L. at 1068 (arguing that safe districts encourage polarization in decisionmaking bodies).

district meant he needed to "talk to a lot of Democrats" and to "go into areas that have never seen a Republican."[24] In those more competitive districts, Members must actively work to represent their whole constituency, and citizens reciprocate with more robust civic engagement.

For those same reasons, Members from more competitive districts are also freer to drive efforts to develop pragmatic results for constituents. Amici Republican Representative Tom Reed of New York and Democratic Representative Josh Gottheimer of New Jersey, for example, co-chair the Problem Solvers Caucus, which, as its name suggests, is designed to overcome partisan polarization and deliver practical solutions for the American people.[25] Similarly, amicus former Republican Representative Carlos Curbelo cochaired the bipartisan Climate Solutions Caucus, which explores policy solutions designed to address the impacts of our changing climate, with his fellow amicus Florida Democratic Representative Ted Deutch.[26]

Representative Will Hurd (R-TX) perhaps best summed up the benefits of competitive districts in July 2017 when he said: "My district is competitive, and

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[24] Hayden, *Pearce talks endangered species, Trump*, Carlsbad Current-Argus (Aug. 18, 2016).

[25] *See* Marcos, *Lawmakers set up bipartisan Problem Solvers Caucus for new Congress*, The Hill (Feb. 3, 2017).

[26] Press Release, Rep. Carlos Curbelo, *Curbelo, Deutch Welcome 50 Members to Bipartisan Climate Solutions Caucus* (July 25, 2017) https://curbelo.house.gov/news/documentsingle.aspx?DocumentID=1603.

that's a good thing ... because it forces people to talk to a broader sense of the community[.]"[27]

2. Partisan gerrymandering enhances the influence of political parties at the expense of independent-minded Members and the constituents they serve

Unfettered partisan gerrymandering also alters the dynamic between Members and their political parties. Power shifts to party insiders, who dictate the literal party line and demand that Members abide by it, irrespective of the preferences of a Member's constituents. If an independent-minded Member breaks with his or her party in order to follow the wishes of constituents, party insiders can use the next redistricting process to make re-election difficult for that Member or eliminate his or her seat altogether. This power dynamic distorts the proper functioning of the House and makes it less responsive to the People.

In amici's experience, if partisan gerrymandering remains unchecked, party insiders will use the redistricting process to threaten or punish independent-minded Members. For example, in 2011, Representative Jim Jordan (R-OH) was threatened with the erasure of his district by party officials after he took independent stands.[28] In the case of Representative Justin Amash (R-MI), the party actually did redraw his district in an unsuccessful attempt to thwart his re-

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[27] Stewart, *Hurd Defends District Lines in Court*, Roll Call (July 17, 2017).

[28] Joseph, *Jordan in redistricting crosshairs after bucking Boehner*, The Hill (July 28, 2011).

election because of commitment to faithfully representing constituents independent from party dictates.[29]

Using the redistricting process to pick winners or enforce internal party discipline is anathema to Members' faithful and independent representation of voters' interests. As Freedom Caucus co-founder Representative Mark Meadows (R-NC) has emphasized: "There should never be a punishment for voting the will of the people. ... To do otherwise would be to be putting party over people, and most Americans have a strong distaste for that."[30]

3. Partisan gerrymandering harms the House as an institution

More artificial "safe" seats and greater party influence over the districting process have helped produce an unprecedented rise in partisanship in the House. Partisan grandstanding and unprincipled obstruction reign supreme while independent-minded, results-oriented representation suffers.[31]

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[29] Harger, *Is the GOP throwing Justin Amash under the bus?*, Michigan Live (June 24, 2011); *see also* Amash, Twitter (May 25, 2017) ("Gerrymandered by Republicans and the Michigan Chamber of Commerce to prevent my re-election. It didn't work.").

[30] Israel, *A Matter of Principles: Mark Meadows Speaks Conservatism*, Mida (July 2, 2017).

[31] *See generally* Mann & Ornstein, *It's Even Worse Than It Looks* (2012) (discussing the rise of hyper-partisanship and "vehemently adversarial" politics); Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005) (discussing effects of "excessive partisanship"); Issacharoff & Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004) ("The result is not only less electoral accountability

Amici know that there are areas where Members from different parties share common ground notwithstanding their deeply held beliefs. But even on issues where bipartisan agreement exists, the "play-to-the-base" and "tow-the-party-line" dynamics that partisan gerrymandering encourages often cause Members to leave common-sense policy solutions on the table. Some deem it more advantageous to attack the other side in the media rather than sit down, grapple with real differences, and explore areas of genuine common ground that exist.[32] The bottom line, as amicus former Representative Zach Wamp, Republican of Tennessee, explained, is that, "[a]s the political lines become more skewed, successful candidates are increasingly more interested in political rhetoric than solutions and serving the public."[33]

Amici can attest that the dynamics that flow from hyper-partisan gerrymandering contribute to the growing partisan rancor in the House. As amicus Representative Blumenauer and former Representative Leach have explained, as a result of gerrymandering,

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but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.").

[32] *See* Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 306-307 (1991) ("[T]he beneficiaries of gerrymanders ... are also less needful of being near the political center of their districts. They are, in brief, more likely to be ideologues"); Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, 430 (2004) (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party").

[33] Hill Staff, *Wamp backs Dem redistricting plan*, The Hill (June 23, 2005).

"Members are less inclined to talk and cooperate, much less compromise," and "[t]he legislative agenda is shaped more to energize the political base than to advance the common good."[34] For Members who occupy artificial "safe" seats, the dynamics described above can apply with particular force. And even for Members who are not directly subject to such electoral disincentives, compromise is more difficult in an environment where there are no limits to the pursuit of partisanship in the shaping of electoral rules. Members who want to work from a position of principled independence have fewer potential partners on the other side.

Perhaps the saddest aspect of this dilemma is that, as amici know well, lack of cooperation begets distrust, which only further erodes the potential for cooperation. Members who strike a difficult bargain on one issue develop trust that then allows them to work together again—seeking out other areas where cooperation can lead to common-sense solutions to the problems our Nation faces. In earlier, less hyper-partisan eras, the result was a virtuous cycle of building trust. In today's climate, a vicious cycle predominates, fostered in substantial part by extreme partisan gerrymandering.

None of this is to suggest that Members should reflexively embrace bipartisanship for its own sake. Members of Congress can, will, and should hold principled beliefs that simply are not up for compromise. What matters is that Members are guided *only* by *their* judgment about how to deliver solutions for *their* constituents. When serving one's constituents calls for toeing the party line, a Member should do that; likewise, when serving one's constituents calls for working towards a bipartisan compromise, a Member should do

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[34] Blumenauer & Leach, *Redistricting*, *supra*.

that too. The problem with partisan gerrymandering is that it encourages partisanship for its own sake. That, amici strongly believe, is something no Member should feel compelled to embrace.

The effects of extreme partisan gerrymandering harm the House as an institution. The dramatic increase in partisanship in recent years has been accompanied by an equally dramatic decrease in major bipartisan legislative accomplishments that leaders on both sides of the aisle were able to forge throughout much of the 20th Century. As amicus Representative Brian Fitzpatrick, Republican of Pennsylvania, has explained, "[p]artisan gerrymandering has exacerbated electoral complacency ... and contributed to the growing divide of partisanship that grinds the gears of government to a halt."[35] The overall productivity of the House has declined as a result, diminishing the House's role in our government.

Virtually no one who has served in Congress actually supports limitless, unchecked partisanship in the districting process. Even former Speaker of the House Newt Gingrich has candidly acknowledged that, with extreme partisan gerrymandering, each party "get[s] to rip off the public in the states where they control," but "the public gets ripped off in [all] circumstances."[36] According to Gingrich, "[i]n the long run, there's a downward spiral of isolation."[37] On that point, amici all

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[35] Ripon Advance News Service, *Fitzpatrick leads bipartisan resolution calling on House to end political gerrymandering*, The Ripon Advance (May 11, 2017).

[36] Eilperin, *The Gerrymander That Ate America*, Slate (Apr. 17, 2006).

[37] *Id.*

agree: When partisan gerrymanders devalue general elections and encourage partisan grandstanding for the base over independent judgment or delivering results for constituents, we all lose.

C. Extreme Partisan Gerrymandering Hurts The People Themselves

The reduction in constructive dialogue among Members and the increased perception that general election outcomes are foreordained cause voters of all stripes to lose faith in the electoral process. As one bipartisan commission including a number of distinguished former Members explained: "Th[e] overtly political [districting] process sows distrust among the electorate about the fairness of the districts as drawn and adds to the rancor between the political parties when one feels that the other is assigning lines that disadvantage their political opponents."[38]

As more and more elections become reserved to those core partisans who tend to vote in party primaries, many other citizens increasingly view their votes as hollow gestures.[39] Voters understand when, as amicus Representative Harris has explained, a districting

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[38] Bipartisan Policy Center, Commission on Political Reform, *Governing in a Polarized America* 30 (2014).

[39] Potter & Viray, *Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003) (electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process" but "[i]t stands to reason that voter turnout decreases when voters feel that their votes are inconsequential. This would occur most often when the outcome of an election appears so clearly predetermined as to make the election a formality.").

map is "not fair to citizens throughout the state."[40] Gerrymandered seats lead voters to feel left out of the conversation entirely.[41]

As a result, faith in the integrity of elections has dropped precipitously in recent years. The Gallup Poll found that between 2009 and 2016, the percentage of Americans who "have confidence" in the "honesty of elections" tumbled from 59 percent to 30 percent, while those lacking faith rose from 40 percent to 69 percent.[42] A November 2013 poll found that 64 percent of respondents (including a majority of Republicans, Democrats, and Independents) believed that the redrawing of districts is often used to take power away from voters.[43]

In light of these trends, proposed electoral reforms, such as the introduction of independent or bipartisan redistricting commissions, have proven increasingly

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[40] Zheng, *Reform seeks public input on redistricting in Md.*, WMDT (Nov. 1, 2016).

[41] *See generally* Issacharoff & Karlan, *Where to Draw*, 153 U. Pa. L. Rev. at 574 ("Noncompetitive elections threaten both the legitimacy and the vitality of democratic governance"); *see* Cox, *Partisan Gerrymandering*, 2004 Sup. Ct. Rev. at 433 n.66 (discussing how efforts to gerrymander may cause the public "to see the political process as somehow less legitimate and thereby skew the incentives to participate").

[42] *See* Gallup, *Update: Americans' Confidence in Voting, Election* (Nov. 1, 2016). This rapid shift can be attributed only in part to the highly partisan 2016 presidential election. As early as 2014, 59 percent of Americans said they lacked confidence in the honesty of elections, while only 40 percent held such confidence—a mirror image of the poll results from 2009. *Id.*

[43] *See* The Harris Poll, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013).

popular with voters across the political spectrum. In the most recent midterm elections, for example, voters in Michigan, Missouri, and Colorado overwhelmingly passed ballot initiatives aimed at districting reform.[44]

Amici embrace the States' role as laboratories for redistricting reform. But amici also know that enacting redistricting reform can be exceedingly difficult when one party controls the machinery of the districting process. In Illinois, voters have sought an amendment to the state constitution that would prevent any districts that are "drawn to purposefully or significantly discriminate against or favor any political party or group, and not considering the residence of any person."[45] The dominant political party in the State has blocked this proposed reform. Even for amicus Representative Alan Lowenthal, who played a significant role in California's transition to an independent commission, the path to that result was long, difficult, and beset by partisan opposition from his own party.[46]

There must be basic limits on the ability of majorities to gerrymander for purely partisan gain. The health of the House, especially its ability to serve the People with clear-eyed independence, as the Framers intended, depends on it.

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[44] *E.g.*, Lapowsky, *Good News: Midterm Voters Drew the Line on Gerrymandering*, Wired (Nov. 7, 2018).

[45] Duncan, *Group seeks to change redistricting*, The Southern Illinoisan (Mar. 23, 2014).

[46] *See* Ingraham, *One easy way to end gerrymandering: Stop letting politicians draw their own districts*, Wash. Post (June 2, 2014).

II. Extreme Gerrymandering Is Inconsistent With The Nature Of Representation In Our Form Of Government

The Framers gave the House of Representatives a special and critical role: to be the authentic voice of the People. They intended Members of the House and the communities they serve to share strong bonds. Extreme partisan gerrymandering is inconsistent with these basic principles on which our government was founded.

A. Members Of The House Are Direct Representatives Of The People

The Framers conceived of a government in which institutions would reflect different forms of political authority. *See* Federalist No. 40 (Madison); *see also, e.g.*, Wood, *The Creation of the American Republic 1776-1787*, at 553-562 (1998). The President and the Senate, each indirectly elected to lengthy terms, were meant to reflect aspects of constitutional monarchy and aristocracy, respectively. *Id.*[47] But the House, then as now, was to be the bastion of democracy—"the grand depository of the democratic principle of the Gov[ernmen]t," as George Mason put it, 3 *The Records of the Federal Convention of 1787*, at 48 (Farrand ed. 1911) ("Farrand").

The House's direct connection to the People was designed to be its essential quality. As the Court explained a generation ago, "[t]he House of Representatives ... was to represent the people as individuals, and on the basis of complete equality for each voter." *Wes-*

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[47] Originally, the Constitution provided for Senators to be chosen by state legislatures rather than by the People. *See* U.S. Const. art. I, § 3, cl. 1. Direct election of Senators was not permitted until ratification of the 17th Amendment in 1913.

berry v. *Sanders*, 376 U.S. 1, 14 (1964). That direct connection is so vital because, in our constitutional order, "all political power flows from the people." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) ("*AIRC*"); *see also, e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803, 821 (1995) (Framers created "a Federal Government directly responsible to the people"); *id.* at 839 (Kennedy, J., concurring) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it."); *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819) ("[W]hen ... it was deemed necessary to [bring forth] an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."); *accord* U.S. Const., Preamble ("We the People of the United States ... do ordain and establish this Constitution for the United States of America.").

The Framers repeatedly emphasized their vision of a House of Representatives that was close to the People, directly responsive to them through the mechanism of frequent and broad-based elections, and thus capable of giving them a powerful voice in the Nation's decision-making. "'Who are to be the electors of the Federal Representatives?' Madison asked. "Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States." Federalist No. 57 (Madison); *see also* Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in 1 *The Founders' Constitution* 252

(House members are the "immediate Representatives of the People"); 2 *Debates on the Federal Constitution* 28-29 (J. Elliot ed., 1876) ("*Elliot's Debates*") ("The federal representatives will represent the people; they will be the people.") (J.C. Jones) (Mass.).

The Framers built these principles into the structure of Article I. They provided for direct elections for the House "by the People of the several States" every two years. U.S. Const. art. I, § 2, cl. 1. They ensured that apportionment of House seats would be done "according to [the People's] respective numbers" in the States, *id.* cl. 3. And they provided that any person who could vote for "the most numerous Branch of the State Legislature" would be eligible to vote in elections for the House as well. *Id.* cl. 1.

Frequent, broad-based elections are designed to create a "direct line of accountability between the National Legislature and the people who elect it," conceived as broadly as possible. *Cook* v. *Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring). In the Framers' thinking, it was "particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people." Federalist No. 52 (Madison). Competitive elections were "unquestionably the only policy by which this dependence and sympathy can be effectually secured." *Id.* Those in power, Madison explained, were to "be kept in dependence on the people" as a matter of "republican liberty." Federalist No. 37.

Notably, the People's representation in the House was to serve one of the fundamental goals of our constitutional structure: elimination of excessive faction. *See* Federalist No. 10 (Madison).

One imperative is thus clear from both the Framers' statements and the constitutional design they es-

tablished: The role of the House in our constitutional order—to reflect the will of the People—depends on the electoral relationship between Members and the People. The People's ability to choose their representatives was an essential guarantee of both popular sovereignty and liberty. The Framers' concerns resonate across the centuries—and amici feel them every day as part of our lived experience.

B. Extreme Gerrymandering Distorts The People's Voice In Contravention Of The Framers' Vision

Extreme partisan gerrymandering threatens the Framers' vision of a directly accountable national legislature.

The Framers envisioned frequent, broad-based, competitive House elections that would create a relationship of "dependence" and tie House Members closely to the People. The entire point of extreme gerrymandering is to undercut that tie in order to achieve a narrow partisan political result. *See, e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 537-538 (1969) (Fortas, J., concurring) (describing "gerrymandering" as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes").

The Framers themselves repeatedly expressed concern that, through the manipulation of electoral districts, "the House of Representatives should not really represent the people," thereby undermining the republican character of the nascent government. *E.g.*, 4 *Elliot's Debates* 303 (C. Pinckney); *accord* 3 *Elliot's Debates* 367 (Madison) (warning that improper "unequal" apportionment could "deprive[]" the people of "the right of suffrage"). They knew that, without some external check,

the rules of the political process could be manipulated.[48] Their concern on this point makes sense in light of their overall project, for "'the true principle of a republic is, that the people should choose whom they please to govern them.'" *Powell* v. *McCormack*, 395 U.S. 486, 540-541 (1969) (quoting 2 *Elliot's Debates* 257 (Hamilton)).

This Court has described extreme gerrymandering as incompatible with this fundamental principle of our form of government. Extreme gerrymandering turns the "true principle" of our Republic on its head, permitting politicians to choose the people whom they represent rather than the reverse. *See AIRC*, 135 S. Ct. at 2677 (noting "the core principle of republican government ... that the voters should choose their representatives, not the other way around" (internal quotation marks omitted)) (quoting Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005)). Partisan gerrymanders "[are incompatible] with democratic principles." *AIRC*, 135 S. Ct. at 2658 (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (Scalia, J.) (plurality opinion) and citing *id.* at 316 (Kennedy, J., concurring in judgment)). They threaten the very notion of a representative government, in which, through the mechanism of broad-based popular elections, "legislatures ... should be bodies which are collectively responsive to the popular will." *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964).

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[48] *Compare* Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1053-1054 (2005) ("[B]ecause gerrymanders involve the rigging of elections themselves, the regular political process is not entirely trustworthy in policing them") *with* Federalist Nos. 56 & 57 (Madison) (discussing rotten borough and pocket borough representatives in Parliament as overcome by faction due to structural defects, and asserting that broad elections by the whole People would remedy such defects).

This is not to say that politics has no place in districting. Far from it. It is an inescapable fact that "the location and shape of districts" can determine "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Some variation in the shape of districts is natural, so long as those variations "are based on legitimate considerations incident to the effectuation of a rational state policy," such as keeping towns, counties, or cohesive political communities together. *E.g.*, *Reynolds*, 377 U.S. at 579.

But true representation, consistent with the special role of the House as the voice of the People, is diminished when district lines are designed to insulate Representatives from the People and instead to achieve a preordained, partisan result. *Cf. California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). Extreme partisan gerrymandering impedes the "direct link" between the People and their representatives in the House that the Framers intended, *Thornton*, 514 U.S. at 803.

III. Recognizing Basic Limits On Extreme Partisan Gerrymandering Is Appropriate And Consistent With The Court's Role In Our Constitutional Order

Because extreme partisan gerrymandering works to skew a zero-sum districting process, there are few political incentives that can entice a dominant party in a given state to end the practice. The problem is thus uniquely difficult to fix through the regular functioning of the political process.

Action by this Court, to recognize constitutional limits on hyper-partisan gerrymandering, is both essential and in keeping with the Court's role in our constitutional order. The Court can do so without becoming entangled in endless political disputes; indeed, merely articulating an outer boundary on the most extreme gerrymanders will do much to jumpstart corrective measures from within the political process itself.

A. Extreme Partisan Gerrymandering Represents A Breakdown In The Political Process

Members of this Court and others have repeatedly expressed the concern that partisan gerrymanders distort the electoral process and result in the "frustration of the will of a majority of the voters." *E.g.*, *Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality op.); *accord AIRC*, 135 S. Ct. at 2677. Partisan gerrymanders are also politically self-insulating. If a gerrymander is done effectively, voters will find it difficult or impossible to punish the political party that carried out the gerrymander, even if the decision to distort the political process is profoundly unpopular.[49]

This self-insulating quality means that, as gerrymanders become more effective, the "temptation to use partisan favoritism in districting in an unconstitutional manner will grow." *Vieth*, 541 U.S. at 312 (Kennedy, J.,

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[49] *See* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1328-1329 (1987) (partisan gerrymandering is "not merely [a] consequence[] of constitutionally suspect politics" but also a "fundamental *cause*[] of it").

concurring).[50] And, aided by technology, partisan gerrymandering has become far more effective in recent years.[51] *See, e.g.*, *Gill* v. *Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("[T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past.").[52]

This Court has long recognized its role in ensuring the proper functioning of the political process. *See, e.g.*, *Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014) (describing the right of citizens, "through the political process, [to] act in concert to try to shape the course of their own times and the course of a nation"); *see also, e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) (political rights are "fundamental" because they are "preservative of all rights"). The Court has accordingly identified breakdowns in the operation of the political process as warranting judicial intervention. *See, e.g.*, *LULAC*, 548 U.S. at 440 (redistricting measures that "'hinder[ed] [certain groups'] ability to participate effectively in the political process'" were impermissible); *see also, e.g.*, *Colorado Republican Fed.*

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[50] *See also, e.g.*, Aguilera, *Drawing the Line:* Whitford *v.* Gill *and the Search for Manageable Partisan Gerrymandering Standards*, 86 U. Cin. L. Rev. 775, 777-778 (2018).

[51] *E.g.*, Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L. J. 2505, 2516 (1997) (late-twentieth-century gerrymandering was more extreme than gerrymandering in previous decades); *see also, e.g.*, *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (per curiam) (due to redistricting software, maps that once took months to prepare could be generated in a matter of hours).

[52] While a few states have used the initiative and referendum to enact districting reforms in recent years, such efforts still face significant political headwinds, *see supra* p. 24—and they are not even possible in the majority of states that lack the initiative and referendum to begin with.

Campaign Comm. v. *FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J. concurring in the judgment and dissenting in part) ("What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 n.16 (1983) ("[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the ... rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny."); *see also generally United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (greater judicial scrutiny required where legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").[53] Extreme partisan gerrymandering is akin to other breakdowns in the electoral process that the Court has identified as calling for judicial action. *See, e.g., Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *Carolene Prods.*, 304 U.S. at 153 n. 4)); *see also, e.g., LULAC*, 548 U.S. at 423-443 (discussing the use of gerrymandering to stymie the increasing electoral power of one growing ethnic group in violation of Voting Rights Act).

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[53] *See also* Ely, *Democracy and Distrust: A Theory of Judicial Review* 106 (1980) ("Courts must police inhibitions on ... political activity because we cannot trust elected officials to do so[.]").

B. Basic Limits Are All That Is Needed To Resolve The Breakdown

Until now, legislative map-makers have had no political incentive to police their own excesses, and no standard by which to do so. Articulation of a constitutional outside limit in this area will force map-drawers to curb the worst excesses and thus prevent some litigation before it starts. Recent events in Colorado exemplify this dynamic. There, partisan warfare and judicial intervention into the redistricting process in the wake of the 2010 census culminated in the imposition of a judge-drawn map, which in turn led both parties to support creation of an independent commission.[54] This Court need not craft a comprehensive legal standard that resolves all potential partisan gerrymandering challenges. Even minimal guidance will provide impetus for restraint.[55]

Amici do not favor frequent or extensive judicial intervention in the political process; indeed, amici appreciate this Court's historical reluctance to enter the "political thicket" surrounding redistricting. *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946) (plurality opinion); *see also Vieth*, 541 U.S. 267 (2004) (plurality opinion). But in light of the constitutional principles that animate our role as Members of the House, and the grave threat that hyper-partisan gerrymanders poses to our Republic, we need constitutional ground rules that ensure

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[54] *See* Brasch, *Anti-Gerrymandering Effort Sails Through The Colorado Capitol On Its Way To The Ballot*, Colorado Public Radio (May 7, 2018).

[55] Indeed, while all amici agree that some constitutional boundaries are essential to police the growing negative effects of partisan gerrymandering, amici take no position on the effectiveness of the different specific legal tests that might be used for enforcing such boundaries.

basic standards of fairness and broad-based competition. That is possible without subjecting the districting process to judicial second-guessing. Intervening, in a measured way, to address a breakdown in the political process, is entirely consistent with the Court's role in our constitutional order.[56]

Recognizing basic constitutional limitations on partisan gerrymandering will encourage political parties and voters to change course and enable them to mend the broken parts of our political process. This Court should give the Nation that chance.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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MARCH 2019

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[56] *See, e.g.*, Charles & Fuentes-Rohwer, *Judicial Intervention As Judicial Restraint*, 132 Harv. L. Rev. 236, 256 (2018) (suggesting that the Court's categorical noninvolvement in partisan gerrymandering cases will signal to political elites and the mass public that the Court has taken a side in the political debate over the issue).

Nos. 18-422 and 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,

v.

COMMON CAUSE, ET AL.,
Appellees.

LINDA H. LAMONE, ET AL.,
Appellants,

v.

O. JOHN BENISEK, ET AL.,
Appellees.

On Appeal from the United States District Courts for Maryland and the Middle District of North Carolina

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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League of United Latin Am. Citizens v. Perry,
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McCutcheon v. FEC, 572 U.S. 185 (2014) 18

O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996) 17

Police Dep't of City of Chi. v. Mosley, 408 U.S. 92 (1972) 16

Reynolds v. Sims, 377 U.S. 533 (1964) 14, 29

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 18

U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) 15

Vieth v. Jubelirer, 541 U.S. 267 (2004) ..... *passim*

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 8, 25

Other Authorities

Anthony J. McGann, *et al.*, Gerrymandering in America (2016) 22, 23

Brennan Ctr. for Justice, *Maryland's Extreme Gerrymander* (Mar. 8, 2019) 28

TABLE OF AUTHORITIES
(continued)

Page(s)

Brian Murphy, *et al.*, *NC State Board Votes for New Election in 9th District After Harris Calls for New Race*, News & Observer (Feb. 21, 2019) 10

Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper's Power*, News & Observer (Dec. 19, 2016) 32

Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209 (2003) 17

Guy-Uriel Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236 (2018) 30, 33

John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies; In a Letter from a Gentleman to his Friend (Apr. 1776) 15

Katie Meyer, *Pennsylvania Chief Justice Criticizes Impeachment Moves*, NPR (Mar. 22, 2018) 33

Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* (2017) 12, 23, 25

TABLE OF AUTHORITIES
(continued)

Page(s)

McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509 (2018) 34

Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371 (2004) 22

Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Detroit Free Press (Nov. 6, 2018) 13

Rosalind S. Helderman & Anita Kumar, *Virginia Assembly Approves New Legislative Maps*, Wash. Post (Apr. 7, 2011) 28

Sam Levine, *Ohio Voters Pass Gerrymandering Reform Measure*, Huff. Post (May 8, 2018) 13

Tara Golshan, *North Carolina Republicans' Shocking Power Grab, Explained*, Vox (Dec. 16, 2016) 32, 33

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including through work to protect the right to vote and ensure fair and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on electoral practices and redistricting and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center has a significant interest in this case, given the Center's longstanding concern about the growth of extreme partisan gerrymandering—a relatively rare but pernicious redistricting tactic that deeply offends the constitutional principles that form the foundation of our representative democracy. On the basis of its own research and studies undertaken by others, the Brennan Center has identified several readily discernible evidentiary signposts that can help the Court differentiate be-

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

tween lawful redistricting and unlawful, extreme partisan gerrymanders like those that have occurred in North Carolina, Maryland, and a few other congressional maps this past redistricting cycle.

The Brennan Center hopes that its perspective will encourage the Court to overturn North Carolina's and Maryland's unconstitutional partisan gerrymanders, and help the Court define a manageable standard that will limit both the likelihood of such extreme gerrymanders recurring in the upcoming decade and judicial intervention into normal political processes. The continued vitality of our constitutional democracy depends on it.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve a particularly pernicious but relatively rare variety of gerrymandering where a political party manipulates the redistricting process to maximize its seats in a legislative body or delegation and insulate those seats from foreseeable future changes in voter preferences. The Court has recognized that such extreme partisan gerrymanders are "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quotation and brackets omitted) (decrying "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality op.) (concluding that "an *excessive* injection of politics is *un*lawful"). The main question facing the Court in the instant cases is how to develop a legal standard

to adjudicate and vindicate those constitutional norms.

The Brennan Center submits this brief to explain how the Court can invalidate the extraordinary constitutional abuses that occur with extreme gerrymandering, while avoiding judicial interference with the large number of maps created through the ordinary "'pull, haul, and trade'" of politics. *See, e.g.*, *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 507 (2006) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

Appellees have provided the Court with several manageable legal standards. And by any of these measures, the maps in North Carolina and Maryland are unconstitutional. That outcome is unsurprising. The various standards share, by and large, the same general structure, calling for plaintiffs to demonstrate the map-makers' intent to disadvantage their political opponents, success in disadvantaging their political opponents, and an absence of a legitimate justification for doing so.

Regardless of how the Court ultimately decides to address partisan gerrymandering as a broader problem, the Court can—at the very least—use a version of these common elements to strike down the most extreme partisan gerrymanders. Such a standard would flag a remediable constitutional violation where, as here, the party in control of the redistricting process (1) intentionally sought to maximize its statewide partisan advantage and insulate its seats from changing voter preferences, (2) succeeded in do-

ing so, and (3) lacked any legitimate justification for its mapping decisions.

Under this standard, both North Carolina's and Maryland's maps would be unconstitutional. In both North Carolina and Maryland, politicians *expressly* redrew congressional maps in a one-sided process to create and lock in the maximum possible partisan advantage for their party, an advantage they historically lacked. Indeed, it would be difficult for mapmakers to do anything more extreme from the perspective of partisan advantage than they did in North Carolina and Maryland.

Targeting extreme partisan gerrymanders such as North Carolina's and Maryland's will neither trigger excessive amounts of new litigation, nor authorize judicial interference in healthy political processes. Indeed, extreme partisan gerrymanders like North Carolina's and Maryland's are anomalous, extraordinarily anti-democratic, and impervious to normal political solutions.

The Court can address any remaining concerns about the manageability of this legal standard by incorporating one or more additional limiting factors into its inquiry. The appropriate factors are highly correlated with, and help confine judicial intervention to, extreme partisan gerrymanders. Single-party control of the redistricting process, for example, is a prerequisite for a governing majority to use its domination of the process to entrench itself in power. Further, a recent history of close statewide elections provides both the motive and the opportunity for a temporary majority to undertake an extreme power grab. In addition to these factors, ir-

regularities in the redistricting process may also be useful for separating constitutionally unproblematic maps from problematic ones.

The record in these cases demonstrates the point. Take North Carolina, for example. North Carolina is essentially evenly divided between Republicans and Democrats, as statewide elections have repeatedly demonstrated. Yet during the last redistricting cycle, following a wave election, Republicans gained control of both chambers of North Carolina's legislature. They therefore had the opportunity to manipulate North Carolina's district lines to guarantee themselves large congressional majorities into the future, even if they were to lose a majority of the statewide vote. And they grabbed it. After courts ordered the North Carolina congressional map redrawn to remedy racial gerrymandering violations, Republicans proclaimed that they would redraw the map to be "a political gerrymander," adopting written criteria requiring that any map have a 10-3 Republican advantage, the maximum partisan advantage Republicans believed they could achieve. They shut Democrats out of the congressional map-drawing process and pushed through a map that was intentionally designed to, and effectively did, entrench Republicans in power. That conduct transgressed the boundaries of normal politics, and because it was carried out in a closely divided state by a party enjoying sole control over the redistricting process, this Court should be highly skeptical of appellants' post hoc justifications for the resulting map. A similar, and similarly straightforward, analysis reveals that this Court should also invalidate the Maryland map at issue in *Benisek*.

Policing such extreme abuses of the redistricting process in the ways discussed will amount to a limited judicial intervention to protect our representative form of government, while safeguarding against interference in normal redistricting processes, which can easily be differentiated by applying the above-referenced factors.

Striking down the aggressive anti-democratic abuses in North Carolina and Maryland will not politicize or delegitimize the federal courts. To the contrary, the Court's confirmation that extreme partisan gerrymanders like North Carolina's and Maryland's are unconstitutional and will be struck down will promote the vitality and integrity of all our nation's governmental institutions, including this Court itself. Politicians have interpreted the absence of judicial limits on partisan gerrymandering as tacit consent to create extreme partisan gerrymanders. A clear pronouncement from this Court barring these gerrymanders will likely have a strong prophylactic effect heading into the next round of redistricting in 2021. Such a pronouncement will also reaffirm long-standing American norms against government action designed to entrench the power of our elected officeholders.

Given the extreme facts of these cases and the stark threats they pose to our core constitutional values, the Court has never been better positioned than it is today to erect basic guardrails around the redistricting process. The Court should affirm the judgments below and hold North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

ARGUMENT

I. EXTREME PARTISAN GERRYMANDERS SUCH AS NORTH CAROLINA'S AND MARYLAND'S ARE RARE, JUDICIALLY MANAGEABLE CONSTITUTIONAL VIOLATIONS.[2]

Appellees have offered the Court a variety of manageable approaches to policing unconstitutional abuses of our redistricting processes. These approaches share several common features, including a near-universal focus on map-drawers' impermissible intent to disadvantage members of an opposing party, their success in doing so, and an absence of a cognizable justification for the map. At a minimum, the Court can use these basic building-blocks of partisan gerrymandering claims to target the problem of extreme partisan gerrymanders.

A clear constitutional standard barring extreme partisan gerrymandering would have three elements: first, the party that controlled the redistricting process intentionally sought to maximize its *statewide* partisan advantage and insulate it from

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[2] Because the Brennan Center previously submitted a brief detailing why the Maryland map at issue in *Benisek* should be deemed unconstitutional, this brief focuses primarily on the facts and circumstances that make North Carolina's extreme gerrymander unconstitutional. *See* Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellants, *Benisek v. Lamone*, No. 17-333 (S. Ct. Jan. 29, 2018) ("*Benisek* Brennan Br."), https://www.brennancenter.org/sites/default/files/legal-work/Benisek_Brennan_Center%20Amicus_Brief.pdf. The legal and institutional arguments presented throughout this brief apply equally to both cases.

normal political swings; second, the party succeeded in doing so; and, third, the party can provide no legitimate justification for its mapping decisions.[3]

A three-part inquiry of this kind is limited and manageable. As the Brennan Center's research demonstrates, this type of legal standard would direct courts' focus to a very narrow set of maps that are extraordinarily anti-democratic and immune to correction through the normal push and pull of electoral politics. This standard would thus ensure that the federal courts do not become overly involved in redistricting processes, while simultaneously focusing the courts' attention on those situations where the need for their intervention is at its highest.

A. The North Carolina And Maryland Maps Are Unquestionably Extreme Partisan Gerrymanders.

As the court below found, the evidence of the North Carolina Republican map-makers' intent to discriminate against voters based on their political viewpoints and entrench Republicans in power could not be clearer. *See* App. 155-87. Their ultimate objective was to retain the same 10-to-3 advantage that

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[3] The Court has clear models for applying each element of this standard, from abundant evidentiary guidelines for assessing legislative intent, *see, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to substantial social science evidence for evaluating the partisan effects of particular maps, *see, e.g.*, Br. of *Amici Curiae* Political Science Professors in Support of Appellees and Affirmance, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017), https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_PoliticalScienceProfessors_InSupportof%20Appellees.pdf.

Republicans enjoyed over Democrats under a 2011 congressional map that this Court struck down as an unconstitutional *racial* gerrymander in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). The legislators charged with drawing North Carolina's map directed the primary map-drawer to consider "Partisan Advantage," a criterion expressly requiring "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App. 20. They also included a "Political Data" criterion specifying that, aside from population counts, "[t]he only data ... to be used to construct congressional districts shall be election results in statewide contests." *Id.* And they explained that the sole reason for using political data was "to gain partisan advantage." *Id.* at 22.

The Republican map-makers also candidly admitted that their overriding purpose in drawing North Carolina's map was to maximize their party's power. App. 157. Representative Lewis, one co-chair of the redistricting committee, "acknowledge[d] freely that [the map] would be a political gerrymander," and emphasized that "the goal" was "to elect 10 Republicans and 3 Democrats." *Id.* at 22-23; *see also id.* at 157 (emphasizing that the Republicans "did seek a partisan advantage in drawing the map"); *id.* at 159 (admitting map was drawn "in a way to help foster" the election of Republican candidates). Senator Rucho, the committee's other co-chair, echoed Representative Lewis's sentiments. *See id.* at 157. And the map-makers confessed that they did not give Republicans a greater partisan advantage only because it was impossible "to draw a map with 11 Republicans and 2 Democrats." *Id.* at 22, 183. North Caro-

lina's map, in other words, personifies the facially-discriminatory statute that several Justices suggested—and the attorneys for Wisconsin and Maryland conceded—would be unconstitutional during the Court's partisan gerrymandering arguments last Term. *See Gill* Tr. 20-21, 26-27; *Benisek* Tr. 45-48.

The partisan skew of North Carolina's map is likewise and unsurprisingly immense, and it almost surely will persist over time. *See* App. 187-214 (district court finding that North Carolina's map "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office").

The first two elections held under the 2016 map confirm Republicans' success in maximizing and entrenching their seats. In the 2016 election, the Republicans "achieved [their] unambiguously stated goal: North Carolina voters elected a congressional delegation of 10 Republicans and 3 Democrats." App. 188. At the same time, the statewide vote was split roughly equally between Republican and Democratic congressional candidates, and a Democrat was elected governor. *Id.* at 189. This advantage persisted through the 2018 election, despite Democrats increasing their share of the statewide vote by nearly 2.3 points.[4] And appellees' experts presented evi-

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[4] This figure reflects the statewide vote *excluding* the results of the uncontested race in the Third Congressional District. The fate of the Republicans' tenth seat has yet to be determined. On February 21, 2019, the North Carolina State Board of Elections unanimously called for a new election for the Ninth Congressional District following discovery of an election fraud scheme that favored Republican candidate—and initial winner—Mark Harris. *See* Brian Murphy, *et al.*, *NC State*

dence that this pronounced imbalance would persist for the foreseeable future. *Id.* at 190-97, 209-12. Their analysis showed, for example, that "all [of North Carolina's 13] districts ... are 'safe,'" i.e., "highly unlikely to change parties in subsequent elections." *Id.* at 190.

It is equally plain that there is no legitimate justification for North Carolina's map. *See* App. 215-22. As the district court explained, the map-makers "drew a plan designed to subordinate the interests of non- Republican voters not because they believe doing so advances any democratic, constitutional, or public interest, but because, as the chief legislative mapmaker openly acknowledged, the General Assembly's Republican majority think[s] electing Republicans is better than electing Democrats." *Id.* at 6 (emphasis and quotation omitted). In this litigation, the Republican map-makers have claimed that their map was justified by (i) North Carolina's political geography and (ii) the legislature's interest in protecting incumbents. *Id.* at 215. But the map-makers themselves created at least two draft maps that performed as well as their chosen map in terms of these traditional districting criteria and yet were far less skewed. *See generally* Ex. 4022. Notably, using the same non-partisan criteria, appellees' expert also randomly generated thousands of comparator maps—all of which equaled or exceeded the chosen map's performance in terms of the non-partisan

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Board Votes for New Election in 9th District After Harris Calls for New Race, News & Observer (Feb. 21, 2019), https://www.newsobserver.com/news/politics-government/article226561504.html#topicLink=election-fraud-investigation.

criteria, and none of which exhibited its extreme partisan skew. App. 168-71, 220-22.

In short, North Carolina's Republicans devised and carried out a plan to win as many seats as possible and to extend their control over the state's congressional slate through at least the decennial period, without any legitimate justification.

As detailed in the Brennan Center's prior *Benisek* brief, the Maryland map at issue in that case is similarly extreme. It too was avowedly drawn to maximize the Democratic share of the congressional delegation, and abundant record evidence shows that the Democrats' plan was a success and lacked any reasonable justification. *Benisek* Brennan Br. 8-9.

B. Extreme Partisan Gerrymanders Are Relatively Rare.

Even with the widespread and pernicious belief among map-drawers that the courts will not police extreme partisan gerrymandering, *see infra* Section III, the extreme gerrymandering on display in North Carolina and Maryland has appeared only rarely this decade. The Brennan Center studied congressional election results from this decade's races to assess the extent and the durability of "partisan bias"—the degree of systematic advantage one party receives over another in turning votes into seats. Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* 1, 3 (2017).[5] According to this analysis, only seven states' congressional maps displayed persistent, extreme levels of partisan bias.

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[5] https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

Id. at 1, 2, 14.[6] Other studies show that approximately a dozen state legislative maps displayed similar levels of partisan bias. *See, e.g.*, Expert Report of Simon Jackman at 73, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. Jan. 22, 2016), ECF No. 58-1.

These studies do not assess the *intent* underlying these extremely skewed maps. But logic dictates that requiring plaintiffs claiming a constitutional violation to demonstrate not only a partisan skew, but also an intent to achieve such a skew could only narrow the set of potentially unconstitutional maps. By setting a legal standard focused on such extreme partisan gerrymanders, the Court thus would not create a large pool of potentially meritorious claims.

C. Extreme Partisan Gerrymanders Are Deeply Anti-Democratic And Offend Basic Constitutional Principles.

While the Court should be hesitant to interfere with ordinary inter-party politics, what happened in North Carolina and Maryland—and what is likely to be at issue in any case where a governing majority that happens to be in charge at the time of redistricting seeks to entrench itself in a perennially competi-

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[6] Two of those states—Ohio and Michigan—have enacted legal reforms that reduce the risk of extreme partisan gerrymandering during the upcoming round of redistricting. *See* Sam Levine, *Ohio Voters Pass Gerrymandering Reform Measure*, Huff. Post (May 8, 2018), https://www.huffingtonpost.com/entry/ohio-gerrymandering-reform_us_5af1a93ee4b0ab5c3d6a0bd2; Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Detroit Free Press (Nov. 6, 2018), https://www.freep.com/story/news/politics/elections/2018/11/06/proposal-2-michigan-gerrymandering/1847078002/.

tive state—is not normal, but extraordinary and deeply anti-democratic.

Indeed, extreme partisan gerrymanders, such as North Carolina's and Maryland's, violate at least three related constitutional norms, all of which lie at the heart of our constitutional democracy: government accountability, legislative representativeness, and neutral treatment of political expression and association. Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellees at 21-36, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017) ("*Gill* Brennan Br.").[7] When a court strikes down such maps, it is policing only maps that fall far outside the bounds of legitimate democratic governance. Moreover, it is striking down only those maps that cannot be corrected through the normal political process.

1. Extreme partisan gerrymandering undermines legislators' accountability to the people. *See id.* at 21-27. These gerrymanders create "lock[ed]-in" or "safe" seats, and legislators "elected from such safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to political minorities within their district." *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also Reynolds v. Sims*, 377 U.S. 533, 570, 576 (1964) (decrying "a minority strangle hold on the State Legislature" and "frustration of the majority will"); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., con-

[7] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BrennanCenterforJustice_InSupportofAppellees.pdf.

curring) (noting lack of "practical opportunities" for the "majority of the people" to correct malapportionment at the polls). We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). But a legislature essentially held hostage by one party or the other is not the responsive body the Constitution envisions. This Court's intervention is necessary to preclude that unconstitutional result.

2. Extreme partisan gerrymandering also locks in a legislative delegation that comes nowhere close to reflecting the political diversity of the state's populace, thereby undermining another core value undergirding our democratic system of government: legislative representativeness. *Gill* Brennan Br. 27-33. Representativeness is critically important not only in and of itself, but also because it guarantees that the legislature will be accountable to *all* of the people it represents.

When the governing majority of the day permanently entrenches itself in power, the legislative bodies no longer "think, feel, reason, [or] act like" the people at large. John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies; In a Letter from a Gentleman to his Friend (Apr. 1776). States that may have vibrant political cultures with diverse perspectives are left with one-note legislatures. The debates held in legislative bodies and the policies lawmakers enact into law bear little resemblance to the fuller conversations among voters in homes and public spaces throughout the state.

To be sure—as appellants and their *amici* unrelentingly, if misguidedly, reiterate—the Constitution does not require precise proportionality of the nation's legislative bodies or that every voter be able to elect the candidate of her choice. But that does not mean the opposite is true, i.e., that legislative bodies should bear little resemblance to the polity they represent. Simply put, the Constitution demands at the very least that there not be a gross disconnect between a representative body and the people it purports to represent. That kind of gross disconnect is the product of entrenchment, and tolerating it ignores our nation's foundational precept that "the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (quotation omitted).

3. Extreme partisan gerrymandering also transgresses crucial First Amendment limits on legislative decision-making.

The First Amendment requires the government to remain neutral regarding its citizens' ideological affiliations. "[A]bove all else," the Court has held, "the First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). That neutrality principle has particular force in the context of elections, because the political acts of voting and associating to advance political causes are quintessential exercises of First Amendment rights. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (noting regulation of voting burdens First Amendment rights); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (recogniz-

ing rights of voters "to cast their votes effectively" and "to associate for the advancement of political beliefs" (quotations omitted)). These two rights are related, allowing individuals to band together for purposes of advancing their candidates through the ballot. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1248-49 (2003) (citing *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296 (1981); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

Extreme partisan gerrymandering—which involves the government's intentional burdening of the efficacy of citizens' votes "*because of* their participation in the electoral process, their voting history, their association with a political party, or their expression of political views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (emphasis added)—is plainly irreconcilable with those First Amendment principles, *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (recognizing that "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment'" (alteration in original) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment))). It is governmental action to disadvantage voters, parties, and political organizations "on account of their political [expression or] association" which, this Court has recognized, contravenes the First Amendment. *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996).

The First Amendment harms caused by extreme partisan gerrymanders are even more damaging be-

cause they undercut the constitutional values of legislative accountability and representativeness discussed above. By selectively impacting the expressive and associational rights of one group, severe partisan gerrymandering limits legislators' "responsive[ness] to the political minorities within their district," locking out of political processes the party that is in the minority when the maps are drawn (much like racial minorities are locked out as a result of a racial gerrymander). *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality op.) ("those who govern should be the *last* people to help decide who *should* govern"); *id.* at 227 ("responsiveness" to constituent views "is key to the very concept of self-governance through elected officials"). Likewise, by undermining voters' foundational right to associate to further their political beliefs through the "pull, haul, and trade" of ordinary politics, extreme partisan gerrymandering negates their ability to choose a government that represents their diverse needs and interests. *See, e.g.*, *Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Citizens Against Rent Control*, 454 U.S. at 296; *Kusper*, 414 U.S. at 57. And as Justice Kagan recognized in *Gill*, "what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations)," because "[b]y placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." 138 S. Ct. at 1938.

D. North Carolina's And Maryland's Extreme Partisan Gerrymanders Violate Those Constitutional Principles.

The constitutional harms generated by "severe partisan gerrymanders" explain why North Carolina's and Maryland's extreme gerrymanders are "incompatib[le] ... with democratic principles" and must be held unlawful by this Court. *Vieth*, 541 U.S. at 292 (plurality op.). The map-makers drew North Carolina's and Maryland's maps to reduce the responsiveness and representativeness of the legislature with respect to a large segment of constituents, specifically because of those constituents' chosen political affiliation. Such action undermines principles of popular sovereignty, governmental accountability, and equal treatment that are embodied in the First and Fourteenth Amendments and lie at the heart of our system of democracy.

Already, this Court "has recognized" that such severe "[p]artisan gerrymanders ... [are incompatible] with democratic principles." *Ariz. State Legislature*, 135 S. Ct. at 2658 (second alteration in original) (quoting *Vieth*, 541 U.S. at 292 (plurality op.)). Indeed, *every* Justice in *Vieth* agreed that "an *excessive* injection of politics is *un*lawful." 541 U.S. at 293 (plurality op.). Both this Court and individual Justices, moreover, have on several other occasions specifically identified actions that entrench a political party as constitutionally impermissible. *See, e.g.*, *LULAC*, 548 U.S. at 419-20 (expressing concern with map "that entrenches an electoral minority" and seeking "a standard for deciding how much partisan dominance is too much"); *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting) ("The bottom line is that

courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected."). The Court should take the next step towards realizing those constitutional freedoms here, by holding North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

E. Appellants' Contentions That Partisan Gerrymandering Claims Are Non-Justiciable Lack Merit.

Appellants claim that the Court is incapable of discerning a judicially manageable standard for distinguishing between unconstitutional partisan gerrymanders and ordinary political processes. Claiming as much does not make it so: appellees, the Brennan Center, and other *amici* in these and prior cases before this Court have provided *many* viable partisan gerrymandering standards.

Moreover, those tests' multiplicity does not, as appellants would have it, demonstrate the impossibility of this Court's agreeing upon one manageable standard. Rather, the array of tests available in this case reflects only the multi-faceted constitutional problems with extreme partisan gerrymanders.[8] As

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[8] Although several of the tests proposed by appellees and the lower courts in these and other partisan gerrymandering cases are district-specific, the constitutional harms (as with all extreme partisan gerrymanders) are not limited to individual voters or individual districts, but also spread across the entire state. The redistricting party sets out to enhance its *statewide* power by categorizing voters around the state based on their political beliefs and associations, and by shifting district lines on that basis to secure a statewide advantage. Consequently, the district-specific harms on which some of appellees' tests

shown, these extreme maps trammel multiple foundational principles running throughout the Constitution. The standards on offer provide the Court with different avenues to address different facets of this constitutional problem. But all provide a viable route forward. The Court can choose which best addresses the harm before it. By choosing, the Court will then eliminate any lack of clarity that the lower courts might have created by adopting a variety of standards.

II. STRAIGHTFORWARD FACTORS CAN HELP COURTS DETECT EXTREME PARTISAN GERRYMANDERS.

To the extent the Court has any remaining concerns about the manageability of a standard targeting extreme partisan gerrymanders, additional factors exist that can be built into the inquiry to further enhance its manageability. Indeed, several clearly discernible, objective factors are highly probative of extreme partisan gerrymanders. The Court can use these factors to narrow the scope of judicial intervention to extreme cases and signal to litigants what types of claims are likely to be meritorious.

As the Brennan Center explained in both *Gill* and *Benisek*, several objective criteria can act as gatekeepers by helping courts identify political circumstances that are likely to give rise to constitutional violations, and their presence here confirms that North Carolina's and Maryland's maps are unconstitutional partisan gerrymanders. *See Gill*

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focus are simply one facet of a greater constitutional problem whenever politicians deploy an extreme partisan gerrymander.

Brennan Br. 11-19; *Benisek* Brennan Br. 9-12. Those factors include single-party control of redistricting, a recent history of close elections, and significant departures from normal political processes. These intuitive criteria are relevant to and help determine whether the political party in power intended to and did entrench itself and its supporters at the expense of the other party and its supporters. Using these indicia to evaluate partisan gerrymandering challenges will help courts more easily identify potentially problematic redistricting processes. And it will enable both courts and prospective litigants to focus on the most biased, constitutionally offensive maps, leaving the vast majority of redistricting processes untouched.

1. The first criterion—single-party control—is a prerequisite for an extreme partisan gerrymander. Before a party can implement an excessive gerrymander, it must have the means to do so. *See* Anthony J. McGann, *et al.*, Gerrymandering in America 147 (2016). When a single party is in control, a minority party is much less able to influence the redistricting process, and normal political checks and balances are much less likely to safeguard against unconstitutional overreach. *See id.* at 147-48; *cf.* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371, 377 (2004) (explaining that "[w]hen there is unified party control of state government, or when one party has a veto-proof majority in the state legislature, the process is streamlined and a plan is usually adopted quickly"); App. 156 (observing that "when a single party exclusively controls the redistricting process, it should not be

very difficult to prove that the likely political consequences of the reapportionment were intended" (quotation omitted)).

The second factor—a recent history of close statewide elections—is not a prerequisite for extreme partisan gerrymanders, but it can be a highly probative signal because it helps identify states where map-drawers have the opportunity and incentive to maximize and entrench their power statewide. *See* McGann, *supra*, at 148-49. In highly competitive states with closely fought elections, the geographic distribution of each party's supporters often is more or less even, and therefore—absent deliberate intervention—power is likely to shift back and forth over the course of a decade. If, after redistricting, one party suddenly gains a new advantage and, more importantly, that advantage appears immune to normal political swings, it is highly suggestive of untoward conduct. Moreover, map-makers in states with a history of close elections will have a powerful incentive to undertake a severe, enduring gerrymander—and can easily do so by strategically joining precincts together to engineer a durable entrenchment. In a state without close elections, by contrast, the dominant party can often maintain its majority whether or not it gerrymanders.

Empirical data confirm these intuitions. The Brennan Center's study of congressional election results from this decade's races revealed that the most biased districting maps of this decade, in both Republican- and Democratic-controlled states, share the two objective features discussed above. *Extreme Maps*, *supra*, at 1, 2, 6, 9, 15.

2. Other facts about a state's political geography might, in certain instances, also create both the opportunity and incentive for extreme gerrymandering even in the absence of a history of close statewide elections. For example, regions of a state that contain large and cohesive pockets of a political minority group can assist—or threaten—the majority party's attempts to maximize its seats. In these subregions of a state, map-makers can still eke out an improper partisan advantage by carefully packing and cracking voters for the minority party. Likewise, map-makers must pay particularly careful attention to the ways in which they draw lines in these sub-regions, lest they gift the minority party with unintended additional seats. These incentives to squeeze out an incremental advantage can be especially compelling when, for example, a political party has sole control of the line-drawing process in a state and it is at a nationwide disadvantage in the number of congressional seats for which it can draw the lines.

3. Likewise, a redistricting process that is one-sided or procedurally unusual can be a useful signal that an unconstitutional partisan gerrymander may have occurred. Easily ascertainable factors that can be woven into a judicial inquiry include: whether the majority party conducted the redistricting in secret; whether map-drawers and legislators drew and approved maps with unusual haste (and without providing voters or the other party with sufficient time to evaluate the maps); whether the dominant party altered redistricting rules (including oversight mechanisms) in a way likely to favor that party; and whether the dominant party moved unusually large

numbers of voters from precinct-to-precinct when redrawing the map. *Cf. Arlington Heights*, 429 U.S. at 267-68 (recognizing that "[t]he specific sequence of events leading up [to a] challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history," among other things, could be relied upon to show improper purpose); App. 140-41 (citing *Arlington Heights* and explaining that "the historical background" and "the legislative process" of a redistricting plan "may be probative of discriminatory intent" for partisan gerrymandering claims (quotations omitted)); *League of Women Voters of Mich. v. Johnson*, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (similar). These factors all reflect deviations from "normal politics" in the redistricting process and can indicate that the redistricting party sought and achieved unconstitutional goals.

4. Against this backdrop, North Carolina's map, for example, is plainly the product of a deeply broken political process, and precisely the type of outlier that should be held unconstitutional. To start, North Carolina's map satisfies the main prerequisite for a partisan gerrymander—single-party control of the redistricting process. When the challenged map was drawn, Republicans dominated both chambers of North Carolina's legislature. App. 10. And the final map was approved along party lines. *Id.* at 24.

It is little surprise, then, that North Carolina is one of the most heavily gerrymandered Republican states in the country. *Extreme Maps*, *supra*, at 1, 6-10, 12-13, 22, 25, 28. Without any influence over the redistricting process, North Carolina Democrats were unable to protect their supporters' interests,

allowing the Republican majority to place severe burdens on Democratic voters on the basis of their political beliefs and affiliations.

In addition to single-party control, other characteristics of North Carolina's politics and political geography show that Republicans had a strong incentive and opportunity to enact an extreme partisan gerrymander. The statewide electorate is about evenly split between Democrats and Republicans, and, indeed, prior to redistricting in 2010 Democrats held a narrow 7-6 advantage in the state's congressional delegation, with several seats consistently competitive. And certain regions in North Carolina have cohesive Democratic populations that provided Republicans with both the opportunity and incentive to crack and pack in order to maximize the Republican share of the state's congressional delegation. By rejiggering district lines to dilute Democrats' voting strength in congressional elections, Republican mapdrawers guaranteed that they will have a secure grip on a 10-3 majority in North Carolina's congressional delegation for the course of a decade, even, as in 2016, when they receive only about half of the votes and even, as in 2018, when Democrats' statewide vote share increased substantially.

Finally, the record plainly shows that North Carolina Republicans departed from normal politics in the redistricting process, much like Wisconsin Republicans did in *Gill* and Maryland Democrats did in *Benisek*. This departure strongly suggests an untoward objective. North Carolina Republicans in this case exploited their majority position by instituting a secretive, rushed redistricting process that almost entirely excluded Democrats from the map-drawing

exercise. They put in writing ground rules for the redistricting process that required map-makers to maintain the 10-to-3 advantage that Republicans had initially gained through their unconstitutional racial gerrymander. The map that North Carolina Republicans eventually approved was designed behind closed doors by a Republican map-drawer acting on instructions from North Carolina congressional Republicans (and Republicans alone). App. 14-18. The map-drawer also understood that his mandate was to maximize Republicans' seats. *Id.* at 17. By all objective metrics, in other words, North Carolina's map-drawers clearly engaged in unconstitutional partisan discrimination.

5. The objective factors identified by the Brennan Center can also be easily applied in other cases to distinguish between those maps that pose severe constitutional problems and those maps that do not.

For instance, Maryland's 2011 congressional map challenged in *Benisek* also triggers those readily-observable indicia, raising the prospect that they too are likely outside constitutional bounds. *Benisek* Brennan Br. 14-17. Democrats controlled all three branches of Maryland's government at the time of the gerrymander. *Id.* at 15. Maryland's Democrats likewise had a strong incentive and opportunity to enact an extreme partisan gerrymander in Maryland, given Maryland's political geography. *Id.*

The Maryland Democrats also departed from normal politics in the redistricting process. The map was designed behind closed doors by a Democratic consulting firm acting under instructions from Maryland's Democrats. *Id.* at 16. The map-makers

moved hundreds of thousands more people than were necessary to achieve population equality among the new districts and moved them at a volume that is unusual in comparison to other redistricting processes undertaken during the same time period. Brennan Ctr. for Justice, *Maryland's Extreme Gerrymander* (Mar. 8, 2019).[9] Further, the map was signed into law just three days after it was introduced. *Benisek* Brennan Br. 16. This gave essentially no time for ordinary political forces to act as a check on Maryland Democrats' power grab. In a testament to the degree of Democratic dominance over the process, Democratic state lawmakers were remarkably blunt about the plan's intent, candidly explaining that they supported it because it meant "more Democrats in the House of Representatives." *Id.* at 16-17.

By contrast, under the type of judicial inquiry the Brennan Center proposes, Virginia's 2011 state house map may not warrant close judicial scrutiny, even though it exhibits high levels of partisan bias in favor of Republicans. This is because the Virginia map was drawn under split-party control. Rosalind S. Helderman & Anita Kumar, *Virginia Assembly Approves New Legislative Maps*, Wash. Post (Apr. 7, 2011).[10] Virginia's Democrats could have marshalled the votes necessary to stop the Republicans' seat grab, but they chose not to. *Id.* Virginia's Dem-

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[9] https://www.brennancenter.org/analysis/marylands-extreme-gerrymander.

[10] https://www.washingtonpost.com/local/politics/virginia-assembly-approves-new-legislative-maps/2011/04/07/AFRjhrxC_story.html?utm_term=.5b8cdda90950.

ocratic governor likewise could have vetoed the map, sending the process back to the legislature or to the courts. He did not. In other words, it was not extreme partisan gerrymandering of the sort only the courts can police, but rather a failed political strategy that allowed Virginia's Republicans to take control of the Virginia state house in 2011.

As these examples demonstrate, the Court is well-equipped to help courts distinguish between unconstitutional partisan gerrymanders and normal political processes.

III. INVALIDATING EXTREME PARTISAN GERRYMANDERS WILL ENHANCE THE LEGITIMACY OF THE COURTS AND OUR SYSTEM OF GOVERNMENT.

This Court is not just capable of holding extreme partisan gerrymanders like North Carolina's and Maryland's unconstitutional, however. It is also in the institutional interests of the Court, the federal courts more broadly, and our democratic system of government to do so.

1. As the Court is well aware, the problem of extreme partisan gerrymandering has dramatically worsened in recent years, and it will only get worse over time as technological advances continue making it exponentially easier for map-drawers to gerrymander. *Gill*, 138 S. Ct. at 1935, 1941 (Kagan, J., concurring); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Given the serious constitutional harms caused by extreme partisan gerrymandering, *see supra* at 13-20, that trajectory should be extremely alarming to the Court, *see Reynolds*, 377 U.S. at 566 (the "denial of constitu-

tionally protected rights demands judicial protection").

The Court is the only neutral institution realistically capable of remedying this worsening constitutional problem and providing guidance before the 2021 round of redistricting. While it is theoretically possible for Congress to legislate limits on excessive partisanship, the prospects for such legislation are far from certain. Any legislative relief likely will not arrive in time for the next round of federal redistricting efforts (which start as early as February 2021 in many states), and it will not impact state-level redistricting.

2. Appellants argue that the Court's holding extreme partisan gerrymanders unconstitutional will delegitimize the federal courts, but precisely the opposite is true. The Court's intervention will promote the legitimacy of all our governmental institutions, including the Court itself. *See generally* Guy-Uriel Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236 (2018).

a. Judicial tolerance of extreme partisan gerrymandering "sends a clear message to political elites that partisanship is justifiably the coin of the realm." *Id.* at 274. The Court's failure to intervene, therefore, will only encourage politicians to press their advantage in future rounds of redistricting.

North Carolina perfectly demonstrates the issue. The Court's decision to refrain from policing partisan gerrymandering to date led one of the Republican co-chairs of North Carolina's redistricting committee to openly declare that their map was a "political ger-

rymander" and therefore "not against the law." App. 22. The Court should not tolerate that state of affairs, especially given its unanimous recognition that partisan gerrymandering is, in fact, *un*constitutional. *See supra* at 2, 19.

Politicians nationwide have been emboldened by this Court's inaction, which they have interpreted as a green light for increased efforts to insulate themselves from the will of voters by manipulating maps. *See Davis v. Bandemer*, 478 U.S. 109, 172-73 (1986) (Powell, J., concurring in part and dissenting in part) ("The failure to articulate clear doctrine in this area ... signal[s] the constitutional green light to would-be gerrymanderers." (quotation and footnote omitted)). That effect will only become more pronounced because of the increased polarization of the country and the always-improving technology and data available to make maps ever more extreme.

As this practice spreads, its threats to our democracy will only multiply. As Justice Kagan recognized last Term, "the evils of gerrymandering seep into the legislative process itself," undercutting incentives for legislators to collaborate and form bipartisan partnerships, and breeding distrust, dysfunction, and hostility that spills over into legislative sessions. *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring) (pointing to amicus briefs filed by bipartisan groups of congressional members and state legislators that described the "cascade of negative results" from extreme partisan gerrymandering); *see generally* Br. for *Amici Curiae* Bipartisan Group of 65 Current and

Former State Legislators in Support of Appellees, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017).[11]

b. The Court's invalidation of extreme partisan gerrymandering now also will send a clear message reinforcing core American norms against political entrenchment that are currently under assault from more than just gerrymandering.

Take, again, the example of North Carolina. The gerrymandering of North Carolina's congressional map is simply one of many legislative measures designed to entrench the dominant party's power by dramatically changing governmental institutions, including both the political branches and the courts. For example, in December 2016, after incumbent Republican Governor Pat McCrory was unseated by Democrat Roy Cooper, North Carolina's Republican-controlled legislature held multiple special sessions to pass laws limiting the newly-elected governor's powers before he took office. Among other things, the legislature severely restricted Governor Cooper's appointment authority by giving North Carolina's Senate veto power over his cabinet picks and reducing the total number of gubernatorial appointees from 1,500 to 425. Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper's Power*, News & Observer (Dec. 19, 2016)[12]; Tara Golshan, *North Caro-*

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[11] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BipartisanLegislators_InSupportofAppellees.pdf.

[12] https://www.newsobserver.com/news/politics-government/state-politics/article121885658.html.

lina Republicans' Shocking Power Grab, Explained, Vox (Dec. 16, 2016).[13]

Similar developments played out in Pennsylvania, another (formerly) severely gerrymandered state. In 2018, the Pennsylvania Supreme Court held that Pennsylvania's congressional map violated the Pennsylvania Constitution because it was an extreme partisan gerrymander drawn to discriminate against Democrats and entrench a lopsided 13-5 Republican majority in a state that is 50/50 politically. *See* Katie Meyer, *Pennsylvania Chief Justice Criticizes Impeachment Moves*, NPR (Mar. 22, 2018).[14] In response, Republicans introduced resolutions to impeach several of the Court's sitting justices. *Id.*

These developments are symptomatic of substantial stresses on—if not outright erosion of—longstanding American norms against entrenched power. Striking down egregious gerrymanders designed to entrench the map-drawing party in power will signal that these norms retain their value and their force.

Time and again, the Court has successfully intervened in the political process to vindicate such constitutional norms. *See, e.g.*, Charles & Fuentes-Rohwer, *supra*, at 266-70, 275; Br. of Heather K. Gerken, *et al.*, as *Amici Curiae* in Support of Appellees at 7-10, *Gill v. Whitford*, No. 16-1161 (S. Ct.

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[13] https://www.vox.com/policy-and-politics/2016/12/16/13971368/republican-power-grab-north-carolina-explained.

[14] https://www.npr.org/2018/03/22/596172829/pennsylvania-chief-justice-criticizes-impeachment-moves.

Aug. 30, 2017)[15]; McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1538-42 (2018). It should do so here too. At this stage, when gerrymandering and the political climate have progressed to such extremes that legislatures have deemed it open season to act in ways that are profoundly antidemocratic, any costs of not intervening far outweigh the risks of intervention.

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Recognizing that extreme partisan gerrymanders are irreconcilable with the Constitution, this Court has long sought a standard that courts could use to provide a reliable and limited answer to the question: "[h]ow much political motivation and effect is too much?" *Vieth*, 541 U.S. at 297 (plurality op.). Armed with the objective limiting factors discussed herein, the Court is readily capable of identifying those rare maps that are intended to and actually will durably entrench a political party in power, all while avoiding judicial interference in normal politics. The conditions that generate those maps are unusual, easily identified, and easily incorporated into a judicial inquiry. Those maps cause the political system to become unresponsive to a particular segment of voters on the basis of their political affiliation. Those maps make the legislature grossly unrepresentative of the state's populace as a whole. And those maps impair voters' First Amendment rights to equal political expression and association.

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[15] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_HeatherK.GerkenEtAl_InSupportofAppellees.pdf.

Those maps, in other words, subvert our democratic system of government, all while stripping voters of their ability to protect themselves through the electoral process. For the sake of those foundational constitutional principles and the institutional interests of the federal courts, the Court should redress those constitutional harms by holding North Carolina's and Maryland's extreme maps unconstitutional.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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March 8, 2019

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Cohen v. California,
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Cooper v. Harris,
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Davis v. FEC,
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Evenwel v. Abbott,
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Gomillion v. Lightfoot,
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Gray v. Sanders,
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League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006)	23
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	31
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McDonald v. City of Chicago, 561 U.S. 742 (2010)	14, 16, 18
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NIFLA v. Becerra, 138 S. Ct. 2361 (2018)	26
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O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996)	25
Reynolds v. Sims, 377 U.S. 533 (1964)	*passim*
Rogers v. Lodge, 458 U.S. 613, (1982)	22
Romer v. Evans, 517 U.S. 620 (1996)	15, 20

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Rutan v. Republican Party of Ill., 497 U.S. 62 (1990)	24, 27
Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014)	29
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United States v. Carolene Prods. Co., 304 U.S. 144 (1938)	6
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	10
Vieth v. Jubelirer, 541 U.S. 267 (2004)	*passim*
Voinovich v. Quilter, 507 U.S. 146 (1993)	23

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Constitutional Provisions and Legislative Materials

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Cong. Globe, 39th Cong., 1st Sess.
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Cong. Globe, 41st Cong., 2d Sess.
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2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) ..... *passim*

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2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 9, 10, 11

3 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 16

Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866) 14, 18

U.S. Const. amend. XIV, § 2 19

U.S. Const. amend. XV, § 1 19

U.S. Const. amend. XIX, § 1 19

U.S. Const. amend. XXIV, § 1 19

U.S. Const. amend. XXVI, § 1 19

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Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (Perennial Classics 2002 ed.) 17

Benj. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress*, 1865–1867 (1914) 16

James Madison, *Report on the Virginia Resolution* (1800) 3, 13, 14

Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (2010) 11

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 8, 12

Speech of Major Gen. Robert C. Schenck at Dayton, Ohio (Aug. 18, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 6 15

Speech of Sen. Lyman Trumbull at the Illinois Rail Road Depot, Chicago (Aug. 2, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 6 15

Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1998 ed.) 8

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

SUMMARY OF ARGUMENT

In these cases, the state legislatures of North Carolina and Maryland drew congressional district lines to subordinate voters of a particular political party, dilute their votes, and entrench in power the party controlling the legislature. In North Carolina, the state legislature drew a map that sought to maximize the election of Republican candidates because, as Representative David Lewis explained, "electing Republicans is better than electing Democrats. So I drew this map to foster what I think is better for the country." Rucho J.A. 460. To that end, the mapmakers packed and cracked Democratic voters, seeking to ensure that Republican would wield political power far exceeding their share of votes cast at the polls. In Maryland, the state legislature redrew the 6th Congressional District

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

to flip the district from Republican to Democratic. To achieve this end, the mapmakers shuffled hundreds of thousands of citizens out of or into the 6th District, using sophisticated political data to dilute the votes of Republican voters.

This sort of partisan gerrymandering is "'incompatible with democratic principles'" deeply rooted in the Constitution's text and history. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)). The maps drawn in these cases violate "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Id.* at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)). A state legislature's drawing of lines to "subordinate adherents of one political party," *id.* at 2658, and to burden disfavored voters' "'representational rights,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)), cannot be squared with the First and Fourteenth Amendments. Under our constitutional scheme, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

When our Constitution's Framers wrote our national charter more than two centuries ago, they recognized that "the true principle of a republic is, that the people should choose whom they please to govern them." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 1836) [hereinafter "*Elliot's Debates*"]. The Framers were also deeply suspicious of partisan manipulation of the electoral process. They knew that "those who have power in their hands will not give it

up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." 1 *The Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., 1911) [hereinafter *Records of the Federal Convention*]. Aware of the dangers of faction, they wrote into the Constitution's text and structure protections against partisan gerrymandering and other similar abuses in federal elections. Concerns about partisan efforts to manipulate the rules of our democracy are thus as old as the Constitution itself.

In 1789, the Framers added the First Amendment to the Constitution, ensuring protection of "[t]he special structural role of freedom of speech in a representative democracy." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 25 (1998). The First Amendment serves as a critical safeguard of democratic self-governance, ensuring that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." James Madison, *Report on the Virginia Resolution* (1800), *in* 4 *Elliot's Debates* at 576. Governmental efforts to subject "a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), cannot be squared with the freedom of speech and association the Constitution guarantees to all. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

The Rucho Appellants argue that the only check on partisan gerrymandering is congressional action under the Elections Clause, *see* Br. of Appellants Rucho, et al. 31-37, but that ignores the changes that

"We the People" have made to the Constitution over time to ensure that states respect the fundamental guarantees of liberty and equality, including in state regulation of the electoral process.

The eighteenth-century Constitution contained few direct limits on the states, but, in the wake of a bloody Civil War fought over slavery, the American people fundamentally altered our federal system, adding to the Constitution universal guarantees of substantive fundamental rights and equal protection of the laws, and, in later amendments, protections for the right of citizens to vote—a right that this Court has recognized is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *McCutcheon*, 572 U.S. at 191 ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). Significantly, these amendments prohibit more than outright denials of the right to vote, because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Efforts by the government to subordinate disfavored persons on account of their political affiliation—such as by diluting their votes—cannot be squared with either the fundamental guarantee of freedom of speech or the Fourteenth Amendment's universal guarantee of the equal protection of the laws. As this Court has many times held, states cannot regulate the electoral process in a manner that runs roughshod over the fundamental protections for speech and equal protection. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 754; *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988); *Anderson v. Celebrezze*, 460 U.S. 780,

786-88, 792-94 (1983); *Bullock v. Carter*, 405 U.S. 134, 141 (1972); *Reynolds*, 377 U.S. at 566-68.

When the Framers of the Fourteenth Amendment wrote the equal protection guarantee, they were particularly concerned about Southern states' efforts to deny equal rights to citizens associated with the Republican party, which had supported the Union during the Civil War. "The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). It protects individuals who choose to associate with a political party from state-sponsored discrimination "because of their 'political association,' 'participation in the electoral process,' 'voting history,' or 'expression of political views.'" *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (quoting *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment)).

Thus, both the Constitution's text and history and this Court's cases point to the same conclusion: the Constitution firmly limits the authority of state legislatures to draw lines that systematically subordinate persons associated with one political party and dilute their voting strength, not for any legitimate government purpose, but simply to entrench the governing political party in power. States may not place such unequal burdens on a group of voters' opportunities to elect their representatives simply because of the party with which those voters associate. That is viewpoint discrimination pure and simple. Such gerrymandering perverts our Constitution's democratic principles, changing the relationship between the people and their elected representatives. It "enables politicians to entrench themselves in power against the people's will." *Id.* at 1935.

In our constitutional system, when the government abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. It is precisely in cases, such as this one, where our nation's democracy is on the line that judicial redress is most urgent and necessary. *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) (observing that, in the case of partisan gerrymanders, "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms"); *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring in the judgment) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); *Reynolds*, 377 U.S. at 566 ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection . . . .")

Persons subjected to an abridgement of their First and Fourteenth Amendment rights by an extreme partisan gerrymander should not be denied a remedy simply because redistricting is inevitably a political process. In our constitutional system, legislative majorities cannot use their broad powers to draw district lines to nullify the essential premises of our system of self-government. Because the partisan gerrymanders in these cases subordinate adherents of one political party, burden their representational rights, and dilute and degrade their right to vote, the judgments below should be affirmed.

ARGUMENT

I. At the Framing, the Constitution Established a System of Government in Which the People Choose Their Elected Representatives, Not the Other Way Around.

More than two centuries ago, "We the People . . . ordain[ed] and establish[ed]" the Constitution, *see* U.S. Const. pmbl., creating a system of government organized around the idea that "the true principle of a republic is, that the people should choose whom they please to govern them," 2 *Elliot's Debates* at 257. As the opening words of the first of the Federalist Papers stress, the Constitution was itself an act of popular sovereignty and self-government. *The Federalist No. 1*, at 1 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1999) ("[Y]ou are called upon to deliberate on a new Constitution for the United States of America.").

At a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers designed a new system of government "where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people," 4 *Elliot's Debates* at 331; *see The Federalist No. 14*, *supra*, at 68 (James Madison) ("[E]ven in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular and founded, at the same time, wholly on that principle."). In the republican system of government created by the Framers, "the representatives of the people" could never be "superior to the people themselves." *Id. No. 78*, at 435 (Alexander Hamilton).

Ensuring fair and effective representation for all had deep roots in America's bid for independence from

England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that embodied the principle that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25; Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 170 (1998 ed.) (observing that of all "electoral safeguards for the representational system" none "was as important to Americans as equality of representation"). The Framers appreciated that the "genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *The Federalist No. 37*, *supra*, at 195 (James Madison).

These fundamental republican principles are amply reflected in the Constitution's text and structure. In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *Elliot's Debates* at 21, the Constitution provides that "the House of Representatives shall be composed of Members chosen every second Year by the People of

the several States." U.S. Const. art. I, § 2, cl. 1. Thus, while the Senate was designed to represent the states, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," serving as "the most exact transcript of the whole Society," 1 *Records of the Federal Convention* at 48, 132. To ensure rights of fair and effective representation, the Constitution allocates representatives to the states "according to their respective Numbers," U.S. Const. art. I, § 2, cl. 3, reflecting that "'every individual of the community at large has an equal right to the protection of government,'" *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (quoting 1 *Records of the Federal Convention* at 473).

The Constitution also establishes explicit rules concerning the right to vote in federal elections and to run for Congress, recognizing that "[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 *Records of the Federal Convention* at 250. Because the "definition of the right of suffrage is very justly regarded as a fundamental article of republican government," *The Federalist No. 52*, *supra*, at 294 (James Madison), the Framers provided that "[t]he electors are to be the great body of the people of the United States," *id. No. 57*, at 319 (James Madison), and incorporated state suffrage rules to broadly protect the right to vote in federal elections, *id.* ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.").

Along similar lines, the Constitution establishes minimal qualification for candidates for federal office. *Id.* ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."). Indeed, reflecting their concern about partisan manipulation of the electoral process, the Framers recognized that "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of (a weaker) faction." 2 *Records of the Federal Convention* at 250.

The Constitution also confers specific powers on the federal government to ensure the integrity of the system of government established by the Constitution. The Guarantee Clause empowers the "United States" to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, protecting the Constitution's system of government from "aristocratic or monarchical innovation," *The Federalist No. 43*, *supra*, at 242 (James Madison). Even more on point, the Elections Clause of Article I, Section 4 gives Congress the power to override state regulation of the time, place, and manner of federal elections, a reflection of the Framers' "distrust of the States regarding elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 811 n.21 (1995). As history shows, this grant of power was "a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S. Ct. at 2672; *see Vieth*, 541 U.S. at 275 (discussing the Framers' conclusion that "Congress must be

given the power to check partisan manipulation of the election process by the States").

During the debates over the Elections Clause at the Constitutional Convention, James Madison argued that a limit on state power was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *Records of the Federal Convention* at 241. The Elections Clause gave "a controuling power to the Natl. legislature," *id.*, because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices," *id.* at 240. Madison observed that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power," *id.*, noting that there were many ways—including districting—that state legislative majorities might manipulate the democratic process in order to "materially affect the appointments," *id.* at 241.

In debates over the Elections Clause during state ratifying conventions, those urging the Constitution's ratification justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people's right to equal voting power." Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 210 (2010). For example, at the Massachusetts convention, Theophilus Parsons explained that the Elections Clause provided a remedy against state manipulation of the democratic process for partisan ends. "[W]hen faction and party spirit run high," Parsons warned, state legislative majorities "might make an unequal and partial division of the states into districts for the election of representatives" or "introduce [other] such regulations as would render the rights of the people insecure and of little value."

2 *Elliot's Debates* at 27. The Elections Clause, he argued, "provides a remedy," empowering Congress to "restore to the people their equal and sacred rights of election." *Id.*

During these debates, the Constitution's supporters often pointed to the case of South Carolina, where "South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so." *Ariz. State Legislature*, 135 S. Ct. at 2672 (citing Rakove, *supra*, at 223-24); *see* 2 *Elliot's Debates* at 51 ("The representatives, therefore, from [South Carolina], will not be chosen *by the people*, but will be representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?"); 3 *id.* at 367 ("Elections are regulated now unequally in some states, particularly South Carolina . . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.").

In short, from the very beginnings of our Constitution's history, attempts by state majorities to manipulate the electoral process have been viewed with deep suspicion. As a consequence, many provisions of the Constitution were drafted to create a republican system of government that helps "secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 Annals of Cong. 797 (1789) (Joseph Gales ed., 1834).

II. Subsequent Amendments to the Constitution Protect the Right of Individuals To Associate for Political Ends and Guarantee that All Americans Enjoy Equal Protection of the Laws, Regardless of Political Affiliation.

In 1789, the Framers added the First Amendment to the Constitution, protecting "[t]he special structural role of freedom of speech in a representative democracy." Amar, *The Bill of Rights*, *supra*, at 25. As this Court has long recognized, the First Amendment "'remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *McCutcheon*, 572 U.S. at 203 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). This reflects that "the right of electing the members of the government constitutes more particularly the essence of a free and responsible government." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 575; *see Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("[T]he system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern.").

In this respect, the First Amendment reflects our Constitution's promise of popular sovereignty: "[I]n our governments, the supreme, absolute, and

uncontrollable power *remains* in the people." 2 *Elliot's Debates* at 432; *see* Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 569 ("[I]n the United States, . . . [t]he people, not the government, possess the absolute sovereignty."). In other words, "[w]hen it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter.*, 564 U.S. at 754. As Madison put it, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). The First Amendment ensures that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 576.

The First Amendment originally constrained only the federal government, but when the Fourteenth Amendment was added to the Constitution nearly seventy years later, it required states to obey the guarantees of free speech and association secured by the First Amendment. It also guaranteed the equal protection of the laws to all persons, thereby providing protection against the possibility that persons affiliated with a disfavored political party would be subject to unequal treatment under state law. That Amendment, along with the other "constitutional Amendments adopted in the aftermath of the Civil War[,] fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution sweeping new limits on state governments. These limits were designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), to "keep[]

whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

The plain text of the Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," establishes a broad guarantee of equality for all persons, forbidding legislative majorities from discriminating against disfavored persons. *See Yick Wo*, 118 U.S. at 369 ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (the "Equal Protection Clause enforces" a "commitment to the law's neutrality where the rights of persons are at stake").

As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another," *id.* The Fourteenth Amendment "put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic," Speech of Sen. Lyman Trumbull at the Illinois Rail Road Depot, Chicago (Aug. 2, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 6, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation," Speech of Major Gen. Robert C. Schenck at Dayton, Ohio (Aug. 18, 1866), *in Cincinnati Com.*, Nov. 23, 1866, at 13.

The Fourteenth Amendment's Framers crafted a broad guarantee of equality for all persons to bring the Constitution back into line with fundamental

principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring in part and concurring in the judgment) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure." (citing 3 *Records of the Federal Convention*, at 212)). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence." Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).

Thus, the Amendment's broad wording was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose broad, universal language specifically intended to secure equal rights for *all*. Although the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Amar, *The Bill of Rights*, *supra*, at 260-61 n.*. Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benj. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867*, at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit

racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination.

The Framers wrote the Amendment's guarantees broadly because, among other things, they were concerned about state efforts in the South to single out for discrimination persons belonging to or associated with the Republican party, which had supported the Union during the Civil War and opposed efforts to reinstitute slavery. The Framers were aware of "the white South's inability to adjust to the end of slavery, the widespread mistreatment of blacks, Unionists, and Northerners, and a pervasive spirit of disloyalty." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 225 (Perennial Classics 2002 ed.); *see McDonald*, 561 U.S. at 779 (plurality opinion) (discussing the "plight of whites in the South who opposed the Black Codes"). In the South, Unionists associated with the Republican party were subject to all manner of discrimination because of their views. Debates in the 39th Congress repeatedly made the point that "[t]he courts are rebel, jurors rebel, Legislatures rebel . . . . They do not disguise their hate for Union men," Cong. Globe, 39th Cong., 1st Sess. 783 (1866), and therefore "the adoption of this Amendment" was "essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them," *id.* at 1093; *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

This sad state of affairs was documented in painstaking detail in the report of the Joint Committee on

Reconstruction, "which was widely reprinted in the press and distributed by Members of the 39th Congress to their constituents shortly after Congress approved the Fourteenth Amendment," *McDonald*, 561 U.S. at 772, and "extensively catalogued the abuses of civil rights in the former slave States," *id.* at 827 (Thomas, J., concurring). The Committee, which took the "testimony of a great number of witnesses," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), learned of a deep-seated hostility to both the newly freed slaves and their Republican allies. The witnesses the Committee spoke with confirmed that, in the South, "[t]here is . . . a feeling of great bitterness towards the [R]epublican party" and that people "look upon them with the greatest hatred, the greatest ill-will imaginable for one class of men to feel towards another." *Report of the Joint Committee*, pt. II, at 66, 208. As a result, the Committee concluded that, without federal protection, "Union men, whether of northern or southern origin, would be obliged to abandon their homes" because of animus "totally averse to the toleration of any class of people friendly to the Union, be they white or black." *Id.* at xvii; *id.* at xvii-xviii ("Southern men who adhered to the Union are bitterly hated and relentlessly persecuted."). Numerous witnesses confirmed that civil rights protections could not be enjoyed because a "loyal man" could not "get his rights in the courts" due to "prejudice," *id.* pt. II, at 97, that newly formed governments "would legislate against them in every way," *id.* pt. I, at 106, and that it was unlikely that persons "would be allowed to express openly their Union sentiments without the protection of the United States troops," *id.* pt. III, at 101. Should a Republican Unionist run for office "[h]e would have no chance at all"; "[t]hey would break up their polls and destroy their ballots." *Id.* pt. IV, at 81.

To prevent these sorts of past abuses as well as new ones that might arise in the future, the Fourteenth Amendment established equality under the law as a constitutional mandate, forbidding state majorities from using the democratic process to subject disfavored persons—whether by reason of their race, their political views, or some other form of animus—to discriminatory treatment and the loss of their fundamental rights. This sweeping guarantee of equality applies to Appellees in this case, who seek to enjoy the "right to participate in electing our political leaders," *McCutcheon*, 572 U.S. at 191, on an equal basis with all other voters in their state. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567.

There is no "redistricting" exception to these fundamental Fourteenth Amendment principles. The text of the Fourteenth Amendment's guarantee of equality "speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Moreover, the right to vote is a fundamental right, "preservative of all rights." *Yick Wo*, 118 U.S. at 370. Indeed, no right is protected by more parts of the Constitution. U.S. Const. amend. XIV, § 2; *id.* amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1; *see Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) ("The Constitution uses the words 'right to vote' in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments."). A districting plan that, in essence, "declar[es] that in general it shall be more difficult for one group of citizens"—defined by their political views—"to seek aid from the government" through the political process is "itself a denial of equal protection of the laws in the most literal

sense." *Romer*, 517 U.S. at 633; *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation' . . . we would surely conclude the Constitution had been violated.").

III. Partisan Gerrymandering that Has the Purpose and Effect of Subordinating Adherents of a Political Party and Severely Limiting the Effectiveness of Their Votes Violates the First and Fourteenth Amendments.

Three lines of this Court's precedents strongly support the proposition that extreme partisan gerrymanders that subordinate adherents of a political party and severely limit the effectiveness of their votes violate the First and Fourteenth Amendments. As these cases make clear, when a state uses "partisan classifications" in a manner that "burdens rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), and violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around,'" *Ariz. State Legislature*, 135 S. Ct. at 2677 (citation omitted), judicial relief is warranted, *see Reynolds*, 377 U.S. at 566 ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). A plan that so degrades the rights of persons belonging to or associated with a disfavored party cannot be squared with "[t]he concept of 'we the people' under the Constitution," which "visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

First, this Court's one-person, one-vote cases have held that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, . . . the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds*, 377 U.S. at 565-66. *Reynolds* held unconstitutional a state legislative districting scheme that gave disproportionate political representation to persons living in rural areas, concluding that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment." *Id.* at 566; *see Bd. of Estimate v. Morris*, 489 U.S. 688, 693-94 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (*Reynolds*' rule is "designed to prevent debasement of voting power and diminution of access to elected representatives.").

Reynolds stressed equal protection principles as well as republican principles deeply rooted in the text and structure of the Constitution. "As long as ours is a representative government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. Any other result would "sanction minority control of state legislative bodies" and prevent legislatures from being "collectively responsive to the popular will." *Id.* at 565. A system that gave persons more political power based on where they lived burdened voters' representational rights, denying certain citizens "an

equally effective voice in the election of members of his state legislature." *Id.*

Second, this Court's cases have also vindicated the rights of racial minorities to participate equally in the political process by preventing at-large and multi-member districting schemes from "being used invidiously to cancel out or minimize the voting strength of racial groups." *White v. Regester*, 412 U.S. 755, 765 (1973); *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (striking down redrawing of boundaries designed to "despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights"). Drawing on *Reynolds*, this Court's cases have affirmed that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), and that plaintiffs may establish an unconstitutional burden on their representational rights by demonstrating that racial minorities "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," *White*, 412 U.S. at 766; *see Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). These cases, thus, quite explicitly protect "rights of fair and effective representation," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment), by ensuring "that each

citizen ha[s] an equally effective voice in the election of members of his state legislature," *Reynolds*, 377 U.S. at 565.

Likewise, this Court's cases construing the results test of Section 2 of the Voting Rights Act, a statute that enforces constitutional protections, have held that states may not "dilut[e] minority voting power" by the "manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-29 (2006) (finding that redrawing of lines to reduce percentage of Latino voting age population "prevented the immediate success of the emergent Latino majority" and resulted in "a denial of opportunity in the real sense of that term"). Manipulation of district lines—whether through packing or cracking voters—can burden voters' representational rights by severely limiting the effectiveness of their votes. *See Gill*, 138 S. Ct. at 1930-31. "When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map." *Id.* at 1936 (Kagan, J., concurring). That is exactly what the evidence shows happened in these cases. *See* Br. of Appellees League of Women Voters of North Carolina, et al. ("LWV Br.") 9-14; Br. of Appellees Common Cause, et al. ("CC Br.") 8-12; Br. of Appellees Benisek, et al. ("Benisek Br.") 8-11.

Third, and finally, this Court's First Amendment cases have repeatedly struck down efforts to subordinate persons belonging to or associated with a political party disfavored by the state. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. at 356, and the "right to associate with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *see Cal. Democratic Party*, 530 U.S. at 574 (recognizing that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs'" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986))). Subordinating adherents of a disfavored political party "based on disapproval of the[ir] ideas or perspectives" is "the essence of viewpoint discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment); LWV Br. 51; CC Br. 53-55; Benisek Br. 24-29.

As this Court's precedents make clear, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), because "the system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern," *Elrod*, 427 U.S. at 372. The First Amendment does not permit the state to subject to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some state-selected orthodoxy," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990), in order to "tip[] the electoral process in favor of the

incumbent party," *Elrod*, 427 U.S. at 356; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate .... The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

"[G]overnment discrimination based on the viewpoint of one's speech or one's political affiliations" is simply antithetical to the First Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (refusing to permit government to "coerce support" simply because of "dislike of the individual's political association"); *Bd. of Educ., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.").

The First Amendment analysis that applies in these cases and in others involving state regulation of the electoral process "concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). This Court's cases insist on a "pragmatic or functional assessment that accords some latitude to the States," *id.*; *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while ensuring "the right of individuals to associate for the advancement of political beliefs, and the right of

qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Under these established First Amendment principles, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. That reflects that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams*, 393 U.S. at 32. Because "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, efforts by a state to subordinate adherents of a disfavored party and severely limit the effectiveness of their votes cannot be squared with the fundamental limits enshrined in the First Amendment. The First Amendment denies the government the authority to entrench one party in power. In the electoral arena—where First Amendment protection is at its apex—"the people lose when the government is the one deciding which ideas should prevail." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018). The First Amendment prevents the government from "favor[ing] some participants in th[e democratic] process over others." *McCutcheon*, 572 U.S. at 227; *Davis v. FEC*, 554 U.S. 724, 742 (2008) ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices."); LWV Br. 38-39.

It is, of course, true that "[p]olitics and political considerations are inseparable from districting and apportionment" and that "districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S. at 753. But a state does not have carte blanche to draw district lines free from

constitutional constraints. *See id.* at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."); *Gomillion*, 364 U.S. at 345 (refusing to "sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions"); *cf. Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained."). The fact that the government makes political choices in districting does not carry with it a license to subordinate a group of voters and dilute their right to vote because of their political affiliation.

In sum, republican principles embedded in the Constitution's text and structure, fundamental First Amendment principles that safeguard freedom of political association, and equal protection principles that ensure equal rights under the law for all persons, regardless of their political convictions—principles deeply rooted in the Constitution's text and history and this Court's precedents—do not permit the government to use its power over the districting process to give disproportionate political power to a group of citizens based on their political association and views. This "ingrained structural inequality," *Evenwel*, 136 S. Ct. at 1123—like the malapportionment invalidated in *Reynolds* and the cases that followed it—singles out a group of citizens and dilutes and debases their right to vote in a manner manifestly inconsistent with constitutional guarantees and the system of fair and effective representation our Constitution establishes. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds*, 377 U.S. at 567. The fact that an individual belongs to one political party or another "is not a legitimate reason for . . .

diluting the efficacy of his vote." *Id.*; *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

In light of these fundamental constitutional principles, "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *Gaffney*, 412 U.S. at 752 ("It would be idle . . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). The fact that a state legislature drew district lines with political considerations in mind is the beginning, not the end, of the analysis. "The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). In other words, there must be a showing that "partisan classifications burden[] rights of fair and effective representation." *Id.* at 312. This requires a demonstration that a partisan gerrymander has the purpose and effect of subordinating adherents of a political party and severely limiting the effectiveness of their votes, conferring legislative power far in excess of votes cast at the polls. It requires showing that the partisan gerrymander unjustifiably obstructs the basic workings of representative government, "subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* at 314. These inquiries provide judicially manageable standards for separating ordinary political line drawing from unconstitutional efforts to degrade and dilute a group of voters' opportunities to

elect representatives on account of their political affiliation.

Under these standards, the extreme gerrymanders in these cases, which turn our Constitution's system of representative government on its head, cannot be squared with the First and Fourteenth Amendments. A state cannot enact into law the view that "electing Republicans is better than electing Democrats," Rucho J.A. 460, or that electing Democrats is better than electing Republicans. A state cannot use its considerable power to draw lines to nullify the fundamental principles at the core of our Constitution's system of government.

IV. The Constitution Requires Redress by the Courts When States Subordinate Adherents of a Political Party Based on Viewpoint in Violation of the First and Fourteenth Amendments.

Judicial relief is warranted here. "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 313 (2014)). Although this case, like many others, is undeniably sensitive and demands careful judgment, "this is what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Both at the Founding and following the Civil War, our Constitution's Framers insisted that constitutional limitations "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without

this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78, supra*, at 434 (Alexander Hamilton); 3 *Elliot's Debates* at 554 ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). The Framers created the Article III judiciary to "guard the Constitution and the rights of individuals from . . . designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *The Federalist No. 78, supra*, at 437 (Alexander Hamilton); *id. No. 10*, at 49 (James Madison) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

Like their counterparts at the Founding, the Framers of the Fourteenth Amendment recognized that judicial review was essential to ensure that the Amendment's constitutional protections "cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). The Framers understood that the "object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority." *Id.* "[T]he greatest safeguard of liberty and of private rights," they recognized, is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary." Cong. Globe, 41st Cong., 2d Sess. 94 (1869).

As the Constitution's text and history reflect, "[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

by the courts." *Obergefell*, 135 S. Ct. at 2605-06 (quoting *Barnette*, 319 U.S. at 638). This Court "cannot . . . ask another Branch to share [its] responsibility" to engage in judicial review of challenged state action. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

Thus, it is of no moment that the Elections Clause gives Congress the power to prescribe a remedy for partisan gerrymandering in congressional redistricting. This Court cannot delegate to Congress its constitutional role to "say what the law is" and enforce the Constitution's status as "the fundamental and paramount law of the nation." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That would permit the fundamental limits imposed by the First and Fourteenth Amendments to be "passed as pleasure." *Id.* at 178. Indeed, this Court has repeatedly refused to "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), simply because of the possibility that Congress could act under the Elections Clause. The authority granted by the Elections Clause "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian*, 479 U.S. at 217; LWV Br. 40-44; CC Br. 35-37; Benisek Br. 28. Whether or not Congress imposes regulations of its own, the Fourteenth Amendment requires states to respect First Amendment freedoms and obliges courts to intervene if they do not.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

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March 8, 2019

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No. 18-726

In the Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF MICHAEL C. DORF, JOSHUA S. SELLERS, ANDREW M. SIEGEL, AND JOSEPH T. THAI AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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OTHER AUTHORITIES

10 J. Richardson,
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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nationally recognized constitutional law scholars. They have substantial expertise regarding the First Amendment and redistricting. And they have authored books and articles on constitutional law and democracy. They believe that legislatures engaged in redistricting must operate within constitutional limits, and that one set of those limits is grounded in the First Amendment.[2]

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[1] All parties have given blanket consent to the filing of amicus briefs in this matter. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici and their counsel contributed money that was intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Equally fundamental is the right "to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Accordingly, legislatures engaged in redistricting must operate within constitutional limits to avoid impinging on those core rights, and courts have a constitutional obligation to police those limits. The fact that redistricting actions have political consequences does not make them non-justiciable political questions. And courts considering challenges to redistricting do so properly under not just the Fifth and Fourteenth Amendments' guarantees of equal protection, but also the First Amendment and the Fourteenth Amendment's Due Process Clause.

"First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314–16 (2004) (Kennedy, J., concurring). Applying the First Amendment to partisan gerrymandering challenges is consistent with that fundamental interest in "not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* Nor does applying the First Amendment to such challenges force courts into

using an unmanageable and ambiguous standard: courts have already devised a manageable standard to apply to the question of redistricting in the equal protection context of racial gerrymandering. Extending that framework to First Amendment claims will not be any less manageable.

ARGUMENT

I. Legislatures Engaged In Redistricting Must Operate Within Constitutional Limits, And Courts Are Empowered To Enforce Those Limits

Judicial responsibility for enforcing constitutional rights applies even in cases with intense political ramifications. While "politics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), that does not mean that courts cannot resolve cases and controversies properly before them "merely because the issues have political implications." *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Nor does the fact that a case involves political rights insulate it from scrutiny or make claims nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 209–10 (1962) ("[T]he right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."). This is so because "[n]o policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *I.N.S. v. Chadha*, 462 U.S. 919, 941–42 (1983); *Baker*, 369

U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."). Nor does potential difficulty in deriving and administering standards render courts impotent or allow them to avoid cases properly before them, even if they might otherwise prefer to do so. *Zivotofsky*, 566 U.S. at 194.

The threshold question, therefore, is whether the act of drawing voting districts is so uniquely political that claims of constitutional infirmity are nonjusticiable. That question has been answered long ago: "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence" because a state cloaks the impairment of voting rights "in the garb of the realignment of political subdivisions." *Baker*, 369 U.S. at 230 (internal quotation marks omitted). This Court saw no problem in concluding that the constitutional rights at issue in *Baker* presented justiciable claims. So too here.

A. The Election Clause does not insulate claims of constitutional harm in the redistricting process from judicial review

The Election Clause, Article I, § 4, gives state legislatures the power to prescribe "The Times, Places and Manner of holding Elections for Senators and Representatives," and Congress the power to "at any time by Law make or alter such Regulations." But the framers did not intend the Election Clause to establish Congress as the exclusive check on the states. To the contrary, if the Election Clause gave

Congress exclusive authority to enforce voting and redistricting laws, courts would necessarily be impotent to examine challenges to *federal* election laws. Yet, this Court has, time and again, held these types of claims justiciable, such as when it subjected the Voting Rights Act of 1965 to judicial scrutiny. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (upholding the Act). More recently, this Court revisited whether certain aspects of the Voting Rights Act "continue[d] to satisfy constitutional requirements." *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2013) (striking down part of the Act). Nowhere in between was it ever held that federal election laws were per se nonjusticiable.

Nevertheless, advocates of non-justiciability contend that: (1) delegation of supervisory authority over state elections to Congress was appropriate, but that review by Article III courts would be wholly inappropriate given the partisan fray; (2) the framers did not even consider whether federal courts should properly oversee election regulations to ensure no undue advantage to one party or faction; and (3) Congress in fact has exercised its authority to address concerns of partisan gerrymandering. None of these arguments warrants judicial retreat.

First, generalized notions of judicial independence cannot hide the complete lack of any historical or textual support for the argument that the framers were concerned about judicial review of state redistricting. While the framers considered and rejected assigning to the Judiciary other politically fraught tasks, like where to try impeachments, that does not equate to a blanket principle that courts

should have no involvement in politically fraught tasks lest their independence be compromised. Such a broad principle would, of course, run headlong into this Court's repeated assertion that "politically fraught" does not mean "out of the reach of the Judiciary." *See, e.g.*, *Baker*, 369 U.S. at 209 (holding that a challenge to a redistricting plan was justiciable). The Article III power to resolve cases and controversies covers claims involving political rights, *id.*, even those with substantial political implications. *Zivotofsky*, 566 U.S. at 196. And ruling against any judicial involvement in constitutional claims related to redistricting "could erode confidence in the courts as much as would a premature decision to intervene." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring).

Second, the argument that the framers did not consider the Judiciary the proper body to oversee election regulations overstates the issue. We do not suggest that federal courts should supervise the minutiae of election regulations. But courts can and should hear cases and controversies when citizens bring claims that their government has improperly targeted them in violation of their constitutional rights. *See id.* at 308–10 (Kennedy, J., concurring) (rejecting certain judicial interventions in redistricting but noting that it is not "alien to the Judiciary to draw or approve election district lines"); *White v. Regester*, 412 U.S. 755, 763 (1973) (noting that reapportionment of congressional seats is subject to strict standards).

Moreover, it is unsurprising that the Constitution does not affirmatively delegate

authority to the Judiciary to review state election laws, given that judicial review itself appears nowhere in the text of the Constitution (although it was widely assumed, *see* Federalist No. 78 (Hamilton)). More fundamentally, however, when the Election Clause was drafted, the Bill of Rights had yet to be written, and even after it was ratified in 1791, the rights contained therein were not binding on the states or enforceable by the federal Judiciary until incorporation under the Fourteenth Amendment.

Third, the fact that Congress has in fact exercised its authority to oversee states is no reason for courts to abstain. Put another way, congressional action does not compel judicial inaction where a state has violated a citizen's rights in an individual case. And even if the framers had envisioned Congress as the primary overseer of state redistricting laws, Congress itself has vested jurisdiction in three-judge, federal district court panels to hear cases "challenging the constitutionality of the apportionment of congressional districts . . . ." 28 U.S.C. § 2284; *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n.2 (2017). Congress clearly sees a judicial role. But if the Election Clause constituted an exclusive delegation of authority to the legislative branch, then is § 2284 an unconstitutional delegation of legislative authority? That cannot be right. Rather, the jurisdictional grant itself underscores the judicial reviewability of such claims; deciding a case involving a challenge to the constitutionality of a redistricting plan is decidedly judicial, not legislative.

The delegation to Congress in the Election Clause (and, later, the Fourteenth and Fifteenth Amendments) was not intended to exclude the Judiciary from all election-related claims, but to include Congress. During both the Founding and Reconstruction, federalism principles were hotly debated, and an explicit grant to Congress was necessary to allow it to act. Without such a delegation, the Tenth Amendment would have prohibited Congress from legislating in the field of elections.

However, since at least *Marbury v. Madison*, 5 U.S. 137 (1803), the Judiciary has not shied away from determining the constitutionality of a statute simply because Congress has been granted power to legislate in a particular area. *Zivotofsky*, 566 U.S. at 196. Indeed, if a constitutional grant of power to Congress were sufficient to insulate it from scrutiny, judicial review itself would be hamstrung, given that the Tenth Amendment prohibits Congress from acting unless it has been specifically delegated power by the Constitution. This Court should not lightly read exclusivity into this, especially where, as here, fundamental constitutional rights that this Court has long held justiciable are at stake.

B. The text and history of the Fourteenth Amendment supports judicial review of state redistricting laws

Just like the Election Clause, the Fourteenth Amendment delegates to Congress the authority to legislate in areas that involve state authority: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

§ 5. And Congress has, in fact, regularly acted pursuant to each of these powers. Yet no one would seriously contend that the Fourteenth Amendment is beyond the Judiciary's reach. The fact that the Constitution grants to Congress the power to give effect to a particular right does not thereby preclude courts from executing their Article III authority to ensure that the legislative branches—both federal and state—operate within constitutional boundaries in that particular field. It still falls to the courts to adjudicate disputes between litigants on the basis of that legislation, including when one party alleges a constitutional deficiency.

Moreover, if the Election Clause and the Fourteenth Amendment were intended to imbue Congress with the exclusive authority to regulate state legislatures in the realm of elections, then *no* judicial scrutiny of election laws would be permissible. But one-person-one-vote and racial gerrymandering challenges are indisputably justiciable. *Shaw v. Reno*, 509 U.S. 630, 640–41 (1993). Indeed, state laws relating to the "times, places, and manner of holding elections" have regularly been struck down on constitutional grounds. *See, e.g.*, *Williams*, 393 U.S. at 34 (ballot access); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (same); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (party primary nominations); *Shaw*, 509 U.S. at 641 (vote dilution); *Cook v. Gralike*, 531 U.S. 510 (2001) (ballot language). And the long history of judicial intervention in redistricting confirms that both the Judiciary and Congress have authority to

"respond[] to the problem of vote dilution."[3] *Shaw*, 509 U.S. at 641. Acknowledging this, however, undermines the entire Election Clause exclusivity argument. Even a little yeast leavens the entire batch of dough.

Arguments that the Constitution envisioned an exclusively political check on redistricting are equally unpersuasive where the issue involves legislatures intentionally creating uncompetitive or "safe" districts. In so doing, the majority is seeking to insulate itself from political accountability. "A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (citing Madison, The Federalist Papers, Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents

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[3] That vote dilution constitutes an actual injury is beyond dispute. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), all the members of the Court agreed that a plaintiff can show harm through actual vote dilution. Justice Kagan, joined by Justices Ginsberg, Breyer, and Sotomayor, asserted that a plaintiff might also show injury in the form of an associational harm that burdens "fundraising, registering voters, attracting volunteers," and other forms of political organization. *Id.* at 1938 (Kagan, J., concurring). Because this injury inquiry is primarily a question of standing, the Court here can rule on justiciability using the uncontroversial injury of vote dilution without reaching the question of whether the type of associational harm noted by Justice Kagan also qualifies to confer standing.

(1899) pp. 98—99 (President Jefferson)).[4] And "the entrenchment of one or a few parties to the exclusion of others . . . is a very effective impediment to the associational and speech freedoms . . . essential to a meaningful system of democratic government." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 368–70 (1976) (plurality opinion)). The idea that an electoral majority—which benefits from gerrymandered districts and the corollary burdening of an electoral minority's rights—will act as a guardian of minority interests and hold the legislature accountable for that gerrymandering defies the wisdom of the framers and hundreds of years of experience in a representational republic. The ambition of one faction cannot check the ambition of another, Federalist No. 10, when the latter has effectively insulated itself from accountability.

The result looks less like a constitutional republic than the tyranny of the (electoral) majority that the framers feared and from which they sought to protect the country. *See* Federalist No. 51. The solution, as Madison said, was a system of checks and balances. When the redistricting process lies entirely in the hands of a legislature—whether

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[4] Not all incumbency protection is problematic under the First Amendment. For example, a goal of avoiding contests between incumbents by not drawing two representatives into the same district does not necessarily raise the same First Amendment concerns. However, incumbency protection could cross the line if used in a partisan way against those who might otherwise challenge an incumbent.

federal or state—a faction that seizes control can insulate itself from political accountability by effectively suppressing the rights of other citizens. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) ("The first instinct of power is the retention of power") (Scalia, J., concurring in part and dissenting in part). To be sure, state legislatures have broad latitude, but it is not boundless. And the Judiciary stands as a vital check on that power.

II. The Constitution Prohibits Discrimination On The Basis Of Political Affiliation

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases). "[T]he First Amendment is plainly offended" when a legislature attempts to favor one particular viewpoint. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978). And that concern with non-neutrality is at its apex where political speech and association are concerned. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The advancement of common political goals and ideas" is central to the First Amendment's right of free association); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (striking down a state election law that "suffocates" the "freedom of association protected by the First and Fourteenth Amendments").

A. The First Amendment and the Due Process Clause apply to redistricting

The First Amendment and the Due Process Clause have long been construed to prevent government discrimination or retaliation on the basis of political affiliation in a variety of contexts separate and apart from redistricting. "[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Anderson*, 460 U.S. at 787 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Thus, in *Anderson*, the Court held that a law requiring independent candidates to declare before established political parties had chosen their candidates disproportionately burdened new or small political parties or independent candidates. As a result, the law impinged on First Amendment associational rights because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Anderson*, 460 U.S. at 793–94; *see also Williams*, 393 U.S. at 30 (holding that certain ballot restrictions infringed upon voters' rights of political association, as well as their right to cast effective ballots "regardless of their political persuasion"); *Kusper v. Pontikes*, 414 U.S. 51 (1973). The statute's effect was to "limit[] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," a fact which "threaten[ed] to reduce diversity and competition in the

marketplace of ideas." *Anderson*, 460 U.S. at 794; *id.* at 788 n.8 (noting that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes"); *NAACP v. Ala.*, 357 U.S. at 462–63 (applying strict scrutiny to a discovery request into the identities of NAACP members because if granted, it was likely to adversely affect the NAACP's and its members' ability "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate"); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (applying strict scrutiny to a Virginia statute that limited the NAACP's ability to solicit plaintiffs for civil rights litigation because such litigation was "a form of political expression," as well as a "means for achieving the lawful objectives of equality of treatment . . .").

This is so because "political belief and association constitute the core of those activities protected by the First Amendment." *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 356). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Elrod*, 427 U.S. at 357. Thus, in *Elrod*, the Court held it unconstitutional to fire people from certain government jobs based on party affiliation, because doing so "tips the electoral process in favor of the incumbent party" and "starv[es the] political opposition." *Id.* at 356; *see also Rutan*, 497 U.S. at 74–76; *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Accordingly, state legislation—including election laws—may not improperly "burden[] a political party's First and Fourteenth Amendment right of

association." *Cal. Democratic Party*, 530 U.S. at 586; see *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that no person can be excluded from the franchise "because of the way [she] may vote" and invalidating a Texas constitutional provision prohibiting members of the military stationed in Texas from voting in Texas elections, which Texas justified by arguing that military members were likely to have different political preferences than long-term residents).

To date, this Court has not directly ruled on the question of whether First Amendment and Due Process Clause challenges to redistricting decisions also present justiciable controversies, but there is no reason to conclude that they do not. *See Eu*, 489 U.S. at 222 ("To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments."). While appellees ask this Court to squarely confront the application of the First Amendment and Due Process Clause to the specific case of partisan gerrymandering, the principle itself is well established in the law. *See supra*. "The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The Court there went on to cite cases in which government regulation was struck down for favoring (or disfavoring) a particular viewpoint in the areas of commercial speech (*Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)); regulation of public utilities (*Consol. Edison Co. of New York v.*

Pub. Serv. Comm'n of New York, 447 U.S. 530, 536 (1980)); and picketing (*Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 96)). Indeed, "[t]he First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

Moreover, nothing in the text of the First or Fourteenth Amendments suggests that redistricting should be treated differently than other claims of electoral discrimination. Indeed, the incorporation of the First Amendment to apply to state action flows through the same section of the Fourteenth Amendment that guarantees a citizen freedom from racial discrimination. Fourteenth Amendment, § 1; *Williams*, 393 U.S. at 30–31 (noting that First Amendment rights are "entitled under the Fourteenth Amendment to the same protection from infringement by the States"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). To hold that legislatures may intentionally burden citizens' rights on the basis of First Amendment-protected activity would thus require arbitrarily drawing a line between the Equal Protection and Due Process Clauses, prohibiting states from redistricting in violation of the former, but not the latter. This Court should not invent such a distinction here. Just as a legislative intent to punish a person based on their membership in a racial group is constitutionally suspect, so too is legislative intent to punish or retaliate against a person based on their political affiliation or past voting behavior.

In *Buckley v. Valeo*, the Court acknowledged that the Election Clause clearly gives Congress authority to regulate federal elections. 424 U.S. 1, 13 n.16 (1976). The pivotal constitutional question, however, concerned "whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment." *Id.* at 14. The Court thus linked the First and Fifth Amendments as both applying to election laws and found no problem with adjudicating the claim. Indeed,

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring).

In addition, the line between equal protection, due process, and First Amendment concerns in the context of partisan gerrymandering is not always clear. An equal protection claim may be "closely intertwined with First Amendment interests." *Mosley*, 408 U.S. at 95. Indeed, equal protection cases often have undertones of due process concerns, and vice versa. *See, e.g.*, *Williams*, 393 U.S. at 34 (finding that a state ballot access scheme "imposes a

burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause"). In *Thornburg v. Gingles*, the Court articulated a three-pronged test for vote dilution in the context of a claim brought under the Equal Protection Clause and the Voting Rights Act. 478 U.S. 30, 51 (1986). The second prong asks whether a minority group was politically cohesive such that the minority's voting power was diluted. *Id.* "Politically cohesive" is another way of saying "votes in a particular way." The constitutional problem in *Gingles*, therefore, lay not only in discrimination based on race, but also based on how the targeted minority affiliates politically. Accord *Shaw v. Reno*, 509 U.S. at 641 (recognizing that the Fourteenth Amendment is triggered "[w]here members of a racial minority group vote as a cohesive unit").[5]

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[5] Appellants nevertheless suggest that no viewpoint targeting could have occurred here because ballots are secret, "[e]lection results are known and reportable at no smaller unit than the precinct," and "voting behavior cannot be reliably inferred from party registration." Appellants' Brief at 46, n. 12. First, the fact that redistricting targeted an entire group and not a pre-known individual is irrelevant. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (noting that apportionment schemes can cause justiciable harm that is "individual and personal in nature"). Second, whether attempted targeting was actually effective is relevant to an injury or causation analysis, not whether a legislature intended to target a group based on their behavior. Third, even under an injury or causation inquiry, Appellants' argument might have had some force in the era before modern polling and big data, which now provide an extremely precise and accurate picture of voting behavior. The ruthless efficiency

B. Dilution of votes on the basis of political affiliation cannot be cured by allowing other protected activity

The fact that minority parties can still organize or engage in other forms of speech does not cure the First Amendment violation caused by diluting their vote or by burdening their associational rights. This Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Cal. Democratic Party*, 530 U.S. at 581 (citing *Spence v. State of Wash.*, 418 U.S. 405, 411, n.4 (1974); *Kusper*, 414 U.S. at 58). "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 151–52 (1939). In other words, a state may not target a person or group for disfavored treatment based on political affiliation and then escape scrutiny simply because the state has not explicitly prohibited political organizing or directly impaired a person's ability to pull the lever for the candidate of her choice.

Nor does the fact that a redistricting plan may have been affirmed by a referendum insulate it from constitutional scrutiny. *See* Appellant Brief at 49. To the contrary, referenda are subject to the same constitutional limitations as laws enacted by a legislature. *Hunter v. Erickson*, 393 U.S. 385, 392

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of such techniques makes gerrymandering all the more pernicious today.

(1969). A state cannot hide behind the "majority rules" trope "where constitutional imperatives intervene." *Cal. Democratic Party*, 530 U.S. at 584. And in cases where a referendum upholds or affirms legislation, courts can still look to the legislature itself to determine discriminatory intent. *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) ("[S]tatements made by decisionmakers or referendum sponsors . . . may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative.").

C. The same manageable standard currently used for equal protection claims should also be used for First Amendment and due process claims

Because this Court has not explicitly held that the First Amendment and Due Process Clause impose judicially enforceable limits on redistricting, states have frequently relied on a "partisanship defense" when confronted by an equal protection challenge to a redistricting plan. Under this defense, the state argues that it did not target based on race but rather on partisan principles. As a result, courts have often struggled to determine whether there is a valid constitutional claim in cases where "racial identification is highly correlated with political affiliation," making it "difficult to distinguish between political and race-based decisionmaking." *Cooper*, 137 S. Ct. at 1488 (citing *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)).

A framework that places the First Amendment and Due Process Clause on equal footing with the Equal Protection Clause in evaluating

gerrymandering claims eliminates the ability of states to hide behind the defense that they are burdening individuals "only" on the basis of political affiliation rather than race. Under this unified Fourteenth Amendment theory, a court no longer needs to attempt to divine whether a legislature intended to discriminate on the basis of race or political affiliation. Both are improper.

Using this equal protection framework also has the advantage of providing a substantive, manageable standard to guide courts in adjudicating First Amendment challenges to redistricting. When evaluating a claim of racial gerrymandering, a court must find more than that the legislature was merely aware of race; it must find "that race was the predominant factor motivating the legislature's decision" to draw district lines where it did. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). And courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* But that does not mean that the standard is not administrable. *Cooper*, 137 S. Ct. at 1473 (noting that "a trial court has a formidable task" in assessing racial motivation, but nevertheless holding racial gerrymandering claims justiciable).

So too with First Amendment claims. Some awareness of the political geography of a state is inevitable when drawing district lines. *Gaffney*, 412 U.S. at 753. *Cf. Miller*, 515 U.S. at 916 (recognizing that "[r]edistricting legislatures will . . . almost always be aware of racial demographics"). By entrusting redistricting to the state legislatures, the Constitution envisions that some politics will be part

and parcel of the process. For example, some minority and majority parties in a legislature might agree to "pack" certain districts so that both sides can have safe seats.[6] Or, in a split state government—where one party holds the governorship and the other holds the legislature—both sides might engage in horse trading involving multiple pieces of legislation. Or, some incumbents might want to retain communities of interest. These few examples of the type of "complex interplay of forces that enter a legislature's redistricting calculus," *Miller*, 515 U.S. at 915–16, are far removed from the type of systematic and discriminatory targeting that does raise constitutional issues.

We therefore do not suggest broadly applying the First Amendment and Due Process Clause in a way that would allow courts to intervene in the redistricting process simply because some politics were involved. Rather, as in the equal protection context, a plaintiff bringing a claim of improper partisan gerrymandering must show that political affiliation was the "predominant factor motivating

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[6] Like most facially neutral legislation, such arrangements could have the effect of diluting the vote of a particular person in a particular district. And as this Court recently held, an injury analysis in a gerrymandering claim is conducted on a district-by-district basis. *Gill*, 138 S. Ct. at 1931. The intent inquiry, however, is done at the state level. *See, e.g.*, *Miller*, 515 U.S. at 913 (looking at the "legislature's dominant and controlling rationale in drawing its district lines"). Thus, even where there is harm in the form of vote dilution, there is no constitutional deficiency unless a plaintiff can overcome the presumption of "the good faith of a state legislature" and show discriminatory intent. *Id.* at 915.

the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916; *see also* Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light—or at Least a Yellow Light*, Findlaw (May 12, 2004), https://supreme.findlaw.com/legal-commentary/the-supreme-court-gives-partisan-gerrymandering-the-green-light-or-at-least-a-yellow-light.html. Mere consideration of politics would not suffice to show intent to burden the constitutional right of association. Using this framework, which the Court has already established, a ruling here that the First Amendment and Due Process Clause also reach the legislative act of redistricting would not put courts in the business of overseeing elections. It would merely extend an already-known standard to a "fixed star in our constitutional constellation." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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March 8, 2019

No. 18-422, 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF AMICI CURIAE FIRST AMENDMENT AND ELECTION LAW SCHOLARS IN SUPPORT OF APPELLEES

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Branti v. Finkel,
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Burdick v. Takushi,
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Citizens Against Rent Control v. City of Berkeley,
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Common Cause v. Rucho,
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Cooper v. Harris,
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Elrod v. Burns,
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Eu v. San Francisco Co. Democratic Cent. Comm.,
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Gill v. Whitford,
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NAACP v. Button,
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NAACP v. State of Ala. ex rel. Patterson,
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Norman v. Reed,
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Police Department v. Mosley,
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Roberts v. U.S. Jaycees,
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Romer v. Evans,
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Tashjian v. Republican Party of Connecticut,
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United Public Workers v. Mitchell,
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Washington State Grange v. Washington State Republican Party,
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Washington v. Davis,
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Williams v. Rhodes,
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CONSTITUTIONAL PROVISIONS

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OTHER AUTHORITIES

Abramowitz, Alan I. , THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010) 4

Abu El-Haj, Tabatha , *Networking the Party*, 118 Columbia L. Rev. 1225 (2018) 14

Bartels, Larry, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35 (2000) 4

Charles, Guy-Uriel, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209 (2003)..... 12

King, Gary & Browning, Robert X., *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987) 19

Lewis-Beck, Michael S., et al., THE AMERICAN VOTER REVISITED (2011) 4

Mellow, Nicole E., *Voting Behavior: Continuity and Confusion in the Electorate*, in THE ELECTIONS OF 2016, 87 (Michael Nelson, ed., 2017)..... 4

Miller, Warren E. & Shanks, J. Merrill, THE NEW AMERICAN VOTER 146-50 (1996) 4

Pew Research Ctr., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf 4

Pildes, Richard H., *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America* 4

Ringhand, Lori A., *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 Election L.J. 288 (2014) 6

Royden, Laura & Li, Michael, *Extreme Maps* (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf. 19

Schultz, David, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 Cap. U. L. Rev. 1, 45-47 (2007) 8

SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015) 4

Theriault, Sean M., PARTY POLARIZATION IN CONGRESS (2008) 4

Tokaji, Daniel P., *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159, 2191-97 (2018) 14

Tokaji, Daniel P., *Voting Is Association*, 43 Fla. St. L. Rev. 763 (2016) 11

INTEREST OF AMICI CURIAE[1]

Amici are eleven nationally recognized scholars and teachers of the First Amendment and Election Law. All of them have substantial expertise on the subjects of redistricting and the First Amendment. Each has authored multiple scholarly articles and books on constitutional law and the democratic process. Their scholarship and experience lead them to conclude, for the reasons explained below, that the First Amendment right of freedom of association should be understood to require strict scrutiny of redistricting plans that discriminate based on political-party affiliation—partisan gerrymanders—and that both North Carolina's and Maryland's plans are unconstitutional. A full list of amici, including brief summaries of their credentials and relevant scholarship, appears in the Appendix.

SUMMARY OF ARGUMENT

Amici urge affirmance of the lower courts' decisions that extreme partisan gerrymanders may violate the First Amendment right of association of both individuals and parties, though we propose a legal standard different from that adopted by either of those courts. The First Amendment right to freedom of association protects both an individual's ability to exercise political influence by joining with like-minded others, and the right of expressive associations, including political parties, to be free from discrimination based on the political viewpoint of the group.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae.

There is no more important way in which citizens seek to advance their political beliefs than by associating with political parties. As this Court has long recognized, party-based discrimination is anathema to the First Amendment because it infringes on individual liberty and distorts the electoral process. *See Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (recognizing that discrimination based on political party violates the First Amendment right of association because it inhibits "the individual's ability to act according to his beliefs and to associate" and "tips the electoral process in favor of the incumbent party").

Under this Court's precedents, the right to freedom of association does more than just safeguard the right to *join* a political party or other group of like-minded people. It also prohibits state regulations that *discriminatorily burden a political group's ability to influence the electoral process. See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1986); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Redistricting laws that discriminatorily burden one political party at the expense of another—partisan gerrymandering—effect this type of injury and warrant strict scrutiny. Unless they are narrowly tailored to a compelling state interest, such laws must be struck down.

Recognizing that partisan gerrymandering implicates associational rights is fully consistent with this Court's precedents. The Court has long recognized the relationship between expressive association and voting, applying the same standard to association claims under the First Amendment and right-to-vote claims under the Fourteenth Amendment. *See Anderson*, 460 U.S. at 788-90; *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

Recognition of an association-based partisan gerrymandering claim would not categorically foreclose any consideration of party affiliation in redistricting. But, where party affiliation is used to draw district lines in a manner that discriminates against a political party and its adherents by placing them at a significant disadvantage relative to their statewide voting strength, that would be a severe burden that triggers strict scrutiny. *See id.* at 434. Even then, the state could defend its plan by showing that it is narrowly tailored to further a compelling interest such as ensuring compactness or preserving political subdivisions.

There is ample guidance in First Amendment case law to define when a redistricting plan imposes a discriminatory burden on association that is of such a magnitude to warrant heightened scrutiny. Here, there can be no doubt that North Carolina's plan severely burdens the associational rights of the minority party and its adherents. The packing and cracking of Democratic voters makes it more difficult for their preferred candidates to win congressional elections and impedes citizens' ability to join with like-minded others outside the electoral process – for example, by recruiting candidates, raising money, and otherwise organizing for collective political expression. There is no compelling justification for the discriminatory burden that North Carolina's plan imposes on the non-dominant party and its adherents. While the Maryland case is closer, that plan imposes a substantial burden on the disfavored party and its supporters, in this case Republicans, by entrenching a 7-1 split in favor of the Democratic Party. The evidence of record demonstrates harm to association both inside and outside the electoral process that cannot be justified by Maryland's proffered interests.

The importance and urgency of this Court's adopting a legal standard by which to assess partisan gerrymandering cannot be overstated. As Justice Kagan has recently emphasized, "[p]artisan gerrymandering jeopardizes '[t]he ordered working of our Republic, and of the democratic process.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (opinion of Kagan, J.); quoting *Vieth v. Jubelirer*, 541. U.S. 267 at 316 (opinion of Kennedy, J.). The dominant party's incentive and ability to entrench itself in power are stronger than ever, given the increase in partisan polarization[2] and the hardening of partisan attitudes.[3] Enhanced technological tools are now available that enable the dominant political party in any state to draw district lines so that it not only maximizes its immediate electoral gains but also—by drawing enough "safe" seats for itself—ensures that its electoral advantage will persist for years. *See Gill*, 138 S. Ct. at 1941:

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[2] *See, e.g.*, Alan I. Abramowitz, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015); Sean M. Theriault, PARTY POLARIZATION IN CONGRESS (2008); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273, 276-81 (2011); Pew Research Ctr., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf.

[3] Michael S. Lewis-Beck, et al., THE AMERICAN VOTER REVISITED, 127 (2011); Larry Bartels, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35 (2000); Warren E. Miller & J. Merrill Shanks, THE NEW AMERICAN VOTER 146-50 (1996); Nicole E. Mellow, *Voting Behavior: Continuity and Confusion in the Electorate*, in THE ELECTIONS OF 2016, 87, 90-92 (Michael Nelson, ed., 2017).

> Technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements. . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides.

Moreover, because partisanship has increased and stiffened, it is even more likely now than before that the effects of such partisan gerrymandering will persist. Such substantial and durable party-based discrimination in redistricting fundamentally undermines our democracy.

ARGUMENT

A. The Right of Association Protects an Individual's Ability to Enhance Her Political Influence by Associating with Others

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Central to the right of association is "the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The right to expressive association afforded to civic groups, including political parties, arises in part from the individual interest in gathering with others and lending

one's voice to a larger cause. But that is not the only basis for this right. As this Court has recognized, the right of association also limits the state's ability to discriminate against groups that espouse a rival point of view. This Court has thus recognized that the right of association extends to rules regulating the electoral process itself and has applied a balancing test under which rules that impose "severe" burdens trigger strict scrutiny.

Freedom of association is closely linked to the First Amendment's prohibition on content and viewpoint discrimination. This Court has held that, "[a]bove all else, the First Amendment 'means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). This principle applies with special force where political speech is concerned, to ensure that the dominant political group may not stifle or diminish the collective voice of its opponents. *See* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 Election L.J. 288, 291-93 (2014). This is in keeping with the long line of precedent holding that government discrimination against disfavored viewpoints or speakers contravenes the First Amendment. *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 340-41 (2010) (citing cases).

Consistent with the viewpoint-neutrality principle, the Court's earliest decisions protecting expressive association have restricted government efforts to discourage or punish individuals for joining groups with disfavored viewpoints. The first example is *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), in which the Court found that a discovery request by the

State of Alabama seeking the identities of NAACP members triggered strict scrutiny. The Court explained that the request, if granted, was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. The associational interest in *Patterson* thus went beyond the right of individuals simply to join the organization; it also included the right of those with a disfavored viewpoint not to be burdened in ways that interfered with achievement of their shared "political goals." *Id.*

So too, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court applied strict scrutiny to a Virginia statute that impeded free expression in the pursuit of associational viewpoints, in that case by inhibiting the NAACP's solicitation of plaintiffs in civil-rights litigation. Such litigation, the Court explained, was "a form of political expression" and particularly "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community." *Id.* at 429. The Virginia statute threatened to undermine the NAACP's ability to exercise political power to further its members' viewpoints: there "inhere[d] in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.* at 434. It cut off a key "avenue open to a minority to petition for redress of grievances" and thereby to exert political power in furtherance of its viewpoints. *Id.* at 430.

This Court's patronage cases similarly recognize that the right of association protects both the individual interest in associating with like-minded others and the collective interest in "the free functioning of the

electoral process." *Elrod*, 427 U.S. at 356. In *Elrod*, the Court held unconstitutional the practice of firing people from certain government jobs because of their party affiliation. After describing the harm to the individual liberty interest arising from this practice, the *Elrod* plurality explained that patronage "tips the electoral process in favor of the incumbent party" by allowing it to "starve [the] political opposition." *Id.* *See also id.* at 371 n.6 ("Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.") (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). Later patronage cases go even further than *Elrod* in limiting government consideration of party affiliation. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The principle underlying these decisions is viewpoint-neutrality, especially when it comes to government actions that might affect the electoral process. *See* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 Cap. U. L. Rev. 1, 45-47 (2007).

The First Amendment right of association thus implicates both the systemic interest in a fair political process and the individual interest in furthering one's beliefs, both of which underlie the patronage cases. *Elrod* and its progeny also illustrate the centrality of *political parties* to the right of association—and the corresponding harms arising from the dominant party's discrimination against a non-dominant party to entrench itself in power.

These same principles have guided the Court's consideration of state laws directly regulating the electoral process. The Court first held voting itself to be a form of expressive association in *Williams v. Rhodes*,

393 U.S. 23 (1968), striking down an Ohio ballot-access law that disadvantaged new political parties while giving "the two old established parties a decided advantage." *Id.* at 31. Later, in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court struck down an Illinois law providing that a voter could not vote in a party primary if, in the prior 23 months, the voter had cast a ballot in the primary of another political party. The Court held that the law burdened the plaintiff's right of association because it impaired her ability to "associate effectively with the party of her choice." *Id.* at 58. The problem with the statute was not that it rendered the plaintiff unable to associate with the party of her choice: she plainly could, just not in the particular context of the party's primary elections. *Id.* Rather, the fatal problem was that the statute "constituted a 'substantial restraint' and a 'significant interference'" on a "basic function" and "prime objective" of associating with others in the exercise of political power, namely choosing a party's candidates by participating in primary elections. *Id.* *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (recognizing that ordinance limiting contributions and expenditures in ballot measure campaigns impermissibly "hobble[d] the collective expressions of a group," limiting its power to advocate effectively for the political views of its members).

These cases recognize that associational interests are implicated when people lend their individual voices to a broader chorus to advance their shared political viewpoint, both inside and outside the electoral process. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied this principle to discrimination based on *which* chorus of voices one chooses to join.

Plaintiffs in *Anderson* challenged an Ohio statute that required independent candidates seeking a place on the ballot to declare their candidacies before the established political parties had chosen their candidates. *Id.* at 782-83, 799. The Court concluded that this law "burden[ed] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.* at 788. It explained that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94. In short, the Ohio statute placed a "particular burden on an identifiable segment of Ohio's independent-minded voters," hindering the ability of such voters to band together and influence the political process. *Id.* at 792.

Like previous associational-rights cases, *Anderson* was concerned with the discrimination the law imposed on a group of voters' attempting to further their political beliefs through the electoral process. The statute "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," restrictions that "threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794; *see also id.* at 788 n. 8 ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and denied and equal opportunity to win votes") (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

Under *Anderson*, courts should weigh the "character and magnitude" of the injury to associational and voting rights against the state's asserted interests. 460 U.S. at 789. While "reasonable, nondiscriminatory" restrictions may generally be justified by the state's "important regulatory interests," the Court held, a stronger state justification is required if the law discriminates against an identifiable political group. *Id.*

The Court later clarified that strict scrutiny applies only to "severe" restrictions, as opposed to "'reasonable, nondiscriminatory'" ones. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). Since *Anderson* and *Burdick*, the Court has continued to emphasize that advancement of one's beliefs *through a political party* is central to freedom of association. *See* Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. L. Rev. 763, 777, 785 (2016).

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), for instance, the Republican Party challenged a Connecticut statute prohibiting independent voters from participating in its primary. The Republican Party argued that the statute "impermissibly burden[ed] the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success." *Id.* at 214. The Court agreed, concluding that the statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 216. *See also California Democratic Party v. Jones*, 530 U.S. 567 (2000) (recognizing associational rights of major parties); *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 581 (1989) (same).

Of course, not all burdens on political party association violate the First Amendment. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458 (2008) (upholding blanket primary that did not severely restrict party's associational rights); *Clingman v. Beaver*, 544 U.S. 581, 589 (2005) (upholding law prohibiting members of one party from voting in another party's primary because law did not impose a severe burden). But, where the state severely restricts the associational right of a political party and its adherents by imposing *discriminatory* burdens, strict scrutiny applies.

The Court's freedom-of-association cases thus do more than simply protect individuals' ability to associate with like-minded others. They are also concerned with the ability to advance the group's shared viewpoints by *translating that association into political power through the ballot*. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1249 (2003) ("[I]n protecting political association, the First Amendment protects more than private association. [It] also extends to election laws that burden the individual's right to make free choices and to associate politically through the vote."). Most importantly for these cases, they limit a dominant political party's power to discriminate against a rival group and its supporters by diminishing their collective voice in the electoral process.

B. The Right of Association Forbids Districting that Discriminatorily Burdens Political Association Based on Party Affiliation

As the preceding section demonstrates, this Court's right-of-association cases establish that laws discriminating on the basis on party affiliation trigger strict

scrutiny under the First Amendment. This principle is grounded in both the individual liberty interest in affiliating with others to advance one's beliefs and the collective interest in preventing the dominant political group from impairing the free functioning of the electoral process. In assessing election laws alleged to violate the right of association, this Court has articulated a balancing standard, under which "severe" restrictions are subject to strict scrutiny while "reasonable, nondiscriminatory" ones receive more deferential review.

This Court should apply this established standard to partisan gerrymandering. As Justice Kennedy has recognized, redistricting laws are comparable to other laws that discriminatorily restrict political-party association, including those that accomplish this objective through regulation of the electoral process. *See Vieth*, at 314-16 (citing *Elrod*, *California Democratic Party*, *Eu*, and *Anderson*). Redistricting laws plainly affect opportunities for association: the boundaries of a district define which voters may associate with one another for purposes of advancing their viewpoints by voting for candidates within that district. A districting scheme that discriminates against a particular association of like-minded individuals—and especially a political party, which is the primary means through which individuals organize to advance their political beliefs at the ballot box—will impede the efficacy of that group's efforts to achieve its political aims.

It is well-established that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see also id.* (recognizing the "First Amendment

interest of not burdening or penalizing citizens because of . . . their association with a political party").

In the context of redistricting, as in other associational-rights cases, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights." *Id.* at 315. Under this Court's freedom-of-association case law, a districting plan that imposes discriminatory burdens on people with a particular viewpoint—for instance, the independent-minded voters in *Anderson* or the supporters of the minority political party in these cases—runs afoul of the First Amendment, because such a plan violates the associational rights of citizens seeking to join their voices with others sharing their viewpoint. Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159, 2191-97 (2018). As Justice Kagan stated in her concurring opinion in *Gill*, "[m]embers of the 'disfavored party' in the State. . . deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." 138 S. Ct. at 1938 (citation omitted). *See also* Tabatha Abu El-Haj, *Networking the Party*, 118 Columbia L. Rev. 1225, 1286 (2018) (association inquiry should focus on "the party's ability to mobilize broad and representative political participation").

Applying the Court's freedom-of-association jurisprudence to redistricting is fully consistent with the basic principles that have long guided redistricting decisions under the Equal Protection Clause. The Court has applied the same legal standard to both associa-

tion and voting claims for over three decades. *See Anderson*, 460 U.S. at 787-89 & n.7 (recognizing that ballot-access law implicated "overlapping" associational and voting rights and applying same standard to both); *Burdick*, 504 U.S. at 433-34 (applying same standard to both voting and association claims). There is no tension between the Court's freedom-of-association case law and the Court's observation that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Political gerrymandering does not infringe on associational rights merely by virtue of its consideration of political party affiliation. Instead, political gerrymandering infringes on associational rights when it discriminatorily burdens the proponents of a particular viewpoint, through effects both inside and outside the electoral process.

In *Gaffney*, the Court upheld a redistricting plan that plainly protected associational rights: a statewide plan drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas." *Id.* at 752; *see also id.* ("We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts."). Such a plan, which sought to ensure that the elected representatives roughly mirrored the electorate, cannot be said to place an undue burden on either party. To the contrary, the *Gaffney* plan considered political viewpoint to *avoid* infringement on associational rights. By contrast, a plan that discriminates against one political party and in favor of the other should trigger strict scrutiny under the First Amendment.

As this Court's decisions make clear, state action need not completely "deprive [plaintiffs] of all opportunities to associate with the political party of their choice" in order to warrant First Amendment scrutiny. *Kusper*, 414 U.S. at 58. Instead, the Court looks to whether the action "constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association." *Id.* (quoting *Patterson*, 357 U.S. at 462 and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)). A "significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest" but rather must be narrowly tailored to serve a compelling state interest. *Id.*; *see also Button*, 371 U.S. at 438 ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

Similarly, this Court's voting and associational rights cases call for "[a] court considering a challenge to a state election law" to assess "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789). When First Amendment rights are "subjected to 'severe' restrictions" by state election laws, the laws will survive only if they are "'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally

sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

A state election law, therefore, will not trigger heightened scrutiny on freedom-of-association grounds unless it imposes a sufficiently large and lasting burden on association. As this Court's decisions make clear, a restriction on association is "severe" and warrants strict scrutiny where it is not "reasonable [and] nondiscriminatory." Thus, in both *Kusper* and *Anderson*, the Court applied strict scrutiny where the challenged laws imposed discriminatory burdens on independent-minded voters and candidates. *See Anderson*, 460 U.S. at 793 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."); *Kusper*, 414 U.S. at 58 (strict scrutiny applied where state law forbade voters from participating in one party's primary within 23 months after voting in another party's primary).

In the context of redistricting, then, there must be a significant *discriminatory* effect on a political party and its adherents for the restriction to be deemed "severe." The mere fact that a redistricting plan yields districts that tend to result in one party's having an electoral advantage over another does not alone demonstrate discrimination or compel strict scrutiny. *Cf. Burdick*, 504 U.S. at 433. A redistricting plan that achieves a "rough approximation" in representation of those parties "large enough to elect legislators from discernible geographic areas" would not trigger strict

scrutiny. *Gaffney*, 412 U.S. at 752. In those circumstances, the character and magnitude of any burden would not justify a finding that associational rights had been severely restricted. *See Burdick*, 504 U.S. at 434 ("[W[hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson* , 460 U.S. at 788).

But, where redistricting discriminates against a political party and its members by placing them at a significant disadvantage relative to their statewide voting strength, strict scrutiny is warranted. *Cf. Gaffney*, 412 U.S. at 754 ("[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."). That would include cases in which a state plan undertakes "to minimize or eliminate the political strength of any group or party." *Cf. id.* (holding that state plan may not be invalidated where "it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough proportional representation in the legislative halls of the State").

The constitutional standard amici advocate is different from that employed by either of the courts below. The lower courts adopted slightly different three-part tests, looking to the state's intent to burden the disfavored party and its supporters, the actual effects on association, and causation. *Lamone v. Benisek*, 348 F. Supp. 3d 493, 515 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 929 (M.D. N.C. 2018).

Amici instead propose application of the familiar *Anderson-Burdick* standard that has been applied in other cases involving voting and association, considering the "character and magnitude" of the burden on the disfavored party and its supporters. If the burden is sufficiently large and lasting to be severe, then strict scrutiny applies. If not, the state's important regulatory interest may justify the burden. This provides an appropriately nuanced standard that considers whether the burdens on associational rights are justified by the state's interests.

There are multiple ways to measure the burden that a particular plan imposes on the electoral opportunities of a political party and its supporters. One of them is the "efficiency gap," which the district court defined as "votes cast for a candidate in excess of what the candidate needed to win a given district, which increase as more voters supporting the candidate are 'packed' into the district, *or* votes cast for a losing candidate in a given district, which increase on an aggregate basis, when a party's supporters are 'cracked'". *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 658 (M.D. N.C 2018). Other metrics of the statewide impact on a party include the mean-median difference[4] and seats-to-votes curve.[5] These and other metrics are more extensively addressed in Plaintiffs-Appellees' briefs and other amicus briefs being filed in support of their position.

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[4] *See* Laura Royden & Michael Li, *Extreme Maps* (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf., at 4

[5] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987).

Amici do not propose that this Court endorse any one of these proposed metrics as the gold standard, but all of them may provide evidence of the statewide effects of a redistricting plan on the nondominant party and its adherents. So too will actual election results under a redistricting plan where one party is consistently able to garner a share of legislative seats significantly larger than its share of votes *and* the other party a share of seats significantly smaller than its share of votes. Evidence of legislative intent to create or entrench a partisan imbalance likewise will suggest First Amendment harm—for instance if there are statements by legislators urging a plan that that would prevent the opposing party from gaining a majority of seats, even when it receives a majority of votes. When all these indicators point in the same direction, they may show a severe burden on that party, especially when combined with evidence of effects outside the electoral process.

Even if a redistricting plan imposes a significant discriminatory burden on one political party, it could still survive if it is narrowly tailored to serve a compelling government interest. Such a plan could not, of course, be justified by any purported interest in favoring the dominant political party over a less popular one. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). But a districting plan might survive if its disparate impact on one political party were justifiable in light of traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions. *See Bush v. Vera*, 517 U.S. 952, 959-960 (1996) (identifying

traditional redistricting principles). This might be the case where, for example, a party's members are arrayed geographically such that a districting plan reflecting the party's statewide voting strength would require non-compact and unusually shaped districts. If a minority party's members were widely dispersed across a state, a statewide districting plan that yielded a proportion of legislative seats lower than the proportion of the party's supporters might be justifiable. The same would be true if a party's members were densely concentrated in several pockets of the state where it possesses super-majorities. Under such circumstances, the state's interest in consistency and contiguity of districts might justify the burden on associational rights.

The standard we advocate does not guarantee any particular quantum of political power. Rather, it protects against significant discriminatory burdens on association, in service of the central First Amendment interest in avoiding viewpoint discrimination. A party may face inherent disadvantages by virtue of geography. A state with only a few congressional districts may adopt a plan that favors one party because such a plan is necessary to avoid non-compact districts or splits of political subdivisions. But a state may not adopt a plan that discriminatorily burdens adherents of a particular viewpoint, such that their avenues to political power are effectively blocked while the dominant party is entrenched.

Nor would our proposed standard foreclose any consideration of political party in drawing lines. Rather, consistent with established voting and association precedent, it would prohibit only those plans that impose a *severe* burden on an identifiable political group that is not narrowly tailored to further a compelling

interest. In this context, that means a plan that discriminates significantly based on political-party affiliation and cannot be justified based on traditional redistricting principles. To make this judgment does not require that the courts assess the substance of individuals' or groups' political viewpoints. Instead, it requires attention to disparities between voting strength and representational strength, informed by attention to traditional districting principles, an area in which this Court has extensive experience. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

C. North Carolina's Redistricting Plan Violates Plaintiffs' Associational Rights

Viewed under the established freedom-of-association standard, the North Carolina case is not close. The state's 2016 Plan imposes substantial and lasting discriminatory burdens on the associational rights of individuals who support one political party, and these burdens are not narrowly tailored to a compelling government interest. Accordingly, the district court's judgment should be affirmed.

This Court's jurisprudence calls for assessment of the "character and magnitude" of the burden on voting and associational rights. The discriminatory burden on associational rights here is severe. The 2016 Plan dramatically enhances the voting strength of Republican voters in North Carolina's congressional districts, to the detriment of Democratic voters. For instance, in 2016, Republican candidates won 76.9% of the state's Congressional delegation with only 53.22% of the statewide vote. *Rucho*, 279 F. Supp. 3d at 657. Moreover, as the district court found, the "empirical evidence reveals that the 2016 Plan 'bears more heavily on [supporters of candidates of one party] than another'". *Id.* at 642, *quoting Washington v. Davis*, 426

U.S. 229, 242 (1976). And the district court also found that Plaintiffs' empirical evidence further showed that "the 2016 Plan's pro-Republican bias is not attributable to a legitimate redistricting objective, but instead reflects an intentional effort to subordinate the interests of non-Republican voters." *Rucho*, 279 F. Supp. 3d at 644-45.

The empirical evidence shows that the North Carolina plan's negative effects on the nondominant party were severe. Using the results of the 2016 election, conducted under the 2016 Plan, one of Appellees' experts "calculated an efficiency gap favoring Republican candidates of 19.4 percent," *Rucho*, 279 F. Supp. 3d at 659. Partly by virtue of this disparity in "wasted" votes, Republicans were able to amass an extensive majority of North Carolina's congressional delegation in 2016, even though they had fewer voters statewide than Democrats. Appellees' expert also showed that the plan would likely have an *average* 8% efficiency gap in favor of the dominant party throughout the life of the plan. *Id.* at 660. The plan thus weakens the ability of Democratic voters to associate with each other through the electoral process, compared to their Republican counterparts.

This is the definition of a severe and invidious associational burden: individuals belonging to a group defined by belief or viewpoint are unable, as a result of discriminatory legislation, to associate with one another in a manner that would otherwise enhance their political power. There is overwhelming evidence that these effects were intended. As the district court found, there is no dispute that "the General Assembly intended for the 2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-

Republican candidates. Nor could they. The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data'. . .to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts." *Rucho*, 279 F. Supp. 3d at 597.

The undisputed evidence of record also demonstrates that the 2016 Plan diminished expressive association *outside* the electoral process. *Id.* at 679. The district court found that the 2016 Plan has had various "chilling effects on speech and association—[including] difficulty convincing voters to participate in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials. . . ." *Id.* at 680. For example, the 2016 Plan has made it very difficult for non-Republicans to get out the vote. Multiple Plaintiffs testified that in "the most recent election, a lot of people did not come out to vote" despite concerted get-out-the vote efforts – "[b]ecause they felt their vote didn't count.'" *Id.*, *citing* Deposition of Elizabeth Evans, ECF 101-7, at 16:4-9. The 2016 Plan similarly chilled the speech and associational rights of voters affiliated with the North Carolina Democratic Party. Because Democratic candidates were unlikely to prevail in districts drawn by the General Assembly to elect Republicans, it "ma[d]e[] it extremely difficult" for the North Carolina Democratic Party "to raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts. . . . For the same reasons, the party had difficulty recruiting strong candidates." *Rucho*, 279 F. Supp. 3d at 680 (al-

terations in original), *citing* Deposition of North Carolina Democratic Party by George Goodwin ["Goodwin Dep."], ECF 110-07, at 98: 1-5; 41:20-42:20; 60:23—61:16; *also citing, e.g.*, Deposition of John Quinn, ECF 101-22, at 39:1-3 "[Extreme gerrymandering] makes it harder for me [as a local organizer] to raise money; it makes it harder for me to recruit candidates, makes it harder to just mobilize a campaign."); Deposition of Melzer Morgan, ECF 101-16, at 23 ("[P]eople. . .say [sic] no sense in us giving money to that candidate because [he or she] is unlikely to prevail, notwithstanding the merit of their positions.") *See also* Goodwin Dep., at 44:18-25 ("it makes it extremely difficult to recruit candidates . . . who are of like mind with fellow Democrats whenever the districts are drawn such that the voting history makes it impossible for a Democrat to even come close in those races."); *Id.*, at 56:16-57:10 (discussing the "domino effect" of partisan gerrymandering: "it also makes it difficult. . . to raise funds, to get a message out for those candidates who have policies that support the Democratic platform . . .").

In this case, the discriminatory burden is not narrowly tailored to a compelling government interest. For example, as the district court found, the political geography of North Carolina "does not explain the 2016 Plan's pro-Republican discriminatory effects. . ." 279 F. Supp. 3d at 669. "In sum, we find that the North Carolina] General Assembly drew and enacted the 2016 Plan with intent to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation. . . .[and] that a variety of evidence demonstrates that the 2016 Plan achieved the General Assembly's discriminatory partisan objective. *Id.* at 672. Put another way, the discriminatory burden on associational rights of non-Republican candidates and voters was

not the necessary byproduct of other governmental interests, but rather the purpose and primary consequence of the Act.

D. Maryland's Redistricting Plan Violates Plaintiffs' Associational Rights.

Although the Maryland redistricting plan presents a closer case, the evidence presented is sufficient to affirm the district court's conclusion that it violates the associational rights of the Republican Party and citizens who wish to associate with it. As the district court properly recognized, the 2011 congressional plan was "specifically intended . . . to achieve a 7 to 1 Democratic majority" in the state's delegation. *Lamone*, 348 F. Supp. 3d at 502. The dominant party achieved this objective principally through the redrawing of the Sixth Congressional District. Over 700,000 voters were moved to redraw this district, which retained only one-half of its previous population. *Id.* at 499. The Cook Political Report concluded that this district went from "R+13" to "D+2", the largest swing of any district in the country. *Id.* at 508.

The Maryland record does not contain the same empirical documentation of statewide injury to the non-dominant party's electoral opportunities that is present in the North Carolina case. It does, however, contain evidence of harm to the associational rights of the Republican Party and its members outside the electoral process. Plaintiff Sharon Strine, for example, testified to the effects of the redrawn Sixth District on her efforts to engage Republican voters. Working on behalf of the Sixth District's Republican candidate in 2014, she spoke to thousands of people and reported on the difficulties in motivating people to engage politically. *Id.* at 508 (quoting Strine's statement that people feel "disenfranchised," believing that "it's not

worth voting anymore" because of the redrawn district). The record evidence also documents that Republican voters' participation palpably declined – for example, going down from 48% of registered voters in 2010 to 35% in 2014 in Garrett County, from 43% to 27% in Allegany County, and from 37% to 25% in Washington County. *Id.* Republican fundraising also declined in these counties, all of which were in the Sixth District both before and after the 2011 redistricting. The Republican Central Committees in these counties received 6.5% less in the 2014 cycle than in the previous midterm election cycle. *Id.* at 509. In 2012, those committees experienced a 12% drop compared to the prior election cycle. *Id.* at 509.

The Maryland record thus demonstrates a tangible effect on the associational rights of the Republican Party and its supporters, both inside and outside the electoral process itself. Without empirical evidence of the magnitude of the impact on Republicans statewide – for example, metrics like the efficiency gap, mean-median difference, or seats-to-vote curve – this evidence may not be sufficient to characterize the burden as "severe." But under the *Anderson-Burdick* standard, lesser burdens on association must still be justified by the state's important regulatory interests. And in the Maryland case, the state has utterly failed to justify its redrawing of the Sixth District. As the district court explained, the geographic features of the region cannot explain the dramatic changes that the legislature adopted. *Id.* at 520. To the contrary, all the evidence of record points to one explanation only for the way in which Democrats redrew that district: to maintain a 7-1 Democratic advantage throughout the life of the plan. Because the state has failed to demonstrate an important interest or even a rational basis

for the redrawn Sixth District, this Court should affirm the district court's judgment.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX OF AMICI CURIAE*

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* Where provided, institutional affiliations are for informational purposes only and are not intended to indicate endorsement by the institution of the views of the individual amicus.

the Conflict Between Liberty and Equality, 26 Can J. L. Juris. 293 (2013).

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,
Appellants,

v.

COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,
Appellants,

v.

O. JOHN BENISEK, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Maryland

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Wesberry v. Sanders,
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Other Authorities

Armand Derfner & J. Gerald Hebert,
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Brief of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107 19

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Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Partisanship*, 116 MICH. L. REV. 351 (2017) 11

Michael Wines, *Just how Bad is Partisan Gerrymandering? Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018) 8

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INTEREST OF AMICUS CURIAE[1]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, access to information, and government transparency. The Abrams Institute has an interest in defending robust constitutional protections for the freedoms of speech and press as critical safeguards of our democratic system.

SUMMARY OF THE ARGUMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." So this Court observed in the first line of Chief Justice Roberts's First Amendment plurality opinion in *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191 (2014). It followed that statement by offering five examples of constitutionally protected participation, one of which was voting itself. *Id.* That example was hardly controversial. Voting, after all, is the ultimate form of "speech by citizens on matters of public concern," *Lane v. Franks*, 573 U.S. 228, 235 (2014), and the principal mechanism by which citizens "expressly advocate the election or defeat of a candidate." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320 (2010).

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

Voting thus lies at the heart of First Amendment protection.

Partisan gerrymandering, the practice at issue in these cases, is fundamentally inconsistent with First Amendment principles. These cases arise out of legislation that shapes election districts in a manner designed to predetermine which political party prevails in certain elections. The legislation does this by sorting citizens on the basis of their past expressed political views and targeting those with disfavored views for disfavored treatment. This is nothing less than quintessential, insidious viewpoint discrimination.

Fortunately, settled First Amendment doctrine provides clear, workable standards for rooting out partisan gerrymanders. First Amendment scrutiny is entirely compatible with state legislatures' constitutional authority to regulate the mechanics of voting, and would not preclude consideration of myriad, long-approved districting factors, such as compactness, political subdivisions, contiguity, and communities of interest. Moreover, well-established First Amendment principles provide courts with a manageable and familiar framework for reviewing partisan gerrymandering claims. Nor does the history of this practice, persistently condemned as unconstitutional from the outset, insulate it from First Amendment scrutiny. For the First Amendment does not, in any manner, countenance discrimination against voters on the basis of their viewpoints, and that is precisely what partisan gerrymandering does and is precisely what the First Amendment forbids.

ARGUMENT

I. Partisan Gerrymandering Violates The First Amendment's Protection Of Freedom Of Speech

The First Amendment stands against all "attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). States are prohibited from regulating speech or expressive conduct "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). States engage in just such prohibited conduct when they establish partisan gerrymanders.

A. Voting Is Core Political Speech

Voting lies at the heart of First Amendment protection. It is the ultimate means "of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is the expression of a citizen's views on government, and the principal way of ensuring "that government remains responsive to the will of the people." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The First Amendment protects picketing, petition-signing, protesting, political expenditures, and even the wearing of arm bands precisely because such activities facilitate speech directed at "the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Voting likewise serves the First Amendment's guarantee "that the individual citizen can effectively participate in and contribute to

our republican system of self-government," as much as any other form of protected political speech. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). As such, the First Amendment necessarily protects the casting of a ballot, for it is the ultimate form of political advocacy and the mechanism by which government is held accountable to the people.

This Court has previously observed that voting constitutes the expression of political views that merit First Amendment protection. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (noting that voters "express their views in the voting booth"); *see also Doe v. Reed*, 561 U.S. 186, 195 (2010) (holding that signing a petition "expresses [a] political view" and "the expression of a political view implicates a First Amendment right"); *id.* at 224 (Scalia, J., concurring) (acknowledging "the existence of a First Amendment interest in voting"). A citizen's vote is an "inherently expressive act" because it is the exercise of a "personal right" to express a view on the preferred outcome of an election. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011); *see also id.* at 133 (Alito, J., concurring) ("Voting has an expressive component in and of itself."). [2] Because the First Amendment safeguards this most basic right to participate in the election of our leaders, it necessarily protects participation through voting at least to the same extent it protects participation by running for office, advocating for a candidate, and contributing to a

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[2] A citizen's vote thus differs from a legislator's vote, which "is the commitment of his apportioned share of the legislature's power," as opposed to the commitment of "a personal right" to the democratic election of a candidate. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011).

campaign. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality opinion).

Additionally, voting falls well within the ambit of the First Amendment as protected expressive conduct. *See Texas v. Johnson*, 491 U.S. 397, 403 (1989). [3] The act of voting is quintessentially expressive—it seeks "to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Votes communicate a clear message to multiple audiences, from candidates to officeholders to ballot counters, all of whom readily understand both the literal meaning of a written or spoken vote and the wider political message that vote conveys.[4] Thus, whether viewed as pure speech or expressive conduct, voting is fully protected by the First Amendment.[5]

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[3] *See also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 487 (2016) ("Voting . . . plainly expresse[s] a point of view and represent[s] a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.").

[4] Nowhere is this more apparent than in the speech-based rhetoric with which politicians and the media characterize election results as 'voters sending a message,' 'voters saying they want change,' 'voters telling us they're frustrated,' and so forth.

[5] Of course, the First Amendment would guard against viewpoint discrimination in the act of drawing legislative districts even if voting were not fully protected speech or expressive conduct. *See Carrigan*, 564 U.S. at 125 ("We have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First

The history of voting in the United States confirms that it has always been archetypal political speech. In early America, voting was conducted by voice vote, termed *viva voce*, or by a public show of hands. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). The *viva voce* method "was not a private affair, but an open, public decision, witnessed by all." *Id.* Election judges would call the name of an individual voter and ask, "for whom do you vote?"—to which the voter would reply "by proclaiming the name of his favorite" candidate. *Doe*, 561 U.S. at 224 (Scalia, J., concurring). Several states held fast to the "oral expression" method of voting up through the Civil War, while others variously replaced the practice of *viva voce* voting with paper ballots. *Id.* at 226.

The switch to paper did not dampen the essential speech element of voting. To the contrary, political parties "used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance," making the votes a public form of political communication at the polling place. *Id.*; *see also Burson*, 504 U.S. at 200-01. At the end of the nineteenth century, states adopted the Australian secret ballot in a direct effort to protect voters' political speech at the polls from being suppressed or distorted through coercion and intimidation. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (noting that the First Amendment protects anonymous political speech in order "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant

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Amendment.") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992)).

society"). A vote—whether delivered orally or in writing, publicly or anonymously—has always functioned as a form of political speech advocating for the election or defeat of a candidate.

That a vote has a specific legal effect does not alter its status as protected political speech. This Court has confirmed that the "legal effect" of an "expressive activity" does not "deprive[] that activity of its expressive component, taking it outside the scope of the First Amendment." *Doe*, 561 U.S. at 195; *see also id.* at 231 (Thomas, J., dissenting) (underscoring the majority's recognition that expressive activity does not fall "'outside the scope of the First Amendment' merely because 'it has legal effect in the electoral process'"). If the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *McCutcheon*, 572 U.S. at 191, it surely follows that a vote—which translates political advocacy into political representation—receives the highest First Amendment protection. If anything, the legal effect of a vote elevates its status to the apex of protected speech.

B. Partisan Gerrymandering Is Viewpoint Discrimination

It is axiomatic that "the government offends the First Amendment when it imposes . . . burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. Partisan gerrymanders do just that. Partisan gerrymandering assigns voters to districts on the basis of their political views with the aim of devaluing the votes of disfavored speakers and enhancing the political impact of preferred speech—goals this Court has

emphatically found impermissible in the context of political speech. *See, e.g.*, *Citizens United*, 558 U.S. at 341; *McCutcheon*, 572 U.S. at 191 ("[T]he political participation of some" may not be restricted "in order to enhance the relative influence of others.").

States engaging in partisan gerrymandering accord their citizens differential treatment based on whether their viewpoints are favored or disfavored by those in power. Past expression—namely, voting history—is used to determine how best to serve the governing party's interests. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). Legislators rely on computer software that overlays state maps with voters' political data to determine the partisan impact on a proposed district of adding or removing voters in groups as small as a block.[6] Citizens with favored views are assembled into districts in a manner most likely to ensure that their preferred candidates will prevail and their political views carry the day. Citizens with disfavored views are "packed," "cracked," or otherwise assigned to districts in ways designed to minimize their political efficacy and defeat their political views. Partisan gerrymandering is thus unambiguously an official act of viewpoint discrimination.

That is precisely what Maryland and North Carolina did here. The states relied on citizens' past voting history to classify them by viewpoint, and then used that classification to decide whether those

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[6] Michael Wines, *Just how Bad is Partisan Gerrymandering? Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/us/gerrymander-political-maps-maryland.html.

citizens should receive favored or disfavored treatment in the redistricting process. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 503 (D. Md. 2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). This type of state action is, by its very nature, at war with the First Amendment.

In Maryland, the challenged congressional districts were drawn using partisan data, including past voting history. *Benisek*, 348 F. Supp. 3d at 503-04. The draft map shown to the state's most senior Democratic leaders was paired with "party registration data and voter turnout data," to develop the final map. *Id.* at 504. Explicit statements by lawmakers and other public officials confirmed the intention to use this information to draw districts in such a manner that the speech preferred by the legislature would prevail in Maryland's Sixth District. *Id.* at 498 (describing undisputed evidence in the record demonstrating legislative intent to disfavor Republican voters). The record findings leave no doubt that Maryland assigned its citizens to election districts based on their political viewpoints.

The North Carolina record demonstrates the same practice. The consultant employed by the North Carolina Redistricting Committees consciously employed "past election data to draw maps that were more favorable to Republican candidates." *Rucho*, 318 F. Supp. 3d at 804 (internal quotation marks omitted). After a federal district court struck down parts of that plan as an illegal racial gerrymander, the chairs of the Redistricting Committees again directed the consultant "to use political data," specifically precinct-level election results, to draw a remedial map. *Id.* at

805. Subsequently, the joint Redistricting Committee adopted districting criteria that relied *only* on population and past election data and that *explicitly* sought to maintain a partisan makeup of 10 Republicans and 3 Democrats. *Id.* at 807-08; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (finding the statute viewpoint discriminatory where the legislature's "stated purposes" were to "target [certain] speakers and their messages for disfavored treatment"). The record findings conclusively demonstrate the North Carolina legislature's use of citizens' viewpoints as the basis for their treatment in the redistricting process.

The process used by each state in drawing the district maps, as well as explicit statements by lawmakers and other public officials, lays bare the legislatures' discrimination against voters on the basis of viewpoint: they assigned citizens disparate treatment based on past expressed views for the purpose of diluting disfavored speech in upcoming elections. In this way, partisan gerrymandering works a double First Amendment injury: it punishes past speech by burdening future speech. Such disfavored treatment imposed because of viewpoint violates the First Amendment. *See Citizens United*, 558 U.S. at 336-37.

The Court need not evaluate the efficacy of a partisan gerrymander to recognize it as viewpoint discrimination. [7] The First Amendment broadly prohibits state action constituting viewpoint

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[7] *See generally* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018).

discrimination regardless of whether that state action achieves its intended effects.[8] The same principle applies to partisan gerrymanders: intentional efforts to discriminate on the basis of viewpoint violate the First Amendment, regardless of whether they succeed. Viewpoint discrimination itself undermines our democracy, in every form it takes, including the partisan gerrymander.

Moreover, quite apart from the vote-dilution, retaliation, and associational harms such viewpoint discrimination inflicts, partisan gerrymanders work a further harm by signaling to whom a district does—and does not—"belong." As the Court has recognized in the context of racial gerrymandering, gerrymandered districts send a message to elected officials about their obligations. Where legislatures draw district boundaries to favor a particular group at the expense of others, legislators understand "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). The "signaling" effected by the gerrymander, therefore, creates an independent representational harm. *Id.* at 650. While the Court decided *Shaw* on Fourteenth Amendment grounds, the logic applies equally to First Amendment claims: whenever the state draws district boundaries with the intent to favor one political party, the legislature conveys a message about whom the representative's "real" constituents are. That devalues the votes—and therefore the speech—of some constituents so that

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[8] *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Partisanship*, 116 MICH. L. REV. 351, 379-81, 403 (2017) (providing examples).

others' speech may be more effective. The same representational harms identified in *Shaw*, therefore, inhere in partisan gerrymanders.

At bottom, drawing district lines with the intention of ensuring victory for candidates of a particular political party is nothing less than imposing restrictions on disfavored views and elevating the influence of the governing party's voters at the expense of others. Such governmental conduct would not be countenanced with respect to any other form of political speech protected by the First Amendment. It is "wholly foreign to the First Amendment." *McCutcheon*, 572 U.S. at 207 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

C. Partisan Gerrymandering Does Not Survive Strict Scrutiny

As viewpoint discrimination, partisan gerrymanders must survive strict scrutiny in order to pass constitutional muster.[9] Few, if any, viewpoint discriminatory laws are sufficiently justified under this standard. *Sorrell*, 564 U.S. at 571. Indeed, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. To overcome this strong presumption against their constitutionality, the Maryland and North Carolina maps must be shown to be "the least restrictive means of achieving a

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[9] Even viewing a vote as expressive conduct rather than pure speech, strict scrutiny applies because partisan gerrymandering is directly related to that expression. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Neither succeeds.

Both Maryland and North Carolina have failed to demonstrate any legitimate, let alone compelling, interest to justify their gerrymandered districts. Their sole interest in using citizen's political viewpoints when drawing these districts was to create partisan advantage. *See* Rucho App. Br. 22. To state the obvious, "partisan advantage" is hardly a compelling governmental interest. Partisan advantage is simply a restatement of legislative intent to impose disfavored treatment on voters expressing disfavored views—the very definition of viewpoint discrimination. Where a viewpoint-discriminatory regulation "has a speech-based restriction as its sole rationale and operative principle," the state has plainly failed to offer a permissible justification. *Rosenberger*, 515 U.S. at 834.

The Maryland appellants gesture to hypothetical interests that might be served by some other theoretical use of partisan data, such as an interest in mimicking proportional representation or undoing prior partisan gerrymanders, but they offer no defense of the challenged map on these grounds.[10] *See* Lamone App. Br. 37-42. Without a compelling governmental interest justifying the gerrymanders at

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[10] The Court need not consider here whether using political data to accomplish such "egalitarian" interests would necessarily trigger a First Amendment strict scrutiny analysis, or whether a lower standard of scrutiny might be warranted. *Cf. Rosenberger*, 515 U.S. at 831 (discrimination consists of "disfavored treatment" imposed on speakers because of their viewpoint).

issue, appellants fail to meet the demanding standard to justify viewpoint discrimination.

The Court need not reach the least-restrictive-means analysis because appellants have failed to offer any compelling interest. Were the Court to reach the tailoring prong, however, both gerrymanders again would fail. To the extent appellants offer any compelling justification for their partisan gerrymanders, neither has explained how any such hypothetical interest requires discriminating against citizens on the basis of viewpoint.

Because the partisan gerrymanders neither serve a compelling interest nor are narrowly tailored, the judgments below should be affirmed under well-established First Amendment principles.

II. First Amendment Scrutiny Offers The Appropriate Framework For Determining The Constitutionality Of Partisan Gerrymandering

A. Settled First Amendment Doctrine Provides A Workable Standard For Legislatures And Courts

The application of long-established and repeatedly applied First Amendment principles to assess the constitutionality of legislative redistricting would not interfere with the consideration of myriad factors long-approved by this Court, such as contiguity, compactness, political subdivisions, communities of

interest,[11] conformity with geographic features, and equality of population—all of which the Court has accepted as legitimate, *see, e.g.*, *Shaw*, 509 U.S. at 647 (describing "traditional districting principles"), or required, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"). Such considerations do not involve line-drawing on the basis of First Amendment-protected expression. Thus, a First Amendment viewpoint discrimination analysis is well-suited to maintaining state legislatures' ability to rely on traditional districting principles—including considerations thought to be "political"—when drawing district lines.

First Amendment scrutiny of partisan gerrymanders is also entirely compatible with state legislatures' broad constitutional authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. 1, § 4, cl. 1. This authority permits states to impose "'*reasonable, nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters." *Burdick*, 504 U.S. at 434 (emphasis added) (quoting *Anderson v.*

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[11] Respect for "communities of interest" cannot justify drawing district lines on the basis of political viewpoint. Accounting for "communities of interest" means that districts should be drawn so that persons residing within a district share social, cultural, and economic interests in common. *See, e.g.*, MICH. CONST. art. IV, § 6, cl. 13(c) (requiring districts to reflect communities of interest, which include "populations that share cultural or historical characteristics or economic interests," but expressly "do not include relationships with political parties, incumbents, or political candidates").

Celebrezze, 460 U.S. 780, 788 (1983)). The Elections Clause allows states to regulate the mechanics of voting, even if the result has some impact on voter expression. It does not, consistent with the First Amendment, permit states to enact election regulations that discriminate against voters on the basis of viewpoint. *See McIntyre*, 514 U.S. at 345 (contrasting permissible measures to "control the mechanics of the electoral process" with the impermissible "regulation of pure speech"). Much as states may regulate expressive conduct "because of the action it entails, but not because of the ideas it expresses," so too states may regulate the mechanics of voting for the legal process it entails, but not for the political message it expresses. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). This Court has already affirmed as much, having held that "severe" restrictions on the First Amendment at the ballot box are subject to strict scrutiny, unlike nondiscriminatory ones. *Burdick*, 504 U.S. at 434 (citing *Norman v. Reed*, 504 U.S. 279, 289 (1992)).

Likewise, First Amendment principles are judicially manageable and thus allay concerns that courts lack administrable standards under the Equal Protection Clause to review partisan gerrymandering claims. Some members of this Court have in the past queried whether any workable standard could be articulated. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion); *id.* at 311 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 155 (1986) (O'Connor, J., concurring). Relying on established First Amendment doctrine provides clear guidelines for courts when called upon to adjudicate partisan gerrymandering claims.

A First Amendment framework does not require courts to police a standard that is unduly vague. As Justice Scalia wrote in *Vieth*, "the vaguer the test for availability, the more frequently interest rather than necessity will produce litigation." 541 U.S. at 300-01. Fortunately, the First Amendment provides a bright line rule: intentionally targeting individuals because of their partisan views and prior voting history constitutes viewpoint discrimination and is subject to strict scrutiny. Far from "attempt[ing] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), this rule only forbids insidious and deliberate viewpoint discrimination in the districting process.[12] A First Amendment framework is thus not only constitutionally mandated here, it is also both familiar to the courts and proven to be judicially administrable.[13]

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[12] In *Gaffney*, a Fourteenth Amendment case, this Court held that a redistricting map designed to achieve rough proportional representation did not offend the Equal Protection Clause because it aimed "not to minimize or eliminate the political strength of any group or party, but to recognize it." 412 U.S. at 754. *Gaffney* also confirmed that it would constitute "invidious[] discriminat[ion] . . . to minimize or cancel out the voting strength of . . . political elements of the voting population." *Id.* at 751 (internal quotation marks omitted).

[13] Indeed, this test is more manageable than the standard for scrutinizing a racial gerrymander, which requires courts to inquire into legislative motive, the predominance of racial considerations, and the interaction between federal statutory law and the Fourteenth Amendment, among other complex questions.

B. The Historical Practice Of Partisan Gerrymandering Does Not Shield It From First Amendment Scrutiny

The long-standing practice of partisan gerrymandering by some states provides no justification for its constitutionality. This is especially true here where the historical record demonstrates persistent rejection of its constitutionality from the outset. Indeed, the history of partisan gerrymandering is a history of constitutional condemnations of the practice.

The first alleged partisan gerrymander, involving Virginia's 1788 districting, was decried by residents as an effort to thwart the nascent Constitution, and by newspapers as "a violation of the right of a free people . . . to choose their representatives."[14] A quarter century later, the portmanteau "Gerry-mander" was coined to describe an audacious map, approved by Massachusetts Governor Elbridge Gerry, that was so arched and contorted it resembled a salamander. That map was immediately and resoundingly denounced as a "grievous wound on the Constitution,—it in fact subverts and changes our Form of Government."[15] The Federalists viewed the map as "a blow at the constitution and a travesty upon the Bill of Rights," and a petition presented to the

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[14] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 40-41 (1907); *see also* Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD. 781 (2011).

[15] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

Massachusetts legislature to redraw the district characterized the map as "unconstitutional, unequal, and unjust."[16] The *Boston Gazette* attributed the results of the subsequent election to the "unconstitutional hackings and hewings of the state."[17] Where the same stunt was attempted in other states over the next several decades, the reaction was the same: partisan gerrymanders are an abuse of power and "an attempt to deprive the people of their rights."[18]

Courts too have long viewed the practice of partisan gerrymandering as constitutionally suspect. In state law challenges to the practice following the end of Reconstruction, courts described partisan gerrymanders as abhorrent to the Constitution. *See, e.g., Parker v. State ex rel. Powell*, 32 N.E. 836, 846 (Ind. 1892) (Elliott, J., concurring) (observing that those "who framed our constitutional system knew and provided against the dangers of legislative usurpation of power, and the wisest among them united in devising checks upon it."); *State ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724, 730 (Wis. 1892). This Court has long evinced the same skepticism and never endorsed the practice. In fact, it has searched for decades for the right case in which to assess the constitutionality of partisan gerrymandering. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *League of United Latin Am. Citizens v. Perry*,

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[16] GRIFFITH, *supra*, at 70-71.

[17] *Id.* at 89.

[18] *Id.* at 106; *see also* Brief of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107.

548 U.S. 399 (2006); *Vieth*, 541 U.S. 267; *Bandemer*, 478 U.S. 109.

It is thus entirely consistent with the Founding era's public understanding of the Constitution to hold that partisan gerrymandering violates the rights secured by the Constitution, and it coheres with the understanding of jurists and citizens alike since that time that this practice "is wholly foreign" to the republican system of government the Constitution established. *Buckley*, 424 U.S. at 49; *cf. Wesberry*, 376 U.S. at 7-18 (relying on the historical record of constitutional skepticism of malapportionment to hold that longstanding practice unconstitutional).

Even without such continuous concern over the constitutionality of a practice, an appeal to history alone cannot spare an unconstitutional governmental action. The longstanding use of a governmental practice, even on a widespread basis, does not prevent this Court from inquiring into its constitutionality or immunize it from judicial intervention. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 944-45 (1983).

This Court has not shied away from striking down longstanding political practices for failing to meet the Constitution's mandates, even while expressly acknowledging their longevity. For example, in *Reynolds v. Sims*, the Court reiterated its commitment to the Constitution over convention by holding that the Equal Protection Clause requires state legislative districts to contain substantially equal populations. 377 U.S. at 568. In so holding, the Court explicitly rejected the argument that the historical longevity of malapportionment bore on its constitutional analysis: "neither history alone, nor

economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.* at 579-80 (footnote omitted). Indeed, the Court made clear that when "[t]he complexions of societies and civilizations change . . . [r]epresentation schemes once fair and equitable become archaic and outdated." *Id.* at 567. What remains constant is the fundamental principle that "the weight of a citizen's vote cannot be made to depend on where he lives." *Id.*

In similar fashion, this Court has not hesitated to strike down racial gerrymandering as unconstitutional under both the Fourteenth and Fifteenth Amendments, notwithstanding its pervasiveness "[f]or much of our Nation's history," including "in parts of this country nearly a century after ratification of the Fifteenth Amendment." *Shaw*, 509 U.S. at 639-40. In a direct rejection of this protracted and ubiquitous practice, the Court perceived it posed "the risk of lasting harm to our society," and demanded such gerrymanders be held to strict scrutiny. *Id.* at 657.

Likewise, in a run of three cases over more than a decade, this Court excised the deeply entrenched practice of political patronage as a violation of the First Amendment, notwithstanding its long-running history "at the federal level at least since the Presidency of Thomas Jefferson." *Elrod v. Burns*, 427 U.S. 347, 353 (1976); *see also Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). The Court's elimination of this two-

hundred-year practice swatted down the notion that historical longevity counsels judicial restraint:

> Our inquiry does not begin with the judgment of history, though the actual operation of a practice, viewed in retrospect, may help to assess its workings with respect to constitutional limitations. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954), *with Plessy v. Ferguson*, 163 U.S. 537 (1896). Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice.

Elrod, 427 U.S. at 354-55. In keeping with its role as the guardian of the First Amendment's guarantee of free participation in our democracy, this Court should now hold partisan gerrymandering unconstitutional.

* * *

The First Amendment categorically forbids viewpoint discrimination because it is fundamentally incompatible with democratic self-government. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. Left unchecked, viewpoint-discriminatory gerrymanders invert the relationship between citizens and their elected representatives, who no longer "have an immediate dependence on, and an intimate sympathy with, the people." THE FEDERALIST NO. 52 (James Madison). Instead, citizens depend on governmental approval of their

speech to effectively exercise the right to participate in electing our political leaders. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of the First Amendment." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

CONCLUSION[19]

This Court should affirm the decisions of the district courts and hold that partisan gerrymandering violates the First Amendment.

Respectfully submitted,

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[19] Counsel wish to thank law students Simon Brewer, Jacob Schriner-Briggs, and Jacob van Leer for their invaluable contributions to this brief. Counsel prepared this brief with the Media Freedom and Information Access Clinic, a program of the Floyd Abrams Institute for Freedom of Expression at Yale Law School. The brief does not purport to express the School's institutional views, if any.

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF BERNARD GROFMAN AND RONALD KEITH GADDIE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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Gill v. Whitford,
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Johnson v. De Grandy,
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League of United Latin American Citizens v. Perry,
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League of Women Voters v. Commonwealth of Pennsylvania,
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Miller v. Johnson,
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Reynolds v. Sims,
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Shaw v. Hunt,
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Thornburg v. Gingles,
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Other Authorities

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Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (2009).....2, 19, 20

Charles S. Bullock, III, Ronald Keith Gaddie & Justin J. Wert, *The Rise and Fall of the Voting Rights Act* (2016).....2

Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312 (2015).....22

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Ronald Keith Gaddie & Charles S. Bullock, III, *Elections to Open Seats in the U.S. House: Where the Action Is* (2000) 2

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Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Pol. Methodology 295 (1983).....1

Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-*Gill *World*, 18 Election L.J. (forthcoming 2019).....12

Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in* Redistricting in the New Millennium (Peter Galderisi ed., 2005) 17

Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 264 (2018) 1

Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 2 (2007) 1, 17

Bernard Grofman, William Koetzle & Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 Electoral Stud. 457 (1997) 1

Bernard Grofman, Michael Migalski & Nicholas Noviello, *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 L. & Pol'y 199 (1985) 1

Justin Levitt, *Where Are The Lines Drawn?, All About Redistricting*, https://tinyurl.com/aw3qgn5 (last visited Feb. 5, 2019).....19

Jonathan Mattingly et al., *Quantifying Gerrymandering*, https://tinyurl.com/yc4cvxkg (last visited Feb. 5, 2019).....22

Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312 (2015) 16, 19

Anthony J. McGann et al., *Gerrymandering in America* (2016) 9, 10, 17, 20

Richard G. Niemi, Bernard Grofman, Carl Carlucci & Thomas Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Pol. 1155 (1990).....1

Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 Pol. Geography Q. 5 (1988).....1

Olga Pierce, Jess Larson & Lois Beckett, *Redistricting, A Devil's Dictionary*, ProPublica (Nov. 2, 2011), https://tinyurl.com/y9uuagw8 6

Report of the Special Master, ECF No. 323, *Bethune-Hill v. Va. State Bd. of Elections*, No. 14-CV-0852 (E.D. Va. Dec. 7, 2018).....7

State Partisan Composition, Nat'l Conference of State Legislatures, https://tinyurl.com/guos34u (last updated Feb. 4, 2019) 10

Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016).....14

Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015) 16

Samuel S. H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 16 Election L.J. 367 (2016).....18

INTEREST OF *AMICI CURIAE*[1]

Amici are political scientists who specialize in redistricting, including the statistical methods used to detect and measure partisan gerrymandering. *Amici* have served as expert witnesses and consultants in redistricting cases on behalf of both states and plaintiffs, Republicans and Democrats. They have also published many peer-reviewed articles on the subject.[2]

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Professor Grofman's publications include Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 264 (2018); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 2 (2007); Bernard Grofman, William Koetzle & Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 Electoral Stud. 457 (1997); Richard G. Niemi, Bernard Grofman, Carl Carlucci & Thomas Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Pol. 1155 (1990); Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 Pol. Geography Q. 5 (1988); Bernard Grofman, Michael Migalski & Nicholas Noviello, *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 L. & Pol'y 199 (1985); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Pol. Methodology 295 (1983).

Amici seek to assist the Court in understanding recent developments in social science methodologies for identifying and measuring the extent of partisan gerrymanders. They do not take a position on whether, given the particular facts and expert witness analyses, the district courts correctly decided these cases. But *amici* firmly believe that partisan gerrymanders are justiciable, and that this Court should adopt an articulable standard for adjudicating partisan gerrymandering claims. Social science tools now allow courts to diagnose partisan gerrymanders with accuracy and precision, including identifying the specific legislative district or districts affected. They also allow courts to distinguish ordinary, acceptable politicking from conduct that rises to the level of unconstitutional discrimination against voters based on their political views. If the Court again declines to adopt a standard for unconstitutional partisan gerrymandering, politicians will have free rein to violate associational and representational rights.

Amicus Bernard Grofman is the Jack W. Peltason Chair of Democracy Studies and Distinguished Professor of Political Science at the University of California, Irvine. He has frequently served as an expert

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Professor Gaddie's publications include Charles S. Bullock, III, Ronald Keith Gaddie & Justin J. Wert, *The Rise and Fall of the Voting Rights Act* (2016); Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (2009); Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *To* Larios*: Recent Redistricting Lessons from Georgia*, 34 Fordham Urb. L.J. 997 (2007); Ronald Keith Gaddie & Charles S. Bullock, III, *Elections to Open Seats in the U.S. House: Where the Action Is* (2000).

witness and consultant in redistricting cases, including for the State of Indiana in *Davis v. Bandemer*, 478 U.S. 109 (1986), and for the plaintiffs in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). He joined *amicus* briefs on behalf of neither party in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), urging that partisan gerrymanders are justiciable. This Court has previously cited Professor Grofman's work (including volumes he edited) in over a dozen cases.[3] Scholars often credit his brief in *LULAC* with introducing the Court to the first generation of social science analysis of partisan asymmetry, and his work was cited extensively in the development of the *Gingles* test for evaluating racial vote dilution under the Voting Rights Act. Professor Grofman has also drawn redistricting plans for federal district courts, non-partisan commissions, and the U.S. Department of Justice—including recent service in 2015 as the special master to a federal district court after it declared Virginia's Congressional District 3 unconstitutional; in 2017 as the special master to a district court responsible for the redrawing of

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[3] *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *LULAC v. Perry*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Davis v. Bandemer*, 478 U.S. 109 (1986).

county commission and school district lines in a small Utah County with a large Navajo population after the previous maps were found unconstitutional under *Shaw v. Reno*; and in 2018 as the special master to a district court responsible for the redrawing of eleven Virginia legislative districts found to be unconstitutional under *Shaw*. Professor Grofman's curriculum vitae is available at https://tinyurl.com/y8ppxmvg.

Amicus Ronald Keith Gaddie is the President's Associates Presidential Professor of Political Science, Architecture and Journalism at the University of Oklahoma and an editor of Social Science Quarterly. He too has served as an expert witness and consultant in numerous redistricting cases, including for the State of Texas in *LULAC* and for the plaintiffs in *Cox v. Larios*, 542 U.S. 947 (2004). Most recently, Professor Gaddie worked as a consultant to the Wisconsin legislature's Republican leadership in drafting the map at issue in *Gill v. Whitford*; the Republican Caucus's attorneys hired Professor Gaddie to assess, among other things, the expected partisan impact of the proposed maps. Professor Gaddie has always believed that partisan gerrymanders are justiciable. He coauthored an *amicus* brief with Professor Grofman in *Gill*. His curriculum vitae is available at https://tinyurl.com/y874ysrm.

INTRODUCTION AND SUMMARY OF ARGUMENT

Modern, computer-driven redistricting now allows the political party in power to craft extremely sophisticated partisan gerrymanders. With vastly improved computer speed, memory, and storage, map

drawers can design district lines so precisely that they simultaneously maximize their party's gains and eliminate most competitive districts—ensuring that the party in power enjoys an electoral advantage that endures throughout the following decade, irrespective of voters' subsequent choices.

Left unchecked, partisan gerrymandering fundamentally undermines our democracy. It is a basic tenet of fair elections that the parties must play by the same rules. But a partisan gerrymander violates that core principle: Under a successful partisan gerrymander, one party needs fewer votes to win representation than the other party. A partisan gerrymander dilutes the votes of some members of the electorate, simply because of their partisan affiliation. And where the partisan gerrymander is unresponsive to electoral shifts, only the courts can provide a remedy.

This Court should hold that partisan gerrymandering claims are justiciable. To be precise, partisan gerrymandering occurs when a districting plan subjects voters to unequal treatment in the weight of their votes, diluting the power of disfavored citizens' votes compared to what might be expected from a plan drawn on the basis of neutral principles. But not all partisan gerrymanders are unconstitutional. The Court should adopt a test for unconstitutional partisan gerrymandering that requires a showing of packing or cracking in a particular district or set of districts that is caused by invidious discrimination and persistently costs the party out of power at least one seat. The district-specific standard we propose provides a judicially manageable framework through

which judges can and should identify and evaluate the extent of partisan gerrymanders. And social science provides ample tools—in the form of analytical tests and computer simulations—to assist the judiciary in conducting those inquiries.

ARGUMENT

I. Courts Must Provide a Check on Egregious Partisan Gerrymandering.

Invidious partisan gerrymandering occurs when a political party intentionally redraws legislative district lines to give itself a durable electoral advantage over the party out of power, penalizing disfavored voters and diluting their votes.[4] The two indispensable tools of partisan gerrymandering are "packing" and "cracking." *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (describing "familiar techniques of political gerrymandering").[5] "Cracking" means spreading opposition party voters across multiple districts so

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[4] We use the phrase "dominant party" to refer to the party doing the line drawing, even if it is not a voting majority of the electorate. The phrase "opposition party" refers to the party out of power.

[5] Other partisan gerrymandering techniques maximize partisan advantage by treating the disfavored party's incumbents disparately, through pairing two incumbents of the disfavored party in one district to preclude one's reelection ("hijacking") or separating an opposition party incumbent from her core supporters to reduce her chances of reelection ("kidnapping"). *See* Olga Pierce, Jess Larson & Lois Beckett, *Redistricting, A Devil's Dictionary*, ProPublica (Nov. 2, 2011), https://tinyurl.com/y9uuagw8; *see generally* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 151 (1985). Also belonging in the gerrymandering

that opposition party support falls short of a majority in each, rendering the opposition incapable of prevailing in any of those districts. Cracking ensures that opposition voters within the cracked districts have a diminished—and vanishingly small—opportunity to elect their candidates of choice. "Packing," in turn, means concentrating the opposition party's backers within one or a small number of districts such that the opposition party wins those districts by overwhelming margins—making those districts essentially noncompetitive. Packing dilutes the influence of opposition party voters within the packed district, rendering each such voter functionally irrelevant to the resulting landslide opposition party victory in the district, and makes it harder for the opposition to win seats because of the distribution of its supporters.

Voters who reside in districts that have been "packed" or "cracked" suffer from having their votes diluted relative to voters in a non-gerrymandered baseline district. They have a reduced opportunity for their vote to make a difference in the outcome of an election. In short, their votes "carry less weight than [they] would carry in another, hypothetical district" that was not gerrymandered. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (majority op.); *see also, e.g.*,

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lexicon is "fracking," which Professor Grofman uses to refer to a form of discontiguity in which a district contains a border that "traverse[s] a county line more than once." *See* Report of the Special Master, ECF No. 323, at 50-51, *Bethune-Hill v. Va. State Bd. of Elections*, No. 14-CV-0852 (E.D. Va. Dec. 7, 2018) (finding fracking in four Virginia legialative districts identified by the district court as unconstitutional and no such discontiguity among districts in the same part of the state whose constitutionality had not been challenged).

Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). This Court has previously held that packing and cracking injure individual voters who are subjected to racial gerrymandering by diluting their votes; vote dilution is also the injury suffered by voters bringing one person, one vote claims. Packing and cracking similarly dilute the votes of citizens subjected to partisan gerrymandering.[6]

Discrimination based on partisanship has real-world consequences. A voter who supports a disfavored party is denied an equal opportunity to use her vote to affect the representation of her district. Her vote is diluted relative to favored voters, because she is "packed" or "cracked" into a district where she does not affect the outcome. The officials representing her district are in turn unaccountable to her. Similarly, across a districting plan, voters from the disfavored party are denied an equal opportunity to affect the partisan composition of the legislature—meaning the legislative proposals they support are less likely to be introduced, debated, and passed. And because such voters have been deliberately boxed out of the political process, they may be unable to reverse the dilution of their votes by electing representatives who will ensure a more neutral distribution of political power. A

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[6] Although packing does not prevent the election of the packed voter's candidate of choice, this Court has recognized that it nonetheless causes a dilution injury because each packed individual's vote has less weight. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

partisan gerrymander thus discriminates against voters in their representational rights because of their views and political associations in a way that cannot realistically be ameliorated through the ordinary electoral process.[7] *See Bandemer*, 478 U.S. at 124 ("[E]ach political group in a State should have the same chance to elect representatives of its choice as any other political group.").

There is compelling evidence that the 2010 redistricting cycle yielded partisan gerrymandering of a magnitude that is qualitatively and quantitatively different from what we have seen in the past—as much as three times more partisan bias than in the 2000 redistricting cycle—even when controlling for residential patterns of voters and demographic change. Anthony J. McGann et al., *Gerrymandering in America* 4-5, 97-98 (2016). Indeed, there were strong increases in bias even where the same party controlled both the 2000 and 2010 redistricting processes. *Id.* at 174. This increase in the aggressiveness of partisan gerrymanders may be driven in part by the fact that, as a result of the Court's "signal[] in *Vieth v. Jubelirer* (2004) that it would not intervene ... [,] state legislatures did not have to worry about the threat of legal oversight and pushed partisan advantage to its limits" during the 2010 cycle. *Id.* Absent

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[7] Plaintiffs alleging unconstitutional partisan gerrymanders have advanced several constitutional theories. *Amici* have sought to offer a standard for identifying and evaluating a partisan gerrymander at the district level under the Equal Protection Clause and the First Amendment. But *amici* also believe that manageable standards exist for evaluating partisan gerrymanders at a statewide level.

a judicial check, the level of egregious partisan gerrymandering may worsen still in 2020 because of a marked increase in the number of legislatures under unified partisan control. *See State Partisan Composition*, Nat'l Conference of State Legislatures, https://tinyurl.com/guos34u (last updated Feb. 4, 2019).

Whether courts should intercede to police egregious partisan gerrymanders is not a matter of one's political leanings. While evidence suggests that at a national level, the net benefits of partisan gerrymandering currently accrue to Republicans, in the past, the net benefits have accrued to Democrats. McGann et al., *supra*, at 71-72, 88. The party in power has strong incentives to change the map to keep itself there. Indeed, the Court here is considering a pair of cases challenging maps enacted by Republicans on one hand and Democrats on the other. On either side, where there is improper gerrymandering it is the voters who lose: Their rights are undermined based upon their political views, and incumbents are entrenched in office without regard to changes in voter preferences. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (noting "the core principle of republican government" that "voters should choose their representatives, not the other way around").

Courts must serve as a neutral check. If the Court again declines to adopt a standard for unconstitutional partisan gerrymandering, politicians will have free rein to wield the technological advances discussed below to craft ever more egregious partisan gerrymanders. Continued judicial abdication would ensure that representatives are selected by the self-

dealing maps they enact, rather than elected by the people they ostensibly serve—locking in place electoral advantages that are, for all practical purposes, impervious to changes by the electorate.

II. Partisan Gerrymanders Can Be Identified and Measured on a Single-District Basis.

The majority opinion in *Gill* made clear that the threshold inquiry under a vote dilution theory of partisan gerrymandering requires identifying specific districts that have been packed or cracked. *See Gill*, 138 S. Ct. at 1921 ("The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked."). In our view, a successful partisan gerrymandering claim will demonstrate packing or cracking in a specific district that is caused by invidious discrimination and persistently costs the party out of power at least one seat. Fortunately, while the tests previously proposed for identifying a partisan gerrymander—including tests that included measures of partisan asymmetry like the efficiency gap and the mean-median gap—typically entailed statewide analysis, the Court need not start from scratch to identify a district-level gerrymander. Instead, the well-developed jurisprudence in racial gerrymandering cases can be adapted to determine the existence of "packing" or "cracking" in the partisan gerrymandering context. And existing social science tools can assist courts in determining the extent to which the challenged district deviates from a neutral baseline, whether the deviation is likely to persist over election cycles, and whether invidious partisan discrimination is the cause.

A. Courts can readily identify packing or cracking in a specific district that costs the party out of power at least one seat.

The Court's racial gerrymandering jurisprudence offers a well-developed framework for identifying whether a particular district has been packed or cracked. We propose adapting existing standards to the partisan gerrymandering context.[8]

Racial vote dilution claims under Section 2 of the Voting Rights Act require a showing that an electoral measure has resulted in the denial or abridgment of the right to vote based on race. *See Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986); *see also Bartlett v. Strickland*, 556 U.S. 1, 26 (2009).[9] In making a threshold determination of whether the necessary (but not sufficient) conditions for such a vote dilution claim have been met, the Court has adopted a three-pronged test, in which the plaintiff must prove that (1) she belongs to a group that is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group is politically cohesive; and (3) voting is racially polarized, and the

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[8] Elaboration of some of the tests and measurement issues discussed in this brief can be found in Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-*Gill *World*, 18 Election L.J. (forthcoming 2019) (on file with author). It will be made available online later this winter.

[9] Similarly, under Section 5 of the Voting Rights Act, courts evaluated whether an electoral change submitted for preclearance would have a retrogressive effect on the ability of minority voters to elect the candidate of their choice. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

level of racial bloc voting is such that in the challenged district the minority candidate usually loses. *See Gingles*, 478 U.S. at 48-49. This inquiry can be readily adapted for application to claims that a district has been unconstitutionally gerrymandered based on partisanship—that the voter, if not gerrymandered, could be placed in a district in which she could meaningfully contribute to the election of her candidate of choice. In adapting this test to partisan gerrymandering claims, the Court would consider three factors that parallel the *Gingles* inquiry—factors that ultimately require partisan gerrymandering plaintiffs to establish that at least one seat lost to partisan gerrymandering could be gained in a neutral plan.

The first factor we would propose is whether the opposition group is sufficiently large and geographically compact in the locality of the challenged district such that a new district can be drawn in which the opposition has a majority or in which it has a realistic opportunity to elect its candidate of choice.[10] Key to this inquiry is whether the district can be redrawn to create a majority or opportunity-to-elect district for the opposition party without reducing the overall number of districts in which the opposition forms a

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[10] While districts where the opposition party could form a majority in a hypothetical non-gerrymandered district present the most obvious claims, a proper statistical evaluation would be able to catch even subtler forms of partisan gerrymandering, such as where several competitive districts have been drawn with a thumb on the scale so that the number of competitive districts leaning toward the dominant party is greater than the number of competitive districts drawn leaning toward the opposition party.

majority. That is, this factor requires that the opposition party has been deprived of partisan advantage in at least one district in the enacted plan.

Second, courts should consider whether the opposition group is politically cohesive and voting is polarized along partisan political lines. In the present era of partisan "hyperpolarization," demonstrating political cohesiveness will be a much easier task than in past decades. Indeed, map drawers (legislators and their staff and consultants) themselves routinely use historical election data to draw maps. They do so knowing that past political preferences are highly predictive of future political fortunes. Courts, assisted by expert witnesses, can appropriately rely on these same data to evaluate the partisan consequences of alternative districting plans. Moreover, experts can adapt models to account for situations in which past partisan performance was likely attributable to idiosyncratic factors. In the racial gerrymandering context, courts have long been comfortable relying on statistical modeling to identify voters' preferences. *Cf. Growe v. Emison*, 507 U.S. 25, 41 (1993). Partisan political modeling is in fact easier in the partisan gerrymandering context than in the racial gerrymandering context, since in the latter we must model preferences based on statistical inferences about how racial minorities voted in the past, Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323, 1356 (2016) (describing challenges in drawing ecological inferences about individual preferences from aggregate information), whereas election data tell us directly how each political party previously performed. And, importantly, modeling voters' political

preferences is not about predicting actual future election outcomes. Rather, modeling establishes how a generic Democrat or Republican would perform—and thus whether a candidate from one party enters the playing field with an advantage.

The third factor we propose differs modestly for packing and cracking claims. For a cracking claim, we inquire whether opposition candidates in the challenged district regularly lose or, if the plan has not yet been implemented, whether there is compelling evidence based on past elections that they would be virtually certain to lose. In other words, the test we propose would find that a challenged district had been cracked only if opposition voters had been diluted such that they could not elect their preferred candidate. Meanwhile, for a packing claim, this factor would inquire whether the challenged district can be redrawn unpacked to create a district in which the opposition retains its ability to elect a candidate of its choice that does an equally good or better job of satisfying traditional districting criteria as the challenged district. In other words, it requires showing that the packed voters can retain the ability to elect their candidate of choice while being unpacked into another district that is at least as good at satisfying other, neutral districting criteria.

B. Testing for responsiveness can establish whether packing or cracking will *persistently* deprive opposition voters of a seat.

An additional element necessary for the identification of an unconstitutional partisan gerrymander is

a lack of responsiveness to the electoral process. Even if districts are revealed to have been packed or cracked along partisan lines, if the party out of power can alter its fate by persuading voters to support it in the next election, then there is no need for courts to intervene. In such cases, ordinary politics remain responsive to voters' preferences; if citizens do not like policies promulgated by their representatives (including the district maps they enact), they can vote them out of office. *See* Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 319 (2015) (arguing that the Court "entered the metaphorical political thicket in the 1960s on the question of malapportionment" because of "the practical problem ... that popular majorities had no political means to correct the offense"); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 865 (2015). In principle, even large-scale disparities in partisan treatment can be fleeting. A constitutional standard for partisan gerrymanders should accordingly require a separate assessment of electoral responsiveness, sometimes called "durability."

Electoral responsiveness describes whether and how representation changes when voters' preferences change. If a map is not responsive, that means that when voters change their preferences and shift their allegiances from one party to another, their representation remains unlikely to change—showing that the politicians have chosen the voters, and not the other way around. In that circumstance, we can expect citizens' votes to remain diluted regardless of the outcome of future elections. Conversely, high

responsiveness suggests that the discriminatory effect on voters may not be long-lasting.

Measuring responsiveness will also detect "self-limiting" gerrymanders—sometimes called "dummymanders," *see* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in* Redistricting in the New Millennium 183, 184 (Peter Galderisi ed., 2005)—in which map drawers crack voters across multiple districts to create margins of victory so thin that they evaporate in future elections. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). But dummymanders can occur only when there are numerous competitive districts in a map. And there is empirical evidence that dummymanders are rare. *See* McGann et al., *supra*, at 226 ("A second myth we have debunked is that partisan gerrymandering is self-limiting"). This is increasingly the case as the computer technology for conducting gerrymanders improves. In any event, assessing responsiveness "allows us to distinguish those cases in which a gerrymandering might have been attempted but was not very well done from those cases in which the partisan bias imposed by gerrymandering is expected to be both substantial and long-lasting." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 2, 13 (2007).

Social science offers tools for evaluating the durability of a gerrymander. Based on historical data—how much voters' preferences swung in prior elec-

tions—experts can identify the full range of realistically possible election outcomes and determine how many legislative seats, if any—and, critically, which seats—would change hands in response to a comparable change in voters' choices. The number of competitive districts also provides evidence of the map's responsiveness. Requiring that plaintiffs demonstrate that a disparate partisan impact will be durable throughout the decade following redistricting—that the map is not responsive to voters—ensures that courts do not intervene in the political process when it is functioning properly. If the map does not persistently obstruct competition, the voters' remedy lies at the polls, not in the courts.

C. Computer simulations can establish whether the partisan disparity in the challenged district was caused by invidious discrimination rather than neutral factors or chance.

1. Once we have identified a district or districts that have been durably packed or cracked, we know that a district or districting plan imposes disparate effects on disfavored voters that are impervious to electoral tides. But that does not end the inquiry. Rather, there is consensus among social scientists that to determine whether invidious discrimination is the cause of a disparate burden on opposition voters, it is necessary to rule out other potential causes of the district configuration—to assess whether the partisan effects of a plan are attributable, for example, to neutral principles, voters' residential patterns, or sheer random chance. *See, e.g.*, Samuel S. H. Wang, *Three Practical Tests for Gerrymandering: Application to*

Maryland and Wisconsin, 16 Election L.J. 367, 374 (2016) ("[A] standard for partisan gerrymandering requires a method for determining whether a [claimed disparity] could have arisen as part of normal variation in districting as practiced across the United States."); McDonald & Best, *supra*, at 317 ("[I]n order to distinguish unintentional from intentional gerrymanders, a benchmark of what naturally would result from any neutral line drawing has to be established."). That is, we must compare the map's disparate effects against a neutral baseline.

As this Court has noted, advantages to one party may occur because of a variety of neutral factors. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 289-90 (2004) (plurality op.); *id.* at 308-09 (Kennedy, J., concurring). For example, map drawers must comply with the Constitution's "one person, one vote" and nondiscrimination requirements. They also must comply with the Voting Rights Act by avoiding racial vote dilution. *See* Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* 343 (2009). And many states' laws also require map drawers to consider certain traditional districting criteria, like contiguity, compactness, and preservation of political subunits like cities and counties, as well as communities of interest—groups of people with a common attribute like race or ethnicity. *See, e.g.*, Justin Levitt, *Where Are The Lines Drawn?, All About Redistricting*, https://tinyurl.com/aw3qgn5 (last visited Feb. 5, 2019) (collecting current, state-by-state requirements for redistricting); *see also* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77 (1985) (Table 3) (collecting state-by-state requirements for 1980s redistricting).

Pursuit of these neutral objectives may produce inadvertent advantages to one party. For example, there is some evidence that "political groups that tend to cluster (as is the case with Democratic voters in cities) [c]ould be systematically affected by what might be called a 'natural' packing effect," *Vieth*, 541 U.S. at 290 (plurality op.)—although new empirical evidence indicates that this effect has been overstated, McGann et al., *supra*, at 135 ("[G]eographic and demographic constraints (such as the urban concentration of Democratic voters, the requirement to draw majority-minority districts, and the geographic sorting of voters) ... certainly cannot account for the increase in [partisan] bias we observe between the 2000 and 2010 districting rounds."). Similarly, compliance with the Voting Rights Act has spillover effects on a district's partisan makeup. *See* Bullock & Gaddie, *supra*, at 343. Random chance may also play a role.

Packing or cracking that is merely a side effect of indisputably legitimate objectives within the redistricting process or that is naturally occurring does not evidence actionable invidious discrimination. Any constitutional test for partisan gerrymandering will thus have to rule out these causes of vote dilution and isolate the degree of disparate partisan advantage that is "unrelated to the [legitimate] aims of apportionment," or to residential patterns or chance. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring).

Social science again provides the toolkit: extremely sophisticated and accurate methods of ruling out neutral factors as the source of partisan asymmetry. Vastly improved computing power permits experts to create hundreds (or even millions) of

computer-generated alternative maps. These computer-generated maps are produced to satisfy all traditional districting criteria to at least the same extent as the challenged plan.

It has become increasingly common in partisan gerrymandering challenges for experts to offer these computer-generated simulations of random plans drawn in accordance with traditional districting principles and reflective of the underlying partisan electoral geography (or, similarly, random permutations from a challenged map). *See, e.g.*, *League of Women Voters v. Commonwealth of Pennsylvania*, 178 A.3d 737, 770-75 (Pa. 2018) (describing the testimony of Dr. Jowei Chen, centering on computer-generated alternative maps). These simulations serve as a neutral baseline for comparison with the challenged district. From these simulations, analysts have used past voting behavior to calculate the range of likely partisan outcomes resulting from the challenged map or district to evaluate whether a challenged map or district is a statistical outlier.

This methodology enables us to establish to a high degree of statistical certainty whether packing or cracking is explainable by something other than invidious intent. For example, because the alternative maps take as a given the actual human geography of the state, any amount of packing that naturally results from residential patterns will be reflected in the alternative maps, which can also be programmed to preserve intact communities of interest or districts required by the Voting Rights Act. *See, e.g.*, Br. of Political Geography Scholars, *Gill v. Whitford*, No. 16-1161 (U.S. 2017), at 7, 12-13 & nn.10-11. These tools enable

experts to identify whether disparate effects are "manmade"—the product of deliberate efforts of the party in power to penalize the opposition—as distinct from those that may be produced by the effects of neutral districting priorities, voters' residential patterns, or chance. *See, e.g.*, Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 312, 312 (2015). We can thus quantify and rule out any conceivable neutral justification for packing and cracking.

Political scientists have developed variations on this computer simulation methodology—with minor differences in how the random-map-generation algorithm operates, what inputs are used, and how they are prioritized. *E.g.*, *id.*; Wendy Tam Cho et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 William & Mary L. Rev. 1521 (2018); Jonathan Mattingly et al., Quantifying Gerrymandering, https://tinyurl.com/yc4cvxkg (last visited Feb. 5, 2019). But the basic method is sound, notwithstanding these nuances. Indeed, courts are already relying on it in the one person, one vote context. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) (holding district court "clearly and reversibly erred in rejecting Dr. Jowei Chen's expert testimony," based on computer generation of 500 randomly drawn redistricting plans, that a challenged population deviation was the product of partisan bias). And in a recent state court challenge to a Pennsylvania redistricting, Professor Chen offered computer simulation evidence about the degree

to which the challenged plan failed to satisfy traditional redistricting criteria compared to politically neutral plans drawn by a computer programmed to honor traditional districting factors. *See League of Women Voters*, 178 A.3d at 770-75. Such evidence can be relied on as indicative of possible partisan motive. And as discussed above, even though Professor Chen's testimony was about statewide effects, it is straightforward to transform his data into evidence that particular districts are statistical outliers.

While these computer simulations have typically been produced and evaluated on a statewide basis, they remain relevant to assessing whether a given district or set of districts exhibits packing or cracking to a degree that would be judged as statistically extreme when compared to expectations derived from maps drawn according to neutral principles. Such an analysis could be a vital component of a district-specific analysis of partisan gerrymandering, though it begins with calculations based on statewide data.

This district-level analysis could be applied to either packed or cracked districts. To detect packing, challenged districts could be ranked in terms of their actual or expected partisan advantage, with reference to voter registration data and past voting behavior. The most heavily opposition district challenged would be compared against simulation results to evaluate the extent to which it was more extreme in its partisan composition than the simulation based on neutral redistricting and whether that difference was statistically significant. The analysis would continue through the ordered list of districts, evaluating

whether the next-most-extreme district in the challenged map was also a statistical outlier with respect to its concentration of opposition voting strength compared to the neutral baseline, proceeding in this fashion until all the statistical outliers had been identified; those outlier districts would be candidates for further evaluation as potentially invidious partisan gerrymanders. A similar approach to allegedly cracked districts would use information on the *most* competitive districts in the computer-generated maps to ascertain whether districts within the challenged map exhibited a partisan advantage favoring the majority party to an extent incompatible with neutral line drawing, in terms of number of districts that were competitive with an edge toward the dominant party versus those that were competitive with an edge toward the opposition.

2. We have focused on aiding the Court in understanding the social science tools for isolating the causes of apparent partisan gerrymanders—a means of inferring whether a disparate effect on voters was intentionally imposed. But, of course, nonstatistical evidence of intent is also relevant. Numerical analyses must be supplemented by more direct inspection of district boundaries (and how they changed from the prior map) to establish invidious discrimination.[11]

Here, again, a well-developed racial gerrymandering jurisprudence illustrates how the Court can

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[11] Relatedly, single-party control of the districting process will likely be a precondition for the finding of an unconstitutional partisan gerrymander.

use nonstatistical evidence to sniff out invidious discrimination on partisan lines. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993). Certainly, public statements by legislators in the dominant party—perhaps boasting of their success in doing the best possible partisan gerrymander—can indicate that an invidious motive to maximize partisan advantage predominated.[12] So too can deviations from the ordinary legislative process, such as secrecy, limited debate, or party-line voting in the enactment of the map. And a comparison between the challenged map and its predecessor may indicate that the lines were redrawn in a direct and egregious partisan fashion, as when changes from a prior plan involved movement of opposition party strength in or out of districts with no nonpartisan justification proffered. Notably, although discriminatory partisan gerrymanders may often be visually unremarkable while still maximizing partisan advantage, contorted district lines and disregard for traditional districting criteria are surefire signals that partisan gerrymandering is afoot, even if not themselves illegal. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995)

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[12] Many legislators apparently came to believe that there would be no court-imposed checks on partisan gerrymandering in the 2010 redistricting round. Accordingly, to minimize the likelihood of a challenge to a plan on *racial* grounds, some mapmakers openly asserted that their driving motivation was to draw the best *partisan* gerrymander possible. For example, the district court in *Rucho* observed that, in North Carolina, Representative Lewis said that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 604 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679.

("Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence ... [of] the legislature's dominant and controlling rationale in drawing its district lines."); *see also, e.g.*, *League of Women Voters*, 178 A.3d at 775-76, 820-21 (2018) (describing testimony of Dr. John Kennedy regarding how specific districts in the challenged map failed to satisfy traditional districting criteria and how the modification of the prior map occurred in a directly partisan manner). The same factors that assist in the "intensely local appraisal," *White v. Register*, 412 U.S. 755 (1973), required in racial gerrymandering cases apply equally to the partisan gerrymandering context.

CONCLUSION

For the foregoing reasons, the Court should hold that partisan gerrymander claims are justiciable and adopt the standard proposed for evaluating the constitutionality of partisan gerrymanders.

Respectfully submitted,

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February 12, 2019

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF APPELLEES

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Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) 39, 40

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Evenwel v. Abbott, 136 S. Ct. 1120 (2016) 35

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U.S. CONST. art. I, § 3 22

U.S. CONST. art. I, § 4 25

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U.S. CONST. amend. XIV 18, 21

U.S. CONST. amend. XV 21

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DEL. DECLARATION OF RIGHTS (1776) 12

MD. CONST. (1776) 12

N.H. CONST. (1784) 12

PA. CONST. (1776) 33

VA. DECLARATION OF RIGHTS (1776) 12

Court Documents

Brief for Appellants, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019) 13, 27, 28, 33, 34

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019) 21

Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019) 27, 28

Page(s)

Other Authorities

1 ANNALS OF CONG. (1789) (Gales & Seaton eds., 1834) 31, 32

Abraham Lincoln, The First Inaugural Address (Mar. 4, 1861), *in* DAVID LOWENTHAL, THE MIND AND ART OF ABRAHAM LINCOLN, PHILOSOPHER STATESEMAN (2012) 18

Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* DAVID LOWENTHAL, THE MIND AND ART OF ABRAHAM LINCOLN, PHILOSOPHER STATESEMAN (2012) 18

Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 17

BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) 6, 7, 11

BRUTUS I (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) 16

Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. SOUTHERN HIST. 192 (1949) 19

Page(s)

Charles Sumner, The Equal Rights of All (Feb. 5-6, 1866), *in* 13 CHARLES SUMNER: HIS COMPLETE WORKS (2d ed. 1900) 18, 19

CONG. GLOBE, 39th Cong., 1st Sess. (1866) 20

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GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (2d ed. 1998) 7, 11, 12, 15

Page(s)

J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999) 38

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) 7, 10, 25

James Madison, Report on the Resolutions (Jan. 1800), *reprinted in* 6 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1906) 14, 15, 17

James Madison, Virginia Resolutions of 1798, *reprinted in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed., 2d ed. 1836) 16

Jerry H. Goldfeder & Myrna Pérez, *A Tale of (at Least) Two Gerrymanders*, N.Y.L.J. (June 22, 2017) 39

John Adams, *Thoughts on Government* (1776), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805 (Charles S. Hyneman & Donald S. Lutz eds., 1983) 8, 12, 31

JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION (1989) 6, 7

Page(s)

KIRSTIN OLSEN, DAILY LIFE IN 18TH-CENTURY ENGLAND (1999) 11

PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010) 28

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 (J. McMaster & F. Stone eds., 1888) 14

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) 11, 12, 25, 40

ROSEMARIE ZAGARRI, THE POLITICS OF SIZE (1987) 9, 10, 33, 38

Theophilus Parsons, *The Essex Result* (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805 (Charles S. Hyneman & Donald S. Lutz eds., 1983) 8

INTEREST OF *AMICI CURIAE*

Amici are historians with a scholarly interest in the origins and adoption of the Constitution, including a particular interest in the development and evolution of American ideas about political representation. *Amici* believe that a historical understanding of these ideas, and of the practice and perception of various forms of gerrymandering in American history, may assist the Court in its analysis of the legal issues presented in this case.[1] *Amici*, whose professional backgrounds and relevant publications are set forth in the Appendix, are:

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that *amici* and their counsel authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. The parties have granted blanket consent to the filing of *amicus* briefs.

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SUMMARY OF ARGUMENT

Fair and effective representation was the bedrock principle of constitutional governance in the new American republic. The historical record surrounding the Constitution offers ample evidence of that: The Founding generation forcefully rejected the British system of government, where legislative corruption and entrenchment of factions eroded meaningful representation, and instead designed a form of government that would be dependent on the People and responsive to the People. Americans were acutely aware of the dangers to that form of fair and effective representation posed by what we now call gerrymandering. They were particularly concerned that legislative factions acting for their own hyper-partisan interests would manipulate election rules and stifle political expression in order to entrench themselves. Those concerns are reflected in Article I, the First Amendment and subsequently the Fourteenth Amendment. Moreover, through Article III, the Framers established the judiciary as the bulwark against intentional overreach by the legislative majority. The Framers' efforts to prevent the improper legislative entrenchment that results from extreme partisan gerrymandering cannot be squared with an argument that they intended to exclude the courts from taking appropriate action where necessary to uphold the principles embodied in the Constitution.

Amici seek to bring to this Court's attention the historical record surrounding the founding principles and values that should inform the analysis of partisan gerrymandering. Because these cases do not turn on the linguistic meaning of any particular phrase in the

relevant constitutional provisions, *amici* focus on the fundamental substantive founding principles, their implementation in the Constitution, and the historical debates at the framing and ratification of the Constitution relating to the issues surrounding partisan gerrymandering.

ARGUMENT

I. THE FRAMERS DESIGNED A SYSTEM OF REPRESENTATION *RESPONSIVE TO* THE PEOPLE AND CONTINUALLY *DEPENDENT ON* THE PEOPLE

A. The American Vision of Representative Democracy Was Based on a Legislature That Reflects the Body Politic and Is Responsive to Its Demands

The American Revolution was in no small part a rejection of the British theory of "virtual representation." The British theory held that those communities that sent no representatives to Parliament—including the American colonies—nevertheless were represented because members of the House of Commons were obliged to consider the greater good when legislating.[2] To the Founding generation, this idea was an object of ridicule.[3] Americans, whose colonial assemblies generally extended representation to new communities as they were organized, believed instead in a system of actual

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[2] *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989).

[3] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167-70 (1967) (explaining that virtual representation was met in the colonies "at once with flat and universal rejection, ultimately with derision"); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 24 (4th ed. 2013) (noting that the colonists "roundly rejected" the idea).

representation.[4] In the emerging American vision of representative democracy, legislative assemblies were meant to share the interests of the electorate and be responsive to its demands,[5] with the vote serving to bind representatives closely to their constituents.[6] It was "particularly essential" that the House of Representatives "have an immediate dependence on, [and] an intimate sympathy with[,] the people,"[7] to ensure "the consent of the governed" envisioned in the Declaration of Independence.[8]

Under this new vision of government, representatives would act as agents of the People[9] and remain responsive to their needs and desires.[10] Elected representatives were expected to inform

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[4] BAILYN, *supra*, at 161-75; REID, *supra*, at 128-36.

[5] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 204 (1996) (discussing the concept of shared interests and its significance in securing accountability of representatives).

[6] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (2d ed. 1998) (noting that in actual representation "[t]he process of voting was not incidental to representation but was at the heart of it").

[7] THE FEDERALIST NO. 52, at 355 (James Madison) (J. E. Cooke ed., 1961).

[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[9] *See* THE FEDERALIST NO. 14, *supra*, at 83-84 (James Madison) (explaining that in a republic, the People "assemble" and administer government "by their representatives and agents").

[10] *See id.* NO. 16, at 102-03 (Alexander Hamilton); *id.* NO. 35, at 221 (Alexander Hamilton).

themselves of the preferences of their constituents and act on their behalf. The result would be a government that shares a "common interest" and maintains an "intimate sympathy" with the People.[11] At the same time, it was expected that representatives would act as a filter on those preferences, "refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[12] "Duty, gratitude, interest, [and] ambition itself" were to be "the chords by which [representatives] will be bound to fidelity and sympathy with the great mass of the people."[13]

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[11] *Id.* NO. 52, at 355 (James Madison).

[12] *Id.* NO. 10, at 62 (James Madison).

[13] *Id.* NO. 57, at 387 (James Madison). Some of the Framers advocated for a Congress that would think and act exactly like its constituents, effectively functioning as a "miniature" of the body politic. For example, Theophilus Parsons argued that "[t]he rights of representation should be so equally and impartially distributed, that the representatives . . . should be an exact miniature of their constituents." Theophilus Parsons, *The Essex Result* (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 480, 497 (Charles S. Hyneman & Donald S. Lutz eds., 1983); *see also* John Adams, *Thoughts on Government* (1776) [hereinafter Adams, *Thoughts on Government*], *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, *supra*, at 401, 403. Although the system of government ultimately adopted was more similar to that advocated by Madison, the conception of a close correspondence between the electorate and the legislature was common ground that framed the debate.

There was also a recognition that maintaining a responsive government requires more than just virtuous candidates; it requires keeping elected representatives *dependent on* the People.[14] Such dependence was to be achieved by establishing frequent elections and representation in proportion to the population:

> "The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands."[15]

In this way, the new government would not allow the abuses of power in the British system, where partisan factions were able to unjustly entrench electoral power.[16]

The American vision of representative democracy centered on actual representation has long been reflected in this Court's jurisprudence. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[L]egislatures . . . should be bodies which are collectively responsive to the popular will."); *id.* at

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[14] *See, e.g.*, THE FEDERALIST NO. 57, *supra*, at 386 (James Madison).

[15] *Id.* NO. 37, at 234 (James Madison).

[16] *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 102-03 (1987).

565-66 (noting that the aim of legislative apportionment is "the achieving of fair and effective representation"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (referencing the "Constitution's plain objective of making equal representation for equal numbers of people").

B. The Founding Generation Rejected "Corruption" of Representation in the British System and Sought To Prevent Similar Undemocratic Entrenchment by Partisan Factions in the American System

At the time of the Framing, Americans saw the abuses of power in the British system, including unjust entrenchment of electoral power by partisan factions, as antithetical to their vision of representative government.[17] From the beginning, they were focused on eliminating the various forms of "corruption" that effectively defeated meaningful representation in Parliament.[18] As this Court has noted, the delegates to the Constitutional Convention

> "were quite aware of what Madison called the 'vicious representation' in Great Britain, whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. [James] Wilson urged that people must be represented as individuals, so that America would escape the evils of the

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[17] *See* ZAGARRI, *supra*, at 102-03.

[18] *See* RAKOVE, *supra*, at 208-12.

> English system under which one man could send two members to Parliament to represent the borough of Old Sarum while London's million people sent but four."

Wesberry, 376 U.S. at 14-15 (footnotes omitted). It was well known that "pocket boroughs," with small numbers of voters easily controlled by a dominant interest or aristocrat, were another tool used to defeat actual representation.[19]

To colonial Americans, the corruption in the parliamentary system was not merely an issue of numbers and suboptimal representation. Rather, it was central to the experience of unjust subjugation that led to the Revolutionary War.[20] The Founding generation believed that the legitimacy of governments created in the wake of that war depended on protecting the system of representation from such entrenched interests. Edmund Randolph warned the Constitutional Convention: "If a fair representation of the people be not secured, the injustice of the Govt. will shake to its foundations."[21]

The Framers knew the danger to fair and effective representation that partisan legislative factions could pose if they were able to entrench themselves in power regardless of the shifting views

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[19] *See, e.g.*, KIRSTIN OLSEN, DAILY LIFE IN 18TH-CENTURY ENGLAND 7 (1999).

[20] *See, e.g.*, BAILYN, *supra*, at 222-23; WOOD, *supra*, at 166.

[21] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 580 (Max Farrand ed., 1911) [hereinafter RECORDS].

of the public. Madison identified England's boroughs as a "striking example" of inequitable government in which a faction was able to block reforms that might dislodge it from its disproportionate and undemocratic power.[22] Preserving representational equality came to be seen as the most important safeguard against such entrenchment.[23] John Adams argued in *Thoughts on Government* that, to prevent "the unfair, partial, and corrupt elections" of the English system, "equal interests among the people should have equal interests" in the legislature.[24] In response to similar concerns, several states included in their constitutions plans for periodic adjustments of representation.[25] Several states also adopted some form of a declaration "[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent."[26]

In short, the new American government was designed to be dependent on, and regularly accountable to, the People. In drafting the Constitution, the Framers saw it as imperative that the electoral process be protected against influences

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[22] *Id.* at 584.

[23] WOOD, *supra*, at 170.

[24] Adams, *Thoughts on Government*, *supra*, at 403.

[25] WOOD, *supra*, at 172 (noting adoption of such provisions in New Jersey, Pennsylvania, New York, Vermont, and South Carolina).

[26] *See* DEL. DECLARATION OF RIGHTS § 6 (1776); *see also* MD. CONST. art. V (1776); N.H. CONST. arts. X, XI (1784); VA. DECLARATION OF RIGHTS § § 5, 6 (1776).

that might infringe upon the right to fair and effective representation,[27] particularly partisan entrenchment by those already in power. Without fair and effective representation, the new republic would devolve into the very type of government Americans fought to separate themselves from—one plagued by "corruption," under which the electors cannot "defeat [the faction's] sinister views by regular vote."[28]

II. THE AMERICAN VISION OF REPRESENTATION IS REFLECTED AND PROTECTED IN THE FIRST AMENDMENT, THE FOURTEENTH AMENDMENT AND ARTICLE I

The historical record is replete with evidence that the Founding generation was focused on abuses that might erode the representative nature of government. The Constitution—in particular, Article I and the First Amendment—was drafted in part to avoid such abuses by the new national government. And in

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[27] Appellants argue that partisan gerrymandering claims require measuring any "deviation[] from a proportional representation baseline." Brief for Appellants at 21-22, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019). Appellants are correct that the Framers did not adopt a proportional representation system. But that choice only reinforces how important it was to the Framers that voters have a free, equal and effective voice in ***selecting*** their representatives. The system of representative government the Framers designed is founded on the principle that the People will elect representatives best suited to represent their interests and that those representatives will remain dependent on and accountable to the People through frequent, effective elections. *See supra* section I.A.

[28] THE FEDERALIST NO. 10, *supra*, at 60 (James Madison).

passing the Fourteenth Amendment, the 39th Congress extended this vision to the state level.

A. The First Amendment Was Intended To Protect American Representative Ideals by Ensuring the People Could Hold Representatives Accountable Through Political Expression, Including the Vote

Since its inception, the First Amendment has been closely intertwined with ideas of popular sovereignty and representation. The right of political expression was an integral part of colonial Americans' transition from subjects of the Crown to citizens possessing "the absolute sovereignty"[29] and employing government officials as "their servants and agents,"[30] required to be "at all times accountable to them."[31] It was the device through which the People could express their voice—and through voting, have it

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[29] James Madison, Report on the Resolutions (Jan. 1800) [hereinafter Madison, Report on the Resolutions], *reprinted in* 6 THE WRITINGS OF JAMES MADISON 341, 386-87 (Gaillard Hunt ed., 1906).

[30] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 9 (J. Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell).

[31] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 250 (J. McMaster & F. Stone eds., 1888) (internal quotation marks omitted) (statement of John Smilie).

heeded—regarding the issues of the day and the performance of the government.[32]

The Framers recognized that the exchange of ideas by members of the public—unhindered by government interference—was essential for free elections and, in turn, an accountable government.[33] Madison argued that the American form of representative government required "the equal freedom" of political expression, particularly by "examining and discussing the[] merits and demerits" of candidates.[34] In opposing the Sedition Act, which criminalized malicious speech against the government, Madison argued that the Act violated the Constitution because it stifled dissemination of speech related to elections—a right necessary to keep government accountable[35] and to ensure all other rights:

> "[The Act] exercises . . . a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of *freely examining* public characters and measures, and of *free communication* among

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[32] *See* WOOD, *supra*, at 164-65.

[33] *See* Madison, Report on the Resolutions, *supra*, at 397 ("[T]he right of electing the members of the Government constitutes more particularly the essence of a free and responsible government.").

[34] *Id.*

[35] *Id.* (rejecting the Sedition Act as a "protection of those who administer the Government" from being exposed to criticisms of the People).

> the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[36]

Hamilton also emphasized the close connection between free speech and effective representation. In response to the claim of anti-Federalist writer "Brutus" that a republic is practicable only in a society without "constant clashing of opinions,"[37] Hamilton argued that it was those "differences of opinion, and the jarrings of parties in [the legislative] department of the government," that "promote deliberation and circumspection; and serve to check excesses in the majority."[38] Discouraging the "jarrings of parties" therefore runs directly counter to the foundational understanding of representative government, particularly when it is done by a partisan faction in power whose excesses the resulting opinions are meant to check.

The First Amendment prohibits government actors from stunting political expression in order to abuse or entrench their own power. As Madison explained, those in power may not restrict the right of political expression and thereby "derive an undue advantage for continuing themselves in it, which, *by impairing the right of election*, endangers the

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[36] James Madison, Virginia Resolutions of 1798, *reprinted in* 4 ELLIOT'S DEBATES, *supra*, at 528, 528-29 (emphasis added).

[37] BRUTUS I (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363, 369-70 (Herbert J. Storing ed., 1981).

[38] THE FEDERALIST NO. 70, *supra*, at 475-76 (Alexander Hamilton).

blessings of the Government founded on it[.]"[39] As one scholar has put it, "[t]he revolutionary intent of the First Amendment is . . . to deny [the government] authority to abridge the freedom of the electoral power of the people."[40] Beyond being one of those expressive activities by which "We, the People" exercise our rights to self-government, the vote is "the official expression of a self-governing [citizen's] judgment on issues of public policy," to be "absolutely protected" under the First Amendment.[41]

In sum, the Framers saw the unfettered right of citizens to express their views through political discourse, and ultimately the vote, as essential for maintaining effective representative rights and government accountability. Mechanisms that prevent translating popular will into actual representation by creating structural impediments to the effective exercise of particular voters' rights—such as partisan gerrymandering—are contrary to the First Amendment values that the Framers recognized as the cornerstone of a vibrant democracy.

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[39] Madison, Report on the Resolutions, *supra*, at 398 (emphasis added).

[40] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254.

[41] *Id.* at 256.

B. The Fourteenth Amendment Extended the Framers' Vision of Representative Government to the States

In the wake of the Civil War, proponents of the Fourteenth Amendment emphasized the need to strengthen and vindicate the Framers' concept of actual representation premised on equal rights. Reconstruction-era Republicans argued vigorously that the Framers' vision of a republic required equal representation of all citizens, and that this vision must prevail on the state level as well as the federal.[42] For example, in his famous "Equal Rights for All" speech, Senator Charles Sumner repeatedly invoked the Framers' rejection of "virtual representation"[43] and argued at length that "[t]he two ideas of Equality and a Right to Representation, so early and constantly avowed by the Fathers, are here again recognized as essential conditions of government; and this is the

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[42] President Lincoln had argued in his First Inaugural Address that "[a] majority, held in restraint by constitutional checks and limitations, and *always changing easily with deliberate changes of popular opinions and sentiments*, is the only true sovereign of a free people." Abraham Lincoln, The First Inaugural Address (Mar. 4, 1861), *in* DAVID LOWENTHAL, THE MIND AND ART OF ABRAHAM LINCOLN, PHILOSOPHER STATESEMAN 198, 201 (2012) (emphasis added). Lincoln echoed this sentiment in the Gettysburg Address, closing with the hope "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* LOWENTHAL, *supra*, at 228, 228.

[43] *See* Charles Sumner, The Equal Rights of All (Feb. 5-6, 1866), *in* 13 CHARLES SUMNER: HIS COMPLETE WORKS 119, 159-60, 170-72 (2d ed. 1900).

true definition of a Republic."[44] Proponents of the Fourteenth Amendment cast the former slave states as aristocracies and oligarchies that must henceforth be required to respect the Framers' vision of representational rights.[45]

Representative John Bingham, a champion of the Fourteenth Amendment, likewise described the Amendment as a way to finish the Framers' work by securing their actual-representation vision on the state level now that the natural barrier to doing so—slavery—had been abolished:

> "What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? Nothing at all. And I am perfectly confident that that grant of power would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been

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[44] *See id.* at 184.

[45] *See, e.g., id.* at 207-11; *see also* Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. SOUTHERN HIST. 192, 198 (1949).

> admitted to be persons. That is the only reason why it was not there."[46]

Other members of the 39th Congress shared Bingham's view that the Fourteenth Amendment was the only way to secure "the declared intent[ion] of the Constitution of [the] fathers" after the abolition of slavery.[47] For example, Ralph Buckland remarked that "[i]t is contrary to the fundamental principles of republican government" "to think that a mere fraction of the people of any of these States can control the State government for any great length of time."[48] Jacob Howard argued, quoting Madison, that "the vital principle of republican government" is "'that those who are to be bound by the laws ought to have a voice in making them.'"[49] This fundamental principle was echoed throughout the Reconstruction era. For example, Section 2 of the Fourteenth Amendment—ensuring that states received representation based on total population—included a provision to reduce representation in Congress should eligible voters have

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[46] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). The debates surrounding the Privileges or Immunities Clause of the Fourteenth Amendment also reveal a close tie between the intent of the 39th Congress and that of the Framers. *See, e.g., id.* at 1095 (statement of John Bingham) ("The amendment is exactly the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States.").

[47] *Id.* at 430.

[48] *Id.* at 1627.

[49] *Id.* at 2767.

their right to vote "in any way abridged."[50] In 1870, the states ratified the Fifteenth Amendment, which explicitly protects "the right of citizens of the United States to vote."[51] This Court has recognized the existence of this strong "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

This Court has held that gerrymanders based on unequal population size violate the Fourteenth Amendment and "run counter to our fundamental ideas of democratic government." *See id.* at 564 (quoting *Wesberry*, 376 U.S. at 8). The same interference with the Founding generation's vision of fair and effective representation is accomplished by intentional partisan gerrymandering.[52]

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[50] U.S. CONST. amend. XIV, § 2.

[51] *Id.* amend. XV, § 1.

[52] One of Appellants' *amici* argues that "[t]he original intent of the authors of the Fourteenth Amendment could hardly include a political gerrymandering cause of action" because the authors themselves benefited from gerrymandering in getting elected. Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants at 4-10, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019). This contention ignores that partisan gerrymandering has been publicly denounced throughout its history. As this brief details in Part III, partisan gerrymandering has existed since the Founding, but at every step of the way, including around the time the Fourteenth Amendment was passed, the practice was condemned—even by those who admitted benefiting from it. *See infra* section III.B.

C. Article I Reflects the American Vision of Representative Government and the Fear That Legislative Manipulations Would Impair That Vision

The Framers were acutely aware that the government's representative function could be undermined not just by restrictions on the franchise, but by malapportionment and what we now call gerrymandering. They were also aware that legislators would have the means and motive to manipulate election-related rules for partisan entrenchment, which they feared. The provisions of Article I represent the Framers' attempts to avoid such manipulation and ensure representative, responsive government.

Article I, Section 2 of the Constitution represents half of the Great Compromise reached by the delegates regarding the election of Congress: the House of Representatives was to be chosen directly "by the People"—as opposed to indirectly by the state legislatures—and in proportion to population.[53] Such a system embodied the founding principle that representatives be dependent on the People—the "great body of the society," not "an inconsiderable

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[53] Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*" and "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2 (emphasis added). In the Senate, on the other hand, each state would have two Senators, elected by the state legislatures. *See* U.S. CONST. art. I, § 3.

proportion, or a favored class of it."[54] For the House to be derived from the People, "equal numbers of people [would have] an equal number of representatives."[55] As Madison explained, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."[56] Thus, while original omissions from the electorate now seem glaring (*e.g.*, exclusions by race, gender, and economic circumstance), the Framers' concern at drafting was that the vote of each member of the existing electorate have equal weight. This Court has agreed with that interpretation, noting that "in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7-8 (footnote omitted).

The Framers also conceived of Article I, Section 2 as a way to maintain responsiveness and accountability of representatives while they held

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[54] THE FEDERALIST NO. 39, *supra*, at 251 (James Madison); *see also id.* NO. 57, at 384-85 (James Madison).

[55] *See* 5 ELLIOT'S DEBATES, *supra*, at 177. Similarly, Francis Dana argued that "the intention of the Convention was to set Congress on a different ground; that a part should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections." 2 *id.* at 49.

[56] 1 *Id.* at 462.

office. Frequent elections and shorter terms of office[57] would deepen the "chords of sympathy" between representatives and their constituents.[58] The fact that the People's opportunity to vote out their representative was never remote would create in the representatives "an habitual recollection of their dependence on the people," forcing representatives to regularly "descend to the level from which they were raised."[59] Without such responsiveness, the Framers feared, "every government degenerates into tyranny."[60]

The decennial Census requirement in Article I, Section 2 was explicitly designed to avoid entrenchment and malapportionment that would preclude a government chosen by the People and responsive to the People. Edmund Randolph, who introduced the Census Clause, argued that it was necessary because the initial apportionment of representatives "placed the power in the hands . . . which could not always be entitled to it," and "this

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[57] *See* U.S. CONST. art. I, § 2, cl. 1 (settling on two-year terms); *see also* THE FEDERALIST NO. 57, *supra*, at 384 (James Madison) ("The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.").

[58] THE FEDERALIST NO. 35, *supra*, at 221 (Alexander Hamilton).

[59] *Id.* NO. 57, at 386 (James Madison).

[60] *Id.* at 387.

power would not be voluntarily renounced."[61] The Census was pointedly aimed at representation. For example, George Mason observed that, without the Clause, "the Legislature would cease to be the Representatives of the people": If the Legislature were not constrained to redistribute representation in the future so that a majority of the people could elect a majority of the Legislature, then "the power w[oul]d be in the hands of the minority, and would never be yielded to the majority,"[62] which would "complain from generation to generation without redress."[63]

The Elections Clause in Article I in the first instance gives state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for the House and Senate.[64] From the beginning, the Framers were focused on ways it might be abused. Two delegates from South Carolina—a notably malapportioned state, with the larger plantations near the Atlantic Coast wielding unequal power over the state's legislative districting[65]—insisted that the states exclusively should be relied on to regulate districting.[66] Madison responded by warning that states would manipulate rules and districting for partisan political ends:

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[61] RECORDS, *supra*, at 579.

[62] *Id.* at 586.

[63] *Id.* at 578.

[64] U.S. CONST. art. I, § 4, cl. 1.

[65] *See* RAKOVE, *supra*, at 223.

[66] 5 ELLIOT'S DEBATES, *supra*, at 401.

> "It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district[;] these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the representation in the legislatures of particular states, would produce a like inequality in their representation in the national legislature, as it was presumable that the counties having the power in the former case would secure it to themselves in the latter."[67]

At the state conventions, the Clause was the subject of much debate. The Massachusetts Convention, for example, debated it over two days. Theophilus Parsons worried that state legislatures might, upon the influence of a faction, "introduce such regulations as would render the rights of the people insecure and of little value."[68] More specifically, Parsons imagined state legislatures "might make an

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[67] *Id.* at 401-02.

[68] 2 *Id.* at 27.

unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors."[69] The historical record demonstrates a clear concern at the Framing that state legislatures would overreach in ways that would dilute the vote and erode the representative nature of the new government through partisan entrenchment. As this Court has emphasized, the Elections Clause was *not* meant to give state legislatures authority to "dictate electoral outcomes." *See Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)).

The North Carolina Appellants and their *amici* argue that the Framers dealt with these concerns exclusively by vesting oversight in Congress. They argue—with no citations to the historical record—that the Framers through the Elections Clause not only assigned to Congress the primary responsibility for overriding state legislature misconduct in election redistricting, but affirmatively rejected any role for the federal judiciary. *E.g.*, Brief for Appellants at 2, *Rucho v. Common Cause*, No. 18-422 (Feb. 8, 2019) ("inappropriate for federal courts"); *id.* at 4; *id.* at 21 ("affirmatively inappropriate"); Brief of Speaker Michael C. Turzai, in His Official Capacity as Constitutional Officer of the Pennsylvania House of Representatives, as *Amicus Curiae* in Support of Appellants at 3-4, *Rucho v. Common Cause*, No. 18-422 (Feb. 12, 2019) ("necessarily excludes"); *id.* at 6 ("denies"); *id.* at 17 ("[d]eprives"); *id.* at 23 (courts as "threats"). Appellants assert it "never occurred to

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[69] *Id.*

anyone in the framing generation" that there would ever be any role for the courts in addressing apportionment. Brief for Appellants, *supra*, at 34; *see also id.* at 5, 32-33; Brief of Speaker Michael C. Turzai, *supra*, at 9. One *amicus* goes so far as to argue that "the Elections Clause forecloses judicial intervention on political grounds under *any* constitutional provision." Brief of Speaker Michael C. Turzai, *supra*, at 4.

These arguments misconstrue the historical record. Many of the delegates were worried that *Congress* would abuse its power under the Elections Clause to entrench itself. Some opponents of the Clause argued that it could give Congress the ability to "perpetuate itself indefinitely by cancelling elections."[70] Others were worried that the Clause would give Congress undue influence over the outcome of elections. For example, Charles Turner voiced the concern at the Massachusetts Convention that Congress could change the place of elections such that "representatives chosen will not be the true and genuine representatives of the people, but creatures of the Congress; and so far as they are so, so far are the people deprived of their rights, and the choice will be made in an irregular and unconstitutional manner."[71]

Therefore, although the Framers settled on Congress as the first line of defense if the *states* abused their power, it is unlikely, given the concerns

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[70] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 173 (2010).

[71] 2 ELLIOT'S DEBATES, *supra*, at 30.

about Congress, that the Framers saw Congress as the *only* defense. To the contrary, there is historical evidence that at least some expressly contemplated that the courts would intervene. For example, at the North Carolina Convention, John Steele assuaged concerns about Congress and the Elections Clause by noting "[t]he *judicial power* of that government is so well constructed as to be a check" and "[i]f the Congress make laws inconsistent with the Constitution, *independent judges will not uphold them*, nor will the people obey them."[72] That prediction of independent judges protecting the right to an effective vote has come true, as reflected in this Court's decisions regarding one-person one-vote. *See, e.g.*, *Wesberry*, 376 U.S. at 18.

The Framers took great care in establishing a representative government—one by the People and for the People. Fearing precisely the harms to that ideal government that partisan gerrymandering brings about, they provided protections throughout the Constitution—in Article I and the First Amendment (and subsequently the Fourteenth Amendment). And, as discussed next, in Article III the Framers created the system of checks and balances pursuant to which the judiciary could intervene if necessary when those provisions are violated.

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[72] 4 *Id.* at 71 (emphasis added).

III. THROUGH ARTICLE III, THE FRAMERS ESTABLISHED THE JUDICIARY AS AN IMPORTANT BULWARK AGAINST LEGISLATIVE OVERREACH AND MAJORITARIAN ENTRENCHMENT

Although Appellants and their *amici* argue that the Framers affirmatively intended to preempt any judicial review of congressional redistricting, such claims are demonstrably ahistorical. As noted above, the debates regarding the Elections Clause in particular included reference to the role of an independent judiciary. More generally, the Framers through Article III established the judiciary as an "impenetrable bulwark" against assumptions of power and violations of the Constitution. Throughout history, partisan gerrymandering has been publicly denounced as antithetical to the American vision of representative government, and there is no historical reason to suggest the Framers intended to eliminate any role for the judiciary in preventing improper legislative entrenchment.

A. The Framers Saw the Judiciary as a Means To Protect the People Against Abuses of Power and Violations of Constitutional Rights by the Legislature

Anticipating that elected representatives might attempt to augment their power or enact laws in contravention of the Constitution, the Framers designed a system of government in which the

judiciary acts as a check on legislative overreach.[73] The Founding generation had witnessed the effects of entrenchment of partisan legislative factions in England, which led them to reject the English approach of the legislature and judiciary being part of a single branch.[74] Instead, the judiciary would be an independent branch, "an impenetrable bulwark against every assumption of power in the legislative or executive."[75] At the ratifying conventions, several delegates emphasized the importance of judicial review in providing a check on encroachments by both the state and federal legislatures.[76] This power-

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[73] *See* THE FEDERALIST NO. 78, *supra*, at 526-27 (Alexander Hamilton) (recognizing that "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"); *see also* Adams, *Thoughts on Government*, *supra*, at 407 ("The dignity and stability of government in all its branches . . . depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both . . . .").

[74] *See* THE FEDERALIST NO. 81, *supra*, at 542-45 (Alexander Hamilton).

[75] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

[76] *See* 2 ELLIOT'S DEBATES, *supra*, at 196 (Oliver Ellsworth of Connecticut) ("This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. . . . [I]f the states go beyond their limits . . . independent judges will declare it [void]."); *id.* at 445 (James Wilson of Pennsylvania) ("[U]nder this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department.").

checking function of the judiciary was necessary to protect the People; as Hamilton explained, the courts were "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[77]

The Founding generation expected that the judiciary would protect the People from violations of constitutional rights at the hands of the legislature. At the North Carolina Convention, for example, William Davie remarked that "there are certain fundamental principles in [the Constitution], both of a positive and negative nature, which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular states," but recognized "[w]ithout a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened."[78] Madison echoed this expectation in his speech proposing the Bill of Rights, explaining that independent courts would act as "the guardians of those rights" and would "be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[79] It was the "*duty*" of an independent judiciary "to declare all acts contrary to the manifest tenor of the constitution void" because "[w]ithout this, all the

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[77] THE FEDERALIST NO. 78, *supra*, at 524-25 (Alexander Hamilton).

[78] 4 ELLIOT'S DEBATES, *supra*, at 156.

[79] 1 ANNALS OF CONG. 457 (1789) (Gales & Seaton eds., 1834).

reservations of particular rights or privileges would amount to nothing."[80]

B. Legislative Partisan Gerrymandering Has Been Denounced Since the Founding as an Unconstitutional Abuse of Power

Appellants place significant weight on the fact that partisan gerrymandering has occurred throughout American history, yet was not brought before the courts for some time. *See* Brief for Appellants, *supra*, at 3-6, 37. But the use of a practice throughout history, even on a widespread basis, does not immunize the practice from judicial review. The long lead-up to the one-person one-vote cases provides a useful illustration of this concept.

Many gerrymanders in American history, several of which Appellants rely on, involved malapportionment—districts of unequal population size—and would therefore be impermissible today.[81]

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[80] THE FEDERALIST NO. 78, *supra*, at 524 (Alexander Hamilton) (emphasis added).

[81] Of course, the pre-Revolution gerrymanders raised by Appellants predate a formal requirement of apportionment in proportion to population. Before the writing of state constitutions, the legislatures simply assigned a certain number of representatives to geographic units without regard for the number of people in each unit. *See* ZAGARRI, *supra*, at 37-39. In many of their first state constitutions, Americans remedied this problem by adopting the principle that equal numbers of people deserved equal numbers of representatives. *See, e.g.*, PA. CONST. § 17 (1776). This was an important contribution to the

For example, Appellants point to what they call the first known gerrymander "on this side of the Atlantic," in the early 1700s in Pennsylvania. *See* Brief for Appellants, *supra*, at 3. That gerrymander involved an attempt to dilute the political power of Philadelphia voters by giving the city fewer representatives than other counties, despite the city's growing size.[82] Appellants next reference a 1732 gerrymander in North Carolina. *See* Brief for Appellants, *supra*, at 3. In that instance, the Governor had manipulated voting boundaries to promote his own agenda, in part by forming some "precincts . . . which contained not more than thirty families."[83]

Appellants go on to say that "partisan gerrymandering did not end with the ratification of the Constitution." Brief for Appellants, *supra*, at 5. They do not refer to specific gerrymanders, but a review of the history reveals that many post-ratification gerrymanders also involved districting that today would violate the one-person one-vote principle.[84] Yet despite a historical record spanning

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development of representative ideals—one that was ultimately incorporated into the structure of the House of Representatives.

[82] *See* ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 26-28 (1907).

[83] GRIFFITH, *supra*, at 28.

[84] *See* GRIFFITH, *supra*, at 42-43 (New York Federalist gerrymander in 1789); *id.* at 47-50 (New Jersey Federalist gerrymander in 1798); *id.* at 53-54 (Philadelphia Democratic gerrymander in 1802); *id.* at 79-80 (New Jersey Federalist gerrymander in 1812); *id.* at 94 (Maryland Democratic gerrymander in 1816); DAILY OHIO ST. J. (Aug. 12, 1842) (Ohio Democratic gerrymander in 1842).

more than 200 years, this Court in *Baker v. Carr*, 369 U.S. 186 (1962), ultimately "confronted this ingrained structural inequality" and ended the "[j]udicial abstention [that] left pervasive malapportionment unchecked." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016). This Court's recognition that unequal-population gerrymanders are unconstitutional and justiciable, and its ability in the decades since to decide such claims (as well as racial gerrymandering claims), undermines the ahistorical suggestion that the Framers saw no role for the judiciary in this sphere.

Moreover, partisan political gerrymandering throughout history has been routinely denounced as unconstitutional, dangerous to the republic, and a violation of citizens' prized right of representation. The first gerrymander in the American republic is generally thought to be Patrick Henry's attempt in 1788 to deny James Madison a congressional seat by grouping Madison's home county in a district with counties believed to be more favorable to Henry's anti-Federalist cause. Although the scheme did not result in an irregularly-shaped district (as some other early gerrymanders did), the Founding generation greeted it with outrage. The press decried the scheme as a violation of the right of a free people to choose their representatives and a destruction of the majority's ability to decide.[85] The practice received still greater attention, and renewed condemnation, when Elbridge Gerry signed the notoriously outrageous 1812 districting bill that would give gerrymandering its

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[85] GRIFFITH, *supra*, at 40-41.

name.[86] Public outcry was immediate and fierce. The newspaper that published the famous political cartoon depicting the "Gerry-Mander" also decried it as a partisan violation of "the Rights of the People" and declared:

> "This Law inflicted a grievous wound on the Constitution,—it in fact subverts and *changes our Form of Government*, which ceases to be *Republican* as long as an *Aristocratic* House of Lords under the form of a Senate tyrannizes over the People, and silences and stifles the voice of the *Majority*."[87]

Several counties issued resolutions condemning the gerrymander, and towns sent remonstrances to the legislature denouncing it as unconstitutional.[88] Federalists decried it as a threat to the safety of republican institutions, which contravened the Constitution and the Bill of Rights by usurping the majority's prerogative to govern.[89] Later that decade, Massachusetts Federalists took control of the state legislature and—still viewing the 1812 gerrymander as a grave injustice, but evidently believing it justified their engaging in similar actions—passed a new

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[86] *Id.* at 16-19.

[87] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

[88] GRIFFITH, *supra*, at 70-71.

[89] *Id.* at 71.

gerrymander to favor their party.[90] The Democratic-Republicans promptly denounced the Federalists' gerrymander as importing the English "rotten borough system."[91]

This pattern continued through the Fourteenth Amendment era and beyond. As the nature of representation increasingly came to be viewed as a national concern in the post–Civil War era, the topic of gerrymandering increasingly was raised by federal officeholders. For example, in 1870, future president James Garfield, then a congressman, acknowledged that he was a beneficiary of gerrymandering in Ohio yet emphatically declared that "no man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice, produce such results as these."[92]

Thus, from the ratification of the Constitution through the passage of the Fourteenth Amendment and beyond, partisan gerrymandering has been forcefully denounced as unconstitutional and contrary to the American vision of representation. Part of that vision was the independent judiciary's role as the "impenetrable bulwark" against legislative partisan entrenchment that sought to undermine effective representative government.

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[90] *Id.* at 88.

[91] *Id.* at 91 (internal quotation marks omitted).

[92] CONG. GLOBE, 41st Cong., 2d Sess. 4737 (1870).

C. Modern Partisan Gerrymandering Enhances the Threat to the Founding Principles of American Democracy

Extreme partisan gerrymanders today are distinct from gerrymanders of the past in ways that more directly threaten core constitutional values of actual, effective representation. Today's partisan gerrymanders, facilitated by big data and sophisticated targeting technology, create the potential for persistent entrenchment—a powerful advantage persisting for multiple election cycles despite intervening shifts in public opinion. Such a result represents the Founding generation's worst fears of an unaccountable government.

Gerrymanders in earlier periods of American history were often crude and ineffective as mechanisms of entrenchment. Gerrymanders built on county-level voting data were not particularly robust, and parties routinely miscalculated their relative levels of support.[93] The greater quantity and quality of demographic data available today allow parties to target voters more precisely and gauge their support more accurately. Today, the nation faces what

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[93] *See, e.g.*, ZAGARRI, *supra*, at 115-18 (discussing repeated miscalculations that hindered New Jersey Federalists' early attempts to gerrymander congressional districts). Likewise, in the late nineteenth century, the crude nature of the data and tools available for partisan gerrymandering created volatility that rendered partisan gerrymanders impermanent. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 45 fig.1.7 (1999) (depicting high levels of volatility in selected congressional elections from 1864 to 1900).

commentators have described as "the specter of elected officials and party officers using high-end technology and increasingly fine-grained data about voters to create maps that lock in their advantage and shut out opponents for years."[94]

According to the findings of the courts below, the partisan gerrymanders at issue in these cases are examples of this phenomenon. In Maryland, a political consulting firm used sophisticated software to draw a map that would create a 7-1 Democratic advantage by flipping the Sixth Congressional District from a predicted "Solid Republican" to "Likely Democratic" score—the largest swing of any district in the country. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 507 (D. Md. 2018). The Sixth District did flip, and a Democratic candidate was elected in the three subsequent elections. *Id.* at 519. In North Carolina, the map drawer similarly used software that relied on past voting data to draw lines according to partisan advantage; the committee predicted and ultimately obtained a 10-3 Republican advantage. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805-07, 810 (M.D.N.C. 2018).

Thus, modern partisan gerrymanders can successfully accomplish what the Framers sought to avoid—political entrenchment of partisan factions that suppresses effective representational rights. A legislative coalition safe in the knowledge that it could lose every swing seat and yet maintain control of the legislature does not satisfy the Founding generation's

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[94] Jerry H. Goldfeder & Myrna Pérez, *A Tale of (at Least) Two Gerrymanders*, N.Y.L.J. (June 22, 2017).

vision of representative government. When gerrymandering "render[s] Representatives responsive to the state legislatures who drew their districts rather than the People," *id.* at 940, it effectively defeats the historic vision of actual representation. Further, the durable nature of today's extreme partisan gerrymandering, permitting a partisan faction effectively to entrench itself throughout the decennial redistricting cycle and control the tools of entrenchment for the next one, means it is exceptionally difficult, or even impossible, for disadvantaged voters to remedy their constitutional injury through the political process. This is the very risk that the Founding generation identified and sought to avoid: that voters targeted by the practice will "complain from generation to generation without redress."[96]

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As this Court said in *Wesberry*, 376 U.S. at 17, relying heavily on the Framers' ideals, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." The Constitution "leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.* at 17-18. As Alexander Hamilton expressed it, the Constitution does not

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[96] RECORDS, *supra*, at 578 (statement of George Mason).

"enable the representatives of the people to substitute their *will* to that of their constituents."[96]

Extreme partisan gerrymandering runs counter to the Founding generation's most fundamental aspiration: to create a full, fair and effective system of political representation that reflects the will of the People. The judiciary was designed to function as an "impenetrable bulwark" against infringements on the People's right to representation. Without the courts' protection, legislative assemblies might cease to "be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. The constitutional right of each citizen to "an equally effective voice," *id.*, in the election of members of the legislature would be rendered illusory. As the historical record demonstrates, only a system free of partisan gerrymandering conforms to the American vision of representative, responsive democracy.

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[96] THE FEDERALIST NO. 78, *supra*, at 525 (Alexander Hamilton).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decisions below.

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APPENDIX

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No. 18-422, 18-726

In The Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Public Integrity Alliance, Inc. v. City of Tucson,
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Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections,
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Vieth v. Jubelirer,
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Whitcomb v. Chavis,
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OTHER AUTHORITIES:

Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L.J. 72 (2005) 9

Alexis de Tocqueville, Democracy in America (H. Reeve trans. 1961) 8, 9

Andrew Douglas, *FairVote's Monopoly Politics 2016 Projections Updated*, FairVote (Sept. 22, 2015) 30

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Brief *Amici Curiae* of International Municipal Lawyers Association, *et al.*, *Gill v. Whitford*, 16-1161 17

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Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, Expert Report in *League of Women Voters of Pa.*, et al., *v. Commonwealth of Pennsylvania*, No. 261 MD 2017 (Pa. Commw. Ct. Nov. 27, 2017) 13-14

FairVote, *Monopoly Politics 2018* 29, 30

Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966) 25

G. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 Wm. & Mary Bill Rts. J. 1107 (2016) 24

G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After* Gill v. Whitford, 95 Ind. L.J. (forthcoming 2020) 19, 20, 23, 25

Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236 (2018) 22, 26, 27

J.B. Wogan, *States and Localities are Losing Their Influence in Washington*, Governing (June 2014) 17

James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627 (2010) 29

John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 23

Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018) 24

Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017) 21-22, 24, 31

Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115 (2018) 14, 17

Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* (unpublished manuscript) 13

Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219 (2014) 8, 9

Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization In Redistricting and Voting Cases*, 59 Wm. & Mary L. Rev. 1837 (2018) 19, 20

Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295 (2000) 25

Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 Am. J. of Pol. Sci. 136 (2001) 14

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, to champion the development of fair and realistic legal solutions, and to assist members on the vast and cutting-edge legal issues facing local government lawyers today. The IMLA provides the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at

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[1] Appellants and appellees have consented to the filing of this brief through blanket consent. Pursuant to Rule 37.6, counsel represents that no part of this brief was authored by counsel for any party, and no person or entity made any monetary contribution to the preparation or submission of the brief.

present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization whose 11,000 members serve as appointed chief executives and assistants for cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional management of local governments throughout the world.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," this Court has held that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Reynolds v. Sims*, 377 U.S. 533, 555, 560 (1964) (quoting *Wesberry*, 376 U.S. at 17-18).

Indeed, almost immediately after establishing the "one-person one-vote" doctrine, the Court recognized that this vital principle might apply with equal force to redistricting schemes that "designedly . . . would operate to minimize . . . the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). For "[t]he question of the gerrymander is the other half of *Reynolds v. Sims*." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part). "[T]he astute drawing of district lines [can] make[] [a] district either heavily Democratic or heavily Republican . . . . Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be." *Id.* at 176-77. As Justice Douglas observed: "The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it." *Id.* at 177.

Amici represent local communities—cities, counties, and towns—across the United States. Such localities and municipalities play an essential part in our civic society, our democratic system, our constitutional order, and in the formation of distinct communities of interest. These communities are as diverse and unique as they are integral to the life, liberty, and happiness of a pluralistic, self-governing people.

Partisan gerrymandering "defeat[s] [and] circumvent[s] the sentiments" of these communities, *id.*, carving up localities and cobbling together bits and pieces of neighborhoods for no legitimate government purpose. Even when mapmakers manage to keep some municipalities intact, it becomes "the will of the cartographers rather than the will of the people [that] govern[s]." *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting). Studies have confirmed the unfortunate truth that voters recognized long ago: those who hold the districting pen can foreordain the composition and character of a state's congressional delegation without changing the mind of a single voter.

When the state targets certain segments of the population and suppresses their electoral influence because it disfavors their political beliefs and fears the way they will vote, it denies those voters meaningful representation and leads elected officials to ignore the distinct interests of localities as coherent communities. This is the polar opposite of what this Court has recognized as "[t]he very essence of districting": "to produce a different—a more 'politically fair'—result than would be reached with elections as large." *Gaffney v. Cummings*, 412 U.S. 735, 753

(1973). The fact that the redistricting process is committed to political actors, permits the use of political considerations for legitimate purposes, and "inevitably has and is intended to have political consequences" does not mean that "racial or political groups [may be] fenced out of the political process [or have] their voting strength invidiously minimized." *Id.* at 753-54.

Although this Court has acknowledged that partisan gerrymanders "are incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and has suggested that partisan gerrymandering is not immune to judicial scrutiny, *see Hunt v. Cromartie*, 526 U.S. 541, 551 n.7 (1999) ("This Court has recognized . . . that political gerrymandering claims are justiciable."), it has declined—for decades—to articulate "the standards that would govern such a claim," *id.* This status quo cannot persist. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design.").

In the absence of any judicial remedy, legislators have grown bolder and more brazen in their abuses. This legal "no man's land" not only undermines the rule of law in general, it also spills over into adjacent areas of the law, complicating redistricting doctrine for local government lawyers everywhere. Because

many local governments *also* utilize single-member districts, this ambiguity makes it more difficult than necessary to identify the clear "dos and don'ts" of the redistricting process.

Happily, the Constitution already provides well-worn and intuitive standards that are familiar to cities, counties, and citizens alike. Whether the Court decides to ground partisan gerrymandering claims in the First Amendment, the Equal Protection Clause, or both, everyone readily understands that the Constitution prohibits the government from infringing the right to vote, from singling out citizens for disfavor based on their views, or from enacting laws that target particular groups of citizens for no reason other than disapproving their political beliefs.

Voters understand these principles innately, and attorneys navigate these legal doctrines fluently. By harmonizing the legal standards and evidentiary rules at issue in partisan gerrymandering cases with those found in the rest of redistricting jurisprudence, this Court can provide doctrinal consistency and practical tools to local government lawyers everywhere ahead of the next round of redistricting. The result will be less legal confusion, more compliant maps, and more responsive and accountable representation for voters and local communities across the country.

For these reasons, *amici* respectfully request that this Court affirm the judgments below.

ARGUMENT

I. LOCAL GOVERNMENTS PLAY A VITAL ROLE IN OUR CONSTITUTIONAL ORDER AND IN CREATING DISTINCT COMMUNITIES OF INTEREST

This Court has long recognized the critical importance of political power being exercised at the local level—that is, the level closest to those governed. *See, e.g.*, *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968). Preserving a space for more local governance "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive' by putting the States in competition for a mobile citizenry.'" *Ariz. State Legis.*, 135 S. Ct. at 2673 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

Each of these enduring and essential aspects of governance aptly applies to our nation's great cities, small towns, and rural counties. This makes the views of local governments especially relevant to the instant cases.

To begin, local governments have a distinct ability to reflect the particular needs and interests of diverse communities across the country. As Justice Brandeis famously argued, decentralization can foster innovation in policymaking. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel

social and economic experiments without risk to the rest of the country.").

Just as the fifty states serve as "laboratories of democracy," the thousands of cities and counties throughout our nation innovate with respect to policy in all sorts of substantive areas. Whether tackling public health challenges, advancing economic development, developing novel strategies for environmental protection, grappling with the challenges of public safety, or addressing so many other policy challenges, our cities, towns, and counties have been true laboratories of democracy, with innovations at the local level often later being adopted by states and the national government when they have succeeded (and cabined when they fail). *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219 (2014) (discussing dynamics of local innovation and policy diffusion). Ensuring that all three levels of governance remain empowered in our federal system is vitally important to preserving this experimentation and accountability.

In addition, municipalities offer uniquely democratic benefits of participation. From the original New England town meetings of the founding generation—a tradition that still endures—to communities across the country today, opportunities for ordinary citizens to participate and interact with local officials abound at the local level in ways not possible at the state or federal level. *See* 1 Alexis de Tocqueville, Democracy in America 174 (H. Reeve trans. 1961) ("It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the

provincial assemblies."). In part, this is because there generally are far fewer constituents for each elected official even in our largest global cities, compared to that of state and national politics. Diller, *supra*, at 1257-58. These representation ratios allow local leaders to respond more directly to the people who elect them.

Local governments enhance democracy in another related sense, as Alexis de Tocqueville highlighted when he noted that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." De Tocqueville, *supra*, at 76. Service on one of our nation's countless city councils, school boards, county commissions, and myriad other local bodies provides an invaluable training ground for public leaders. Eventual leaders in our state and national governments often learn their earliest lessons in the crucible of local government.

Finally, a certain amount of healthy competition among cities promotes efficiency and accountability in governance. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L.J. 72, 97 (2005) (reviewing empirical evidence that "migration patterns between city and suburbs are significantly affected by tax levels and investment in education"). Our nation's cities, towns, and counties have the flexibility to craft distinct policies to respond to the needs and preferences of mobile residents.

For these reasons and more, county and city boundaries play a key part in the redistricting process. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of

interest, particularly when the subdivision plays an important role in the provision of governmental services." *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring). Respect for locality boundaries can improve civic engagement, responsiveness, accountability, and avoid confusion for voters, candidates, and election administrators alike. *See id.* ("[D]istricts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters."). As Justice Powell once wrote:

> Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting. It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Id. at 787 n.3 (Powell, J., dissenting) (internal quotations and citations omitted).

Because localities form a natural "community of interest" with common values and concerns that run deeper than party label, they often bring tailored, apolitical solutions to local policy problems. And just as this Court has rightly associated the decentralization and devolution found in our federal system with unique benefits, so too does empowerment of and respect for localities enhance and improve our democracy.

II. PARTISAN GERRYMANDERING DISRUPTS THE REPRESENTATION OF COMMUNITIES AND STIFLES LOCAL DECISION-MAKING

While local governments facilitate civic engagement, responsiveness, accountability, pluralism, local autonomy, and liberty, partisan gerrymandering undermines these critical democratic values.

1. Gerrymandering tears coherent communities of interest apart and strings dissimilar communities together. When a congressional district is "nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State," *id.* at 787, representatives are less attuned to the unique interests of local communities and those communities are less capable of coherently conveying local sentiments "up the chain" to their federal representatives, *see, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 537-38 (E.D. Va. 2015), *affirmed in part and vacated in part*, 137 S. Ct. 788 (2017) (noting that "the splitting of municipal and county jurisdictions drew the ire of citizens, who . . . pointed out the difficulties that citizens have in knowing who to contact, who to hold accountable, and who among several legislators should coordinate or lead the representation of local city and county interests").

The Court has recognized that gerrymanders that "exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines" can "cause[] a severe disruption of traditional forms of political activity." *Bush v. Vera*, 517 U.S. 952, 974 (1996) (O'Connor, J.). In *Vera*, for example, "[c]ampaigners seeking to visit constituents 'had to

carry a map to identify the district lines, because so often the borders would move from block to block'; voters 'did not know the candidates running for office' because they did not know which district they lived in." *Id.*

Both of the partisan gerrymanders before the Court this term dismember established communities of interest and disrupt traditional political activities. In Maryland, "a blatant targeting of . . . the Republicans in Frederick County" led that county to be divided "for the first time since 1840." *Benisek v. Lamone*, 1:13-CV-3233, 2018 U.S. Dist. LEXIS 190292, *86-87 (D. Md. Nov. 7, 2018) (Bredar, J., concurring). One of the plaintiffs testified that voters in the area "were confused about the candidates [and] didn't know who they should be engaging," with Republican organizers spending most of their outreach time simply "trying to ascertain the voter's district." *Id.* at *29 (majority opinion).

Meanwhile, in North Carolina, Appellants' own expert "conceded that the 2016 plan divided numerous political subdivisions," with all but one of the districts "divid[ing] municipalities and communities of interest along partisan lines." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 883, 901, 903, 906, 907, 910, 912, 913, 915, 917, 919, 920, 922 (M.D.N.C. Aug. 27, 2018) (discussing statewide and district-specific examples). Here, too, "[v]oters and advocacy organizations elected not to participate in congressional races because they believed they could not 'have a democratic—small 'D'—democratic impact." *Id.* at 931.

Studies suggest these are more than mere anecdotes. "When a district plan is skewed against a party, its candidates contest fewer legislative seats

and have worse credentials when they do run, its donors contribute less money, and its voters are not as supportive at the polls." Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* 20-21 (unpublished manuscript available at https://ssrn.com/abstract=3330695). In short, the associational harms one might expect from partisan gerrymandering are quite real. *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (suggesting that gerrymanders may cause "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office").

2. Even when mapmakers manage to hew to municipal boundaries, partisan gerrymandering can still inflict harm and undermine local policies, interests, and decision-making. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement" to establish a gerrymandering claim). This is because the combination of political polarization and partisan gerrymandering restricts the space for pragmatic community compromises and interferes with the representation of localities—with their distinct sets of preferences—as a whole.

Polarization "means that representatives in Congress nearly always vote the party line." Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, Expert Report in *League of Women Voters of Pa.*, et al., *v.*

Commonwealth of Pennsylvania, No. 261 MD 2017, 15-16 (Pa. Commw. Ct. Nov. 27, 2017). As this has become more common, studies have shown an increasingly "muted responsiveness to localities" among representatives. *Id.* (citing Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 Am. J. of Pol. Sci. 136 (2001)). As a result, "polarization exacerbates the effects of gerrymandering on the political process." *Id.* at 16 n.10.[2]

In other words, partisan gerrymandering is about more than "bloodless concepts like seat and vote shares;" it's about the "distort[ion] [of] legislative representation—the beating heart of a democracy." Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115, 2118 (2018). Mapmakers possess the ability to swing the ideology of a state's congressional delegation dramatically—"*all without changing the mind of a single voter*." *Id.* at 2120. *See also* Warshaw, *supra*, at 22-23. And because representatives increasingly vote the party line based on national issues rather than local concerns, citizens who are targeted by partisan gerrymanders "are artificially deprived of the opportunity to . . . have their views represented in Congress." *Warshaw*, *supra*, at 15. This has a profound impact on nuanced, local issues

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[2] Although polarization compounds the harms of gerrymandering, "[t]he consensus among Political Scientists using pre-2011 redistricting period data is that gerrymandering did not cause th[e] [rise in] polarization [since 1970]. There is not yet a consensus about the effect of redistricting on polarization in recent years." Warshaw, *supra*, at 16 n.10.

and whether voters who belong to distinct communities of interest have any voice *as a member of that local community of interest.*

To be sure, this Court made clear in *Gill v. Whitford* that "[a] citizen's interest in the overall composition of the legislature" and in the "policies adopted by the legislature" may not give rise to a claim. 138 S. Ct. at 1931. But if those interests are "embodied in [the citizen's] right to vote for his representative," *id.*, then it is all-the-more vital that the Court vigorously protect the foundational right from which this democratic representation flows.

First-hand testimony from voters in the cases before the Court reflect the damaging downstream consequences that occur when states violate these rights. As one of the plaintiffs from Maryland testified, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time." *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *71. Voters in North Carolina had similar sentiments, expressing that "they felt their vote didn't count." *Rucho*, 318 F. Supp. 3d at 931. Whether one is a Maryland Republican or a North Carolina Democrat, gerrymandering strips disfavored voters of the opportunity to have their unique voice heard in the halls of Congress.

The diminished responsiveness of representatives to *all* of their constituents is not simply troubling as a matter of structural principles, institutional stability, and enduring constitutional values; it also distinguishes modern cases from the past. One repeated concern of the Court has been accepting—*without any evidence*—the notion that representatives will not be responsive to the needs of

their constituencies as whole. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("An individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters."); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 469-70 (2006) (Stevens, J., dissenting) ("[T]his Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.").

As overwhelming statistical and testimonial evidence continue to prove, gerrymandered districts insulate representatives and absolve them of the need to give any weight to the views of those voters who have been stripped of meaningful electoral power. Thus, even when local municipal boundaries are not breached, partisan gerrymandering robs county and city constituencies of the opportunity to have their unique and diverse perspectives heard and dampens congressional concern for local community interests.[3]

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[3] This disconnect manifests in the policies enacted at the both the federal *and state* level, with local prerogatives increasingly steamrolled by legislators more focused on advancing a single ideology than providing space for constituents with diverse views to enact locally tailored solutions based on the needs of the community. For instance, in *Gill v. Whitford*, several *amici* provided examples of the growing number of local policies

In short, partisan gerrymandering frustrates the preservation of local government interests, restricts the freedom of local governments to pursue policies suited to their constituents, and impedes the ability of voters who belong to distinct communities of interest to have their views heard in Washington.

III. *AMICI* SUPPORT A CLEAR AND COHERENT APPROACH TO REDISTRICTING LAW THAT RELIES UPON INTUITIVE STANDARDS AND EVIDENCE

As organizations representing local governments and local government lawyers, *amici* recognize the need for—and advocate for—realistic legal solutions to complex legal problems. Here, too, *amici* believe that the partisan gerrymandering cases before the Court offer an opportunity to clarify the state of the law, apply well-established legal standards, and provide

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being preempted by state legislatures in states with extreme partisan gerrymandering. *See generally* Brief *Amici Curiae* of International Municipal Lawyers Association, *et al.*, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017).

Because gerrymandering "dramatically influences the representational distortion of House delegations," Stephanopoulos, *supra*, at 2144, and polarization continues to grow, local concerns have increasingly fallen by the wayside on Capitol Hill as well, *see* J.B. Wogan, *States and Localities are Losing Their Influence in Washington*, Governing (June 2014), available at http://www.governing.com/topics/politics/gov-states-localities-losing-influence.html (last accessed Jan. 18, 2019). Because Congress and state legislatures alike wield the power to override, curtail, or disregard the policies and positions of municipalities across the country, these bodies must possess the utmost democratic and constitutional legitimacy if their intrusions on local autonomy and policymaking are to be justified.

workable evidentiary guidance to courts and lawyers across the country ahead of the next major round of redistricting in 2021.

A. The Ambiguous Treatment of Partisan Gerrymandering Claims Complicates Redistricting Law for Local Governments

Although many redistricting cases and analyses focus on state legislative and congressional representation, local governments (and local government lawyers) must also navigate the various strands of this Court's redistricting case law. From one-person one-vote cases to racial dilution and racial sorting cases, localities often deal with cutting-edge legal questions before claims are brought on a wider basis.[4] In fact, challenges raised to city and county redistricting decisions are especially useful to the development of redistricting case law because they are

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[4] *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (one-person one-vote case regarding population deviations based on illegitimate consideration of partisan advantage); *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019 (9th Cir. 2016) (equal protection and *Anderson-Burdick* case regarding city's hybrid city council system utilizing ward-level primaries and at-large general election); *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011) (one-person one-vote case regarding use of citizen-voting-age population versus total population); *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002) (racial gerrymandering case); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (racial gerrymandering case regarding whether districts' shapes and demographics provide adequate circumstantial evidence to prevent summary judgment); *Calvin v. Jefferson Cnty. Bd. of Cmm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) (one-person one-vote case regarding use of prison populations in calculating equal population).

some of the few challenges that are routed through the U.S. Courts of Appeals and subject to this Court's discretionary jurisdiction. *See* 28 U.S.C. § 2284(a) (convening three-judge district courts "when an action is filed challenging the constitutionality of the apportionment of *congressional districts* or the apportionment of any *statewide* legislative body") (emphasis added).[5]

And while redistricting law has a reputation for being complex,[6] a great deal of that complexity is due to this Court's ambiguous treatment of prior partisan gerrymandering claims. *See generally* Brief of *Amici Curiae* Law Professors, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). Because the lack of a claim leaves open doctrinal gaps in racial gerrymandering law and the one-person one-vote doctrine, mapmakers and litigants alike engage in "legal arbitrage," distorting the body of law that does exist by using it to fight about conduct governed by a body of law that does not exist. *See* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After* Gill v. Whitford, 95 Ind. L.J. (forthcoming 2020) (manuscript at 60, available at https://ssrn.com/abstract=3334370) [hereinafter Parsons, *Gerrymandering & Justiciability*]. Even if

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[5] *See, e.g.*, *Public Integrity Alliance*, 836 F.3d 1019 (9th Cir. 2016), *cert. denied*, 197 L. Ed. 2d 518 (2017); *Lepak*, 453 F. App'x 522 (5th Cir. 2011), *cert. denied*, 569 U.S. 904 (2013); *Chen*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

[6] Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization In Redistricting and Voting Cases*, 59 Wm. & Mary L. Rev. 1837, 1852 (2018) ("The most charitable thing to say about the current state of racial gerrymandering law is that it is a big mess.").

the Court were to deviate from its default rule that redistricting laws are justiciable, *Baker v. Carr*, 369 U.S. 186 (1962),[7] this doctrinal vacuum would remain, leaving mapmakers and litigants to "shadowbox" over the real issues at stake, *see* Hasen, *supra*, at 1879.

In short, the law's internal inconsistency, ambiguity, and incompleteness provides the greatest headache to local government lawyers faced with the task of advising clients on the "dos and don'ts" of redistricting law, not the flexibility of any particular "do" or the rigorousness of any specific "don't." Crafting a claim (even a demanding one) that completes the redistricting-law picture would not add complexity but ease it.

As this Court has remarked, "clear distinctions" are preferable to "delphic alternative[s]" where "structural safeguards" and institutional boundaries are at issue. *See Plaut v. Spendthrift Farm, Inc.*, 514

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[7] Creating a new justiciability exception for partisan gerrymandering claims would require a substantial (and troubling) shift in this Court's political-question jurisprudence. *See generally* Brief for Constitutional Law Professors as *Amici Curiae*, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). As the district court in *Rucho* observed, "a majority of the Supreme Court *never* has found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." 318 F. Supp. 3d at 842 n.19.

Indeed, the two cases before the Court are perhaps "the most significant political-question doctrine case[s] of our generation." Parsons, *Gerrymandering & Justiciability*, *supra*, at 3. Before significantly expanding that doctrine, the Court should consider carefully the institutional, federalism, and separation-of-powers implications of such a change. *See generally id.* (arguing that the modern political question doctrine is incompatible with the limits and obligations imposed on judicial power by Article III).

U.S. 211, 239-40 (1995). Vague and equivocal treatment "simply prolongs doubt and multiplies confrontation." *Id.* at 240. The Court's approach to partisan gerrymandering has done precisely this, blurring the lines of lawful behavior and drawing legislators out beyond constitutional boundaries. As such, redistricting law would benefit from advice familiar to local government attorneys everywhere: "Good fences make good neighbors." *Id.*

B. Constitutional Doctrine Already Provides Fair and Intuitive Standards Familiar to Local Government Lawyers

As the district court in *Rucho* noted, partisan gerrymandering "violates a number of well-established constitutional standards—that the government act impartially, not infringe the right to vote, and not burden individuals based on the exercise of their rights to political speech and association." 318 F. Supp. 3d at 853. Whether the Court looks to the Equal Protection Clause, the First Amendment, or both, the Constitution provides well-worn, intuitive standards that are familiar to local governments, local government attorneys, and the public.

Applying these principles to partisan gerrymandering is not some adventuresome departure from this Court's case law, but rather a long-overdue correction that harmonizes the Court's approach to partisan gerrymandering claims with the rest of its fundamental constitutional doctrines and its overall approach to judicial neutrality.[8] As Circuit Judge

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[8] *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116

Niemeyer observed below in *Benisek*, "[C]itizens have no constitutional right to be assigned to a district that is likely to elect a representative that shares their views," but "they do have a right . . . not to have the value of their vote diminished *because of* the political views they have expressed." 2018 U.S. Dist. LEXIS 190292, at *46.

This antipathy to viewpoint-targeting is standard constitutional fare and "typical of First Amendment violations in other contexts." *Id.* (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982)). The Court does not uphold judicial independence and impartiality by steering clear of such cases, even when they involve political actors or political issues. Rather, the Court protects the Constitution and preserves its own public status by rigorously and consistently honoring these constitutional mandates. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236, 259-60 (2018) (arguing that establishing limits to partisan gerrymandering could help *protect* the Court "against

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Mich. L. Rev. 351 (2017); *Rucho*, 318 F. Supp. 3d at 927 ("How can the First Amendment prohibit the government from disfavoring certain viewpoints, yet allow a legislature to enact a districting plan that disfavors supporters of a particular set of political beliefs? How can the First Amendment bar the government from disfavoring a class of speakers, but allow a districting plan to disfavor a class of voters and candidates? How can the First Amendment protect government employees' political speech rights, but stand idle when the government infringes on voters' political speech rights? And how can the First Amendment ensure that candidates ascribing to all manner of political beliefs have a reasonable opportunity to appear on the ballot, and yet allow a state electoral system to favor one set of political beliefs over others?").

charges of partisanship" and "save the Court from having to referee . . . secondary partisan fights" over other manipulations of electoral rules).

Relying on such established principles would provide clear rules that are second-nature to local government attorneys, understandable to mapmakers, and obvious to the average citizen.[9] Just as political affiliation can be considered in hiring for *policy-level* government jobs (where the government has a legitimate interest), but not in hiring for *non-policy-level* government jobs (where it does not), *see Vieth*, 541 U.S. at 294 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)), so too can political affiliation be used to advance legitimate redistricting goals (such as consistently creating competitive districts [10] or

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[9] As Chief Justice Roberts noted at oral argument in *Gill v. Whitford*, any decision provided by the Court must be intuitive and sound in clear constitutional principles, lest the "intelligent man on the street" doubt the explanation, thereby risking damage to the "status and integrity" of the Court. *See Gill v. Whitford*, 16-1161, Oral Arg. Tr. 37:11-38:4 (Oct. 3, 2017). "Far from 'impairing' the reputation of the Court," a clear and principled decision restricting partisan gerrymandering is more likely to be received by the public like the Court's celebrated one-person one-vote doctrine—a rule that ultimately "'enhanced the prestige of the Court.'" Parsons, *Gerrymandering & Justiciability*, *supra*, at 66 (quoting John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 121 (1980)).

[10] Appellants in *Benisek* have argued that altering Maryland's Sixth District created a more "competitive" district. Br. for Appellants, *Lamone v. Benisek*, 18-726, at 6 (filed Feb. 8, 2019). But this Court has frequently reminded redistricting litigants that even *legitimate* redistricting policies cannot survive when they are applied inconsistently or in a discriminatory fashion. *See Brown v. Thomson*, 462 U.S. 835, 844 (1983) (noting that the population variations were "entirely the result of the

"allocat[ing] seats proportionately," *Vera*, 517 U.S. at 964-65 (O'Connor, J.) (citing *Gaffney*, 412 U.S. at 751-54)) but not illegitimate redistricting goals (such as partisan advantage, *see Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective")). These are well-known standards that local governments and local government lawyers throughout the country encounter and incorporate into their policy- and decision-making *every day* across a range of contexts.

Simply put, mapmakers cannot draw districts to favor Republicans just because the mapmaker "think[s] electing Republicans is better than electing Democrats," *Rucho*, 318 F. Supp. 3d at 801, or "set out to draw . . . borders in a way that [is] favorable to the Democratic party" because the mapmaker would like to see more Democrats elected, *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *10. "[T]hat is not a choice the Constitution allows . . . mapdrawers to make." *Rucho*, 318 F. Supp. 3d at 801.[11]

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consistent and nondiscriminatory application of a legitimate state policy"); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (permitting population deviations "only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination").

[11] *See also* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, *supra*; G. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for*

To be sure, introducing clear limits on partisan gerrymandering will require "resetting legislators' expectations about what behavior is constitutionally tolerable." Parsons, *Gerrymandering & Justiciability*, *supra*, at 59. But this does not make intervention impossible, inappropriate, or even uncommon. After all, "how 'justiciable' would First-Amendment issues appear today if the process of interpretation and application had been halted in 1912?" *Id.* (quoting Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 595 (1966)). New doctrine always creates a new equilibrium—this is how the Constitution's vital checks and balances maintain fidelity to that instrument over time.

Some of our Nation's most profound betrayals of that promise have occurred when this Court has failed to fulfill its own role in maintaining that equilibrium. In *Giles v. Harris*, this Court claimed it could not provide "a remedy for political wrongs" and stood idly by in the face of a sweeping disenfranchisement scheme targeting black voters. *See* 189 U.S. 475, 486 (1903). Once the Court "effectively blessed" the approach, it spread to other states and "virtual[ly] eliminat[ed] black citizens from political participation in the South" for well over half-a-century. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 313, 297 (2000). In Louisiana, for example, the number of black voters on the registration rolls dropped from 130,334 to 730 between 1896 and 1910. *See id.* at 303.

Partisan Advantage is Unconstitutional, 24 Wm. & Mary Bill Rts. J. 1107 (2016).

The Court's "narrative of nonintervention" would arise again in *Colegrove v. Green*, where a plurality cited *Giles* with *favor* for the proposition that the issue was not fit for "judicial determination." *See* Charles & Fuentes-Rohwer, *supra*, at 243 (discussing *Colegrove v. Green*, 328 U.S. 549 (1946)). In short, the same arguments raised against partisan gerrymandering claims today have been raised throughout our Nation's history. The Court relied upon them "when it refused to intervene to protect African Americans against widespread racial discrimination in the political process and when it refused to intervene to address the problem of grossly malapportioned districts." *Id.* at 240. The Court would eventually rise to meet the task before it in prior eras, and it must do so again in our own time.

Nor is resetting legislators' expectations imprudent. Quite the contrary. At present, the Court's approach sends a signal to elected officials (and to our next generation of leaders) that there is success to be had in brazen suppression, that there is power to be found in dismantling democracy, and that accountability to the voters is merely the fate of the unsavvy—a fool's game from a bygone age. [12] Representative democracy cannot long survive when the values and principles that make it possible are not

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[12] *See* Zachary Roth, *Voting Fight Shifts to Local Level in North Carolina*, NBC News (Aug. 8, 2016), http://www.nbcnews.com/politics/elections/voting-fight-shiftslocal-level-north-carolina-n625751 (noting that the "head of a leading conservative think tank" in North Carolina is "publicly urging" county election officials to "impose new schemes to limit access to the polls" because "making voting harder is just 'partisan politics'—and that's fair game") (last accessed Jan. 18, 2019).

modeled, imparted, and passed along. Here, an ounce of prevention is worth a pound of cure. By doing "a little now—rein[ing] in partisan gerrymandering," the Court can "do a lot less later—by deterring [other, more extreme] bad behavior it would otherwise have to deal with on the merits." *Id.* at 241.

In fact, the Court faces a unique opportunity this term to minimize litigation, streamline the shift to compliant maps, and reset expectations on a broad scale. *Every* map in the United States—congressional, state, and local—must be revisited following the upcoming 2020 census with or without this Court's guidance. *Amici* believe clarification by the Court would substantially benefit those tasked with drawing new maps following the census and would obviate the need for litigation that localities might otherwise face in future years based on the current amorphous state of the law. With a coherent political gerrymandering claim (or claims) in place, mapmakers will better understand what practices are and are not permissible and local government lawyers will better understand how the various strands of this Court's redistricting jurisprudence interact with one another so as to minimize or eliminate the risk of a lawsuit—political, racial, or otherwise.

C. Permitting a Variety of Evidence Would Improve Administrability

Given the diverse contexts in which a partisan gerrymandering claim could arise, *amici* also urge the Court to employ a consistent evidentiary approach to such claims and permit both plaintiffs and defendants to rely upon a variety of types of evidence in bringing and defending claims. This Court held in *Cooper v.*

Harris that a racial gerrymandering claim rests upon fundamental constitutional standards, and while certain types of evidence (such as an alternative map) may be particularly persuasive or useful in supporting such a claim, the Equal Protection Clause does not demand any "special evidentiary prerequisite." 137 S. Ct. 1455, 1479-80 (2017). This should be the case in the partisan gerrymandering context as well.

Expert evidence, for example, should be permitted to maintain or defend a claim. Such evidence will often be the best evidence available in the pursuit or defense of a partisan gerrymandering claim. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 870-80, 893-94 (relying on "extreme statistical outlier" analyses to support findings of discriminatory intent and effect). Expert evidence has not flummoxed lawyers or judges in racial dilution cases, racial sorting cases, or any other number of cases in which such evidence is deployed. *See id.* at 853-58 (citing examples of judicial reliance on statistical and social science evidence as proof of a violation of a constitutional standard).

Moreover, this kind of evidence is becoming increasingly intuitive and accessible in the redistricting context. It does not take special technical training to understand that a map is an outlier when it is more partisan than 99% of almost 25,000 neutrally-drawn maps. *See id.* at 872. And data and studies about the impact of maps are being made available to the public online with greater and greater frequency.

That said, such studies need not be mandatory, either as a threshold showing or as a defensive necessity. For example, the district court in *Benisek* relied upon the Democratic Performance Index (DPI)

and the Cook Partisan Voting Index (PVI) to find that the plaintiffs' "electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened" by intentional state action. 2018 U.S. Dist. LEXIS 190292, at *59-61. As Judge Niemeyer observed, such analyses are sophisticated and dependable tools in their own right, commonly used by the mapmakers themselves. *See id.* at *13-14 (noting that the DPI metric was used by the consultant that designed Maryland's plan); *id.* at *25-27 (noting that the PVI metric is a "well-respected" measure, and observing that "[w]hen the Cook Report has rated a district 'Solid Republican' on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; . . . when a district has been rated as 'Likely Democratic,' the Democratic candidate has won 94% of the time") (citing James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010)).

Independent, nonpartisan organizations have relied on similar kinds of modeling to demonstrate how gerrymandering can diminish the weight of invidiously targeted votes and undermine voters' equal opportunity to exercise the franchise and impact the political process. For example, FairVote predicted the outcome in 361 of 435 congressional seats ahead of the 2016 election with 100% accuracy using no information other than 2010-2014 election results and whether an incumbent was running in the race.[13]

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[13] FairVote, *Monopoly Politics 2018*, at 2, available at https://fairvote.app.box.com/v/MonopolyPolitics2018 (last accessed Jan. 18, 2019) [hereinafter, "FairVote, *Monopoly Politics 2018*"].

These projections were made in *November 2014—two years* before the election—and were only updated to account for races in which representatives announced they would not be seeking reelection in 2016.[14] "In these districts, the challengers [were] powerless to affect the outcome, regardless of their funding, their qualities as candidates, or their ability to motivate supporters."[15]

Members of Congress elected from such "safe" seats (with a 10-percent advantage, for example) "need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities in their district." *LULAC*, 548 U.S. at 470–71 (Stevens, J., dissenting in part). Pretending that such partisan gerrymanders are not readily identifiable or do not substantially impact the ability of targeted voters to meaningfully affect the political process would be sheer judicial fiction.

Of course, if a representative resides in a district that is particularly favorable based on natural geography or other legitimate redistricting considerations, a partisan gerrymandering claim cannot lie. *See Gill*, 138 S. Ct. at 1933. Similarly, the mere fact that one candidate wins and one candidate loses any given race does not, standing alone, prove or negate the existence of an invidious suppressive effect. This is the same evidentiary approach local government attorneys encounter in the Court's racial dilution case law. *See Thornburg v. Gingles*, 478 U.S.

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[14] Andrew Douglas, *FairVote's Monopoly Politics 2016 Projections Updated*, FairVote (Sept. 22, 2015) http://www.fairvote.org/fairvote_s_monopoly_politics_2016_projections_updated (last accessed Jan. 18, 2019).

[15] FairVote, Monopoly Politics 2018, *supra*, at 2.

30, 57 (1986) (noting that the "loss of political power through vote dilution is distinct from the mere inability to win a particular election").

In other words, it simultaneously can be true that a voter possesses no right to live in any particular district or win any particular election, and that the same voter possesses the right not to have the electoral odds intentionally stacked against her. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting that the Constitution protects citizens "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights"); Kang, *supra*, at 383 ("Party members may not have any constitutional entitlement to electoral success, but they should have a constitutional expectation against the government actively trying to burden their representational interests based on their partisan affiliation and beliefs.").

Evidence need not prove impossibility (and, therefore, an ability to divine the future) in order to prove the existence of a meaningful burden. The evidence need only show that the gerrymander was intended to dilute the influence of the targeted voters and that the gerrymander's success is assured under any likely electoral scenario.[16] These elements can be

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[16] *See Rucho*, 318 F. Supp. 3d at 867 ("[A] plaintiff must show that the dilution . . . is likely to persist in subsequent elections."); *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *60 ("Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so.").

proven through a variety of evidence, and the Court should not foreclose this evidence just as it does not foreclose it in other redistricting cases.[17]

* * *

By adopting a consistent and understandable evidentiary approach and relying on well-established, familiar, and coherent constitutional standards, the Court can provide local governments and their lawyers a clear lay of the land heading into the next round of redistricting, forestall a range of racial and political gerrymandering claims that might otherwise arise,

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[17] That the Court already allows defendants in racial sorting cases to rely upon a range of evidence to prove that politics, not race, predominated in the linedrawing process demonstrates that courts are more than capable of receiving and considering a host of different circumstantial and direct evidence in deciding whether the "essential basis" used in forming a district was racial or political. *See Bethune-Hill*, 137 S. Ct. at 799. If political considerations are found to predominate, the only remaining intent question is whether that political purpose is legitimate or illegitimate. *Compare Easley v. Cromartie*, 532 U.S. 234, 239-47 (2001) (legitimate interest in pursuing a 6-6 "partisan balance"), *with Rucho*, 318 F. Supp. 3d at 808 (illegitimate interest in pursuing a 10-3 "partisan advantage"). This question parallels that already ably managed in the racial gerrymandering context, where courts distinguish between legitimate and illegitimate racial considerations in redistricting. *Compare City of Rome v. United States*, 446 U.S. 156, 177 (1980), *abrogated in part by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (legitimate interest in preventing racial dilution and securing equal opportunity to elect), *with Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (illegitimate interest in racial maximization). *See also Gill v. Whitford*, 16-1161, Oral Arg. Tr. 7:8-9 (Oct. 3, 2017) (JUSTICE GINSBURG: "[Doesn't] max-Republican . . . have the same problem that 'max-Black' did?").

and help preserve the faith and voice of voters residing in distinct, local communities across the country.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgments below.

Respectfully submitted,

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March 8, 2019

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF PROFESSOR MICHAEL KANG AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29 (2004) 28

Mackenzie Weinger, "Pa Pol: Voter ID Helps GOP Win State," *Politico* (June 25, 2012) 26-27

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Michael S. Kang is the William G. and Virginia K. Karnes Research Professor at Northwestern Pritzker School of Law and a nationally recognized expert on redistricting and election law.[2] Professor Kang holds a J.D. from the University of Chicago School of Law and a Ph.D. in Government from Harvard University.

Professor Kang was recognized for the Best Election Law Article of 2017 by the Association of American Law Schools Section on Election Law. *See Gerrymandering and the Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). In the article, Professor Kang argues that legislative redistricting, like all lawmaking, must be supported by a legitimate government purpose; and that because the pursuit of partisan advantage is not a legitimate government purpose, a redistricting plan that has partisan effects that result solely from partisanship should be rejected as unconstitutional.

Professor Kang believes that consideration of his thesis would assist the Court in resolving the issues presented by these appeals.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* and his counsel made any monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

[2] The views expressed herein are Professor Kang's alone and do not represent the views of Northwestern Pritzker School of Law.

SUMMARY OF ARGUMENT

Professor Kang submits that, consistent with well-established constitutional norms, the partisan effects of a redistricting plan must result from the mapmakers' pursuit of legitimate government interests, and not solely from their pursuit of a partisan advantage favoring one party over another. Courts should therefore reject a plan as unconstitutional if its partisan effects do not arise from legitimate government objectives. Under this simple standard, courts would not need an exact measure of a plan's partisan effects. The proposed standard would, as a result, be "clear, manageable, and politically neutral." *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment).

No Justice of this Court has ever opined that an excessively partisan redrawing of congressional districts is constitutional. *See, e.g.*, *Vieth*, 541 U.S. at 292–93 (Scalia, J., plurality opinion); *id.* at 325 (Stevens, J., dissenting); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306, 1310 (2016); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). But seeking to fashion an objective constitutional standard based on whether the partisan effect of a particular redistricting plan is "excessive" has understandably vexed the courts because of the difficulties of measurement. "Excessiveness is not easily determined." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). By comparison, a standard requiring a showing that the plan was drawn to achieve legitimate government objectives would, as in the "one person, one vote" and Elections Clause cases, be far easier to apply.

As Justice Stevens has said, "any decision to redraw district boundaries—*like any other state action that affects the electoral process*—must, at the very least, serve some legitimate government purpose" beyond "a purely partisan desire." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 448 (2006) ("*LULAC*") (Stevens, J., concurring in part and dissenting in part) (emphasis added). The legitimate government interest standard is familiar to this Court and the lower courts. A decision to endorse that standard here would align the standard for partisan gerrymandering cases with the Court's prior decisions under the First Amendment, the Fourteenth Amendment, and the Elections Clause (U.S. Const. art. I, § 4). There is no reason for the standards to be different.

This Court's "one person, one vote" and Elections Clause decisions demonstrate that recognizing politicians might consider partisan advantage in drawing a district map does not imply that seeking to disadvantage another political party is a legitimate basis for delineating districts. The acknowledgement that legislatures are partisan bodies is a far cry from holding that they may rely on pure partisanship as a legitimate basis for their decisions. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("On the few occasions where [the Court has struck down a policy as illegitimate under rational basis scrutiny], a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group.") (quotation omitted); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The unfortunate and unintended effect of not rejecting outright redistricting with a purely partisan purpose has been to encourage redistricting plans that are openly designed to put voters favoring a particular party at a disadvantage. That, in turn, has generated numerous challenges to redistricting plans that avowedly seek partisan advantage and has led to more frequent review of those plans by this Court. By adopting a purpose-based standard for political gerrymandering, the Court would strongly discourage the growing practice of public officials openly engaging in the partisan redrawing of district lines—thus abating a practice that undermines the perception and reality of free and fair elections and lessening, if not eliminating, the need for challenges to that practice.

In each of the cases now before the Court, the redistricting plans were designed with an avowedly partisan purpose, and cannot be considered to be the product of legitimate state interests. They present quintessential examples of undiluted partisanship, with clear evidence of a pure partisan purpose in drawing the district lines. *See* Brief for Appellee Common Cause at 7–19, 41, *Rucho v. Common Cause*, No. 18-422; Brief for Appellee League of Women Voters at 6–8 *Rucho v. Common Cause*, No. 18-422; Brief for Appellees at 4–10, 51, *Lamone v. Benisek*, No. 18-726. They, therefore, cannot be sustained under a purpose-based test of constitutionality.

ARGUMENT

I. THE SOLE PURSUIT OF PARTISAN ADVANTAGE IS NOT A LEGITIMATE BASIS FOR REDISTRICTING

Under this Court's redistricting case law, the pure pursuit of party primacy is an illegitimate basis for lawmaking. As Justice Kennedy wrote in *Vieth*: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

In his plurality opinion in *Vieth*, Justice Scalia agreed that "an *excessive* injection of politics [in redistricting] is *un*lawful." 541 U.S. at 293. He also observed that, in seeking to advance legitimate lawmaking interests, the government is entitled to weigh political considerations in redistricting, including potential partisan implications. That observation is not—and should not be allowed to become—a sanction for government officials to pursue an electoral edge for one party at the expense of another. As Justice Stevens observed in *Vieth*, there had not previously been "the slightest intimation in any opinion written by any Member of [the] Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting).[3]

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[3] In *Cox v. Larios*, Justice Scalia over-appraised the support in *Vieth* for accepting "politics as usual" as a "traditional" criterion that is constitutional if not taken too far. 542 U.S. 947, 952 (2004) (Scalia, J., dissenting); *see Vieth*, 541 U.S. at 316 (Kennedy, J., con-

(....continued)

Amicus submits that a standard requiring that legitimate government interests support redistricting plans is "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). Recent lower court decisions in this and other cases demonstrate the manageability of applying such a purpose-focused standard to partisan gerrymandering. Tracking Justice Kennedy's opinion in *Vieth*, these decisions have inquired "not whether political classifications were used" or how excessive the partisan advantage is, but instead whether the government acted with only the impermissible "purpose . . . of imposing burdens on a disfavored party and its voters." *Id.* at 315.

A. There is agreement that "excessive" partisanship is not a legitimate basis for redistricting.

Although the Court has struggled to articulate a standard of constitutionality for partisan gerrymandering, no member of this Court has opined that the Constitution tolerates excessively partisan redrawing of congressional districts. Where, as here, district lines can be explained only by a partisan purpose, the plans should be declared unconstitutional.

This Court first addressed the constitutionality of partisan gerrymandering in *Davis v. Bandemer*, 478 U.S.

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curring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."); *id.* at 351 (Souter, J., dissenting) (proposing that after a plaintiff shows a departure from "traditional districting principles," the defendants must show that "legitimate objectives" other than "naked partisan advantage" justify the redistricting).

109 (1986), when it accepted that the issue is justiciable but articulated an effects-focused standard that so far has not been met. In *Bandemer*, the Court considered an equal protection challenge to the 1981 decennial redistricting of the Indiana state legislature. The district court had found that the Republican-majority legislature drew districts with "simply no conceivable justification" other than "protecting its incumbents and creating every possible 'safe' Republican district possible." *Bandemer v. Davis*, 603 F. Supp. 1479, 1487–88 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986). Nonetheless, a plurality of the Court reasoned that in order to succeed, the plaintiffs needed to prove discriminatory effect by showing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (plurality opinion). The result was to preserve a district map that avowedly served the partisan purpose of keeping a political party in control, which intentionally burdened voting rights. The decision cast doubt on the fairness of the electoral process.

Returning to the question eighteen years later in *Vieth*, the Court again held that partisan gerrymandering cases are justiciable,[4] but rejected the *Bandemer* discriminatory effects standard without articulating a new standard. In *Vieth*, the fractured Court put forward three distinct constitutional rationales and no controlling legal standard. Justice Scalia, writing for a four-member plurality, opined that partisan gerrymandering cases are nonjusticiable despite "the incompatibility of severe par-

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[4] *See* 541 U.S. at 309–10 (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court are convinced" that "political gerrymandering claims are justiciable.").

tisan gerrymanders with democratic principles" and the recognition that "an *excessive* injection of politics is *unlawful*" in legislative districting. *Vieth*, 541 U.S. at 292–93 (plurality opinion). Justice Kennedy, in a concurring opinion, wrote that "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for identifying unconstitutional partisan gerrymandering." *Id.* at 307–08 (Kennedy, J., concurring in the judgment). Justice Stevens, in his dissenting opinion, denied that "a naked purpose to disadvantage a political minority would provide a rational basis" for a redistricting plan. *Id.* at 336–37 (Stevens, J., dissenting). In his view, the appropriate constitutional question was "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles." *Id.* at 339.

The *Vieth* plurality opinion, while not controlling, has nevertheless guided subsequent discourse on the question of whether partisan motivation could constitute a lawful basis for a redistricting plan. The plurality observed that legislative redistricting is contemplated in the Constitution. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."). Because partisan redistricting had a place in American politics since the colonial period, the plurality concluded that "partisan districting is a lawful and common practice." *Vieth*, 541 U.S. at 286 (plurality opinion). In their view, although "excessive" partisanship was unlawful, the question was not justiciable because it was impossible to craft a workable standard to assess "[h]ow much political motivation and effect is too much." *Id.* at 297 (plurality opinion). Had the focus in-

stead been on the illegitimate purpose of the legislation, there would have been no such problem.

Importantly, the plurality opinion in *Vieth* did not identify any prior case law expressing constitutional approval for partisan motivations as legitimate reasons for the drawing of district lines. Rather it cited cases which recognized that, as a practical matter, partisan concerns were commonly considered in redistricting, and which passed no judgment on whether such considerations could be a legitimate government interest or a lawful basis for government action *absent additional nonpartisan considerations*. *See* 541 U.S. at 285–86 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics."); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."). Nevertheless, the *Vieth* plurality cited those cases as support for the conclusion that seeking partisan advantage could be a legitimate basis for a redistricting plan, so long as the partisan purpose and effect were not "excessive." 541 U.S. at 293.

In *Vieth*, Justice Kennedy accepted that the excessiveness of a partisan gerrymander could be part of an undefined constitutional standard, and held open the possibility that criteria for a "clear, manageable, and politically neutral" constitutional standard could be developed in the future. 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). But he also cautioned against "adopting a standard that turns on whether the partisan interests in the redistricting process were excessive," because

"[e]xcessiveness is not easily determined." *Id.* at 316. He suggested that the proper inquiry might instead be purpose-directed, assessing under the First Amendment whether "political classifications were used to burden a group's representational rights." *Id.* at 315. He observed that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." *Id.* at 312.

There is, of course, a significant difference between taking into account political considerations and pursuing party primacy. The Court has long recognized the practical reality that legislatures are partisan bodies and thus aware of the political aspects of redistricting. *See, e.g., Gaffney*, 412 U.S. at 752–53 ("It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.").

Recognizing that legislatures are partisan bodies, however, falls far short of supporting the conclusion that pure partisanship is a legitimate basis for drawing district lines. The Court's approval of legislative consideration of partisan concerns in redistricting has been limited to circumstances in which mapmakers were, at least ostensibly, seeking to achieve *fairness* between the political parties. In *Gaffney*, for example, the Court held that a state does not violate the Constitution by attempting "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties." *Id.* at 752. The Court distinguished this from districting plans that "are

employed to minimize or cancel out the voting strength of racial *or political* elements of the voting population," an action that the Court labeled "invidiously discriminatory." *Id.* at 751 (emphasis added); *see also Harris*, 136 S. Ct. at 1306 (citing *Gaffney* for the proposition that "a state interest in maintaining the competitive balance among political parties" is a "legitimate" state interest in redistricting); *Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (approving the use of partisan considerations in a remedial redistricting plan that sought to render each party's share of the state's congressional delegation proportional to its share of the statewide vote in the most recent congressional election).

B. Identifying partisan advantage as an illegitimate basis for redistricting would address the concerns expressed in *Vieth*.

Dissents by Justice Stevens and Justice Breyer in *Vieth* and *LULAC* articulate a standard that addresses the concerns originally framed by Justice Kennedy in *Vieth*. That standard, which asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *Vieth*, 541 U.S. at 336–39 (Stevens, J., dissenting), is "clear, manageable, and politically neutral" and does not turn "on whether the partisan interests in the redistricting process were excessive," *id.* at 307–08, 316 (Kennedy, J., concurring in the judgment).

Applying that same test in his dissent in *LULAC*, Justice Stevens, joined in relevant part by Justice Breyer, expressed the view that, because the redistricting had the "sole purpose of advantaging Republicans and disadvantaging Democrats," the state had failed its "constitutional requirement that state action must be

supported by a legitimate state interest." *LULAC*, 548 U.S. at 462–63 (Stevens, J., concurring in part and dissenting in part). He cited the overwhelming evidence of purely partisan motivations for the 2003 Texas redistricting plan in concluding that "it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander." *Id.* at 447.

The decisions below demonstrate that a purpose-based standard is manageable. Building on Justice Stevens's and Justice Breyer's standard in *Vieth* and *LULAC*, the panels below reasoned that a core constitutional inquiry in partisan gerrymandering cases should be whether plaintiffs can demonstrate that the illegitimate purpose of partisan advantage—as opposed to any legitimate state interests—resulted in the partisan effects of the redistricting plan at issue. *See, e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 923 (M.D.N.C. 2018) (finding that "the dilution of . . . votes is not attributable to the State's political geography or other legitimate redistricting considerations"); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 520 (D. Md. 2018) (finding that no "legitimate redistricting goa[l] . . . explains the dramatic exchange of populations between the Sixth and Eighth Districts").

II. REDISTRICTING SOLELY TO ACHIEVE A PARTISAN ADVANTAGE IS INCONSISTENT WITH THE LONGSTANDING CONSTITUTIONAL NORM AGAINST GOVERNMENT PARTISANSHIP AS A LEGITIMATE GOVERNMENT ACTIVITY

Redistricting for the purpose of achieving partisan advantage is squarely at odds with the Court's holdings

in related areas of constitutional law that partisanship cannot be a legitimate government purpose. As reflected in this Court's First Amendment, Fourteenth Amendment, and Elections Clause jurisprudence, constitutionality should not turn primarily on the degree of harm resulting from partisanship, but rather upon the fact that disadvantaging another party was the sole basis for a map's design. These cases reflect an overarching constitutional norm against government action to seek partisan advantage as a legitimate government activity. The standard in alleged partisan gerrymandering cases should be the same standard as in these other related areas of the law.

A. The Court's First Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

When the government designs an electoral map for the sole purpose of attaining primacy for a political party, the government is intentionally burdening the core First Amendment rights of citizens with competing political beliefs and associations. That does not further legitimate state interests. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In *Vieth*, Justice Kennedy explained partisan gerrymandering implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history,

their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod*, 427 U.S. 347 (plurality opinion)). He explained that a First Amendment inquiry would focus on "whether political classifications were used to burden a group's representational rights." *Id.* at 315. In his dissent in *Vieth*, Justice Stevens also suggested a First Amendment analysis: "'[P]olitical belief and association constitute the core of those activities protected by the First Amendment' . . . . It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district." *Id.* at 324–25 (Stevens, J., dissenting) (quoting *Elrod*, 427 U.S. at 356 (plurality opinion)).

Justice Kennedy's reasoning came before the Court in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), which is a prior decision in the case that is now captioned *Lamone v. Benisek*, No. 18-726. The plaintiffs had asserted a First Amendment partisan gerrymandering claim based on Justice Kennedy's concurrence in *Vieth*. The claim invoked Justice Kennedy's reasoning that "if 'a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation,'" and that "[w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention . . . ." 136 S. Ct. at 456 (quoting *Vieth*, 541 U.S. at 315)). This Court reversed the dismissal of the claim by a single district judge because he failed to refer the claim to a three-judge panel. *See id.* Because Justice Kennedy's legal theory was "uncontradicted by the majority in any of [the Court's] cases," the claim invoking it was not "'constitutionally insubstantial,'" and should have been referred to a three-judge

panel. *Id.* (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)). On remand, the three-judge panel appropriately adopted a standard reflecting the longstanding First Amendment norm prohibiting a partisan purpose for state action absent a legitimate state interest. *See Benisek*, 348 F. Supp. 3d at 520 (holding that "the intent to flip party control" was an "illegitimate" basis for redistricting); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801–02 (D. Md. 2017). That panel's judgment is now before this Court.

The decisions below in *Benisek* are consistent with the longstanding norm against government action for partisan advantage under the First Amendment, as adopted in the Court's government patronage cases. The patronage decisions uniformly reject government employment actions taken because of partisanship, which the Court found to be an illegitimate government purpose, rather than on legitimate hiring criteria. The plurality in *Elrod* explained that by conditioning employment on party affiliation, patronage burdens political belief under the First Amendment and, more broadly, harms the democratic process. *Elrod*, 427 U.S. at 355–56 (plurality opinion).

This longstanding norm also appears elsewhere in the Court's First Amendment jurisprudence, particularly where one political party exercises control of state government to disadvantage an opposing political party. In *Tashjian*, the Connecticut Democratic Party used its control of state government to force the Republican Party into acquiescing to a primary election law over the party's objection. The Court held that the law was unconstitutional, since it burdened the associational interests of the Republican Party and its members, and recognized that "the views of the State . . . to some extent

represent the views of one political party transiently enjoying majority power." 479 U.S. at 224; *see also Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring) ("[I]t must be recognized that [the State] is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit."). Here, where representatives of one political party use the state government's redistricting authority solely for its own partisan ends, the Court's norm against partisan government should apply with equal force.

B. The Court's Fourteenth Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

The Court's decisions under the Fourteenth Amendment likewise adopt the norm against government action to achieve a partisan advantage. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To show a violation of the Equal Protection Clause, plaintiffs must prove both a discriminatory purpose and a discriminatory effect, upon which the burden shifts to the government to show that the discrimination was justified by a legitimate state interest. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). It is that same burden-shifting, interest-based analysis that the Court employs under the Fourteenth Amendment's "one person, one vote" doctrine. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). Intent to advantage or to disadvantage a political party cannot be such a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996) ("[I]f the

constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'") (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

Within its equal protection jurisprudence, this Court's "one person, one vote" doctrine prohibits even modest population deviations between legislative districts when those deviations are based solely on the illegitimate purpose of providing partisan advantage. To succeed under the "one person, one vote" doctrine, plaintiffs must show that it is more probable than not that a population deviation of less than ten percent is predominantly based on "illegitimate reapportionment factors" rather than "legitimate considerations." *Harris*, 136 S. Ct. at 1304, 1307. Even if the effect of the redistricting is relatively minor, it violates the Equal Protection Clause if it "serve[s] no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength . . . or to disadvantage a politically weak segment." *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

In *Harris*, the Court held that an Arizona Commission's redistricting plan did not violate the Equal Protection Clause because the population deviations it generated were based on a legitimate purpose—a good-faith effort to comply with the Voting Rights Act—rather than by a desire to seek partisan advantage. 136 S. Ct. at 1309. Justice Breyer, writing for the Court, reserved the question of whether "partisanship is an illegitimate redistricting factor," but stated that "[n]o legitimate purposes could explain" the population deviations in redistricting in a previous case, *Cox v. Larios*, 542 U.S. 947 (2004). *Id.* at 1310.

In *Larios v. Cox*, Georgia Democrats had redistricted the state with "two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations . . . and the protection of Democratic incumbents." 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). A three-judge district court held that the partisan gerrymander violated the "one person, one vote" doctrine and that in districting, "each population deviation requires at least *some* plausible and consistently applied state interest to justify it . . . and the defendant's two proffered justifications are plainly impermissible." *Id.* at 1352–53 (emphasis in original).

This Court summarily affirmed. In a concurring opinion joined by Justice Breyer, Justice Stevens reasoned that "the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote." *Cox*, 542 U.S. at 949. Justice Stevens made clear his belief that the "one person, one vote" violation was triggered not by the magnitude of the population deviation, but rather by partisan-motivated redistricting with no legitimate purpose. *See id.* at 949–51.

The Court's racial gerrymandering jurisprudence similarly supports the norm that naked partisan advantage is an illegitimate basis for government action. In *Cooper v. Harris*, a prior version of the districting map at issue in this case was challenged as an unconstitutional racial gerrymander, and the Court held that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . [because] the sorting of voters on grounds of their race remains suspect even if race is

meant to function as a proxy for other (including political) characteristics." *Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (citing *Miller*, 515 U.S. at 915).

Because, as the Court has recognized, "racial gerrymandering is highly correlated with political affiliation," *id.* (quoting *Easley*, 532 U.S. at 242), legislatures commonly sort voters by race for the purpose of achieving partisan advantage, *see* Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 Ohio St. L.J. 867, 871, 888 (2016) ("In the context of conjoined polarization, race and politics are mirror images of each other and can be used interchangeably for redistricting."). Look no further than the *Common Cause* decision now before the Court. After it was struck down as an unconstitutional racial gerrymander, the legislature redrew the map with the sole intent of benefitting Republicans at the expense of other political parties—and the redrawn map was functionally equivalent to its predecessor, seeking to preserve Republican advantage in 10 of the 13 congressional districts in the state. *Common Cause*, 318 F. Supp. 3d at 882 ("[T]he facts and circumstances surrounding the drawing and enactment of the 2011 Plan—the partisan effects of which the Committee expressly sought to carry forward in the 2016 Plan—further establish that the General Assembly drew the 2016 Plan to maximize partisan advantage."). The petitioners pursue the same defense as before: that their sole motivation in drawing the map was to benefit Republican voters at the expense of voters belonging to other political parties.

The Court rightfully does not allow racial gerrymandering, but as this case demonstrates, if the sole pursuit of partisan advantage was a legitimate state interest, legislatures would have free rein to achieve the same re-

sults under the guise of achieving partisan objectives. This surely was not the Court's intent in *Cooper*, which supports the norm that the sole pursuit of partisan advantage is not a legitimate state interest.

C. The Court's Elections Clause decisions support the norm that government action solely for partisan advantage is illegitimate.

The constitutional norm against purely partisan government action also drives the Court's decisions related to the administration of elections. The Elections Clause, U.S. Const. art. I, § 4, delegates authority to states to establish procedures for congressional elections. The Court has made it clear that this clause is a delegation of authority to adopt only procedural regulations for congressional elections; it does not permit states to favor or to disadvantage particular candidates. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995). States are not permitted to dictate electoral outcomes based on candidates' political positions because such action would constitute an illegitimate purpose and would be inconsistent with the constitutional norm against government action solely in support of partisan advantage. *See Cook v. Gralike*, 531 U.S. 510, 526–27 (2001); *Thornton*, 514 U.S. at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.").

In *Cook*, the Court overturned a Missouri constitutional amendment requiring each candidate's position on congressional term limits to be printed on the ballot because the amendment had the purpose of favoring cer-

tain candidates over others. 531 U.S. at 524. The Court found that the law violated the Elections Clause because its purpose was to "dictate electoral outcomes" based on candidates' positions. *Id.* at 526 (quoting *Thornton*, 514 U.S. at 833–34); *see id.* at 524–27; *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But . . . States may not infringe upon basic constitutional protections.").

Similarly, courts have emphasized the illegitimacy of government election administration with a partisan purpose in striking down voter identification laws and early voting restrictions on nonracial bias grounds. In *Obama for America v. Husted*, the Sixth Circuit affirmed a district court's injunction against an Ohio law limiting early voting because the law discriminated between classes of voters. 888 F. Supp. 2d 897 (S.D. Ohio 2012). The court in *Husted* drew upon this Court's holding in *Bush v. Gore* that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 910 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

Consistent with the constitutional norm established in these cases, the panel below in *Common Cause* held that redistricting of congressional districts for partisan advantage violates the Elections Clause. *See Common Cause*, 318 F. Supp. 3d at 941. The panel concluded that the North Carolina 2016 redistricting map "disfavor[ed] the interests of supporters of a particular candidate or party in drawing congressional districts," showed bias toward a specific political party, and was an "impermissible effort to 'dictate electoral outcomes' and 'disfavor a class of candidates.'" *Id.* at 937 (quoting *Thornton*, 514 U.S. at 833–34). The panel held that the redistricting

"violates the Elections Clause by 'infring[ing] upon basic constitutional protections.'" *Id.* at 938 (quoting *Kusper*, 414 U.S. at 56–57).

III. REQUIRING THE GOVERNMENT TO ESTABLISH THAT THE PARTISAN EFFECTS OF REDISTRICTING WERE THE INCIDENTAL RESULT OF ITS PURSUIT OF LEGITIMATE STATE INTERESTS WOULD PROVIDE A CLEAR AND ADMINISTRABLE STANDARD AND A MEANINGFUL CHECK ON ILLEGITIMATE PARTISAN GERRYMANDERING

An electoral map with partisan effects that can be explained only by the intent to achieve partisan advantage violates the Constitution. However, a map with partisan effects that can be explained as the necessary consequence of the government's pursuit of legitimate state interests—such as respect for traditional political boundaries and subdivisions, compactness and contiguity, the preservation of communities of interest, and compliance with the Voting Rights Act—should be upheld. Focusing the constitutional inquiry on the requirement of a legitimate state interest in redistricting, rather than on the excessiveness of the partisan effects, would render unnecessary the need to define excessiveness of partisan effect that has proved so vexing for the courts since *Vieth*.

A. A constitutional standard based on a requirement that an acceptable plan be designed to further legitimate state interests would provide a manageable and meaningful check on the redistricting process.

Applying the proposed standard, the government would need to demonstrate that the partisan effects of a redistricting plan were the incidental result of the government's pursuit of legitimate state interests rather than an effort to provide an advantage to one political party at the expense of another. A redistricting plan could be upheld if the government successfully showed that the partisan effects of redistricting were indirect but necessary results of legitimate state interests. If plaintiffs established both partisan intent and effects, and the government could not explain the partisan effects of its redistricting plan as the product of legitimate state interests, a map would be struck down as the unconstitutional result of lawmaking based on the "naked purpose to disadvantage a political minority." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting); *cf. Romer*, 517 U.S. at 632–36 (1996) (ruling that bare animus to disadvantage a group, even outside a fundamental right or protected class, does not qualify as a legitimate state interest); *USDA v. Moreno*, 413 U.S. at 534–35 (concluding that equal protection "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Such a standard would be familiar. As highlighted in Point II, *supra*, constitutional standards based on partisan purpose already control in related areas of law under the First Amendment, the Fourteenth Amendment, and the Elections Clause. In considering a challenge to

partisan redistricting under the "one person, one vote" doctrine in *Harris*, the Court concluded that a plaintiff must show that "it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality." 136 S. Ct. at 1310. Similarly, prior to *Vieth*, *Bandemer* required courts to assess whether a redistricting plan constituted "intentional discrimination against an identifiable political group." 478 U.S. at 127. In addition, courts have long assessed legislative purpose in the context of racial discrimination claims under the Fourteenth Amendment. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding a zoning ordinance did not violate the Constitution because there was no proof that "discriminatory purpose was a motivating factor in the Village's decision"). As evidenced by its application in related contexts, the proposed standard would be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment).

A redistricting body might attempt to cloak an impermissible partisan purpose in a pretextual rationale, but courts have shown themselves to be adept at analyzing whether explanations are genuine or pretextual. In egregious cases, like those presented by the 2001 Georgia House of Representatives and 2002 Georgia Senate redistricting plans at issue in *Cox*, lower courts have had no trouble determining that the partisan effects of the redistricting resulted solely from a government purpose to advantage one political party. In *Whitford v. Gill*, the district court found that it could distinguish between the impermissible partisan purpose that predominated and the pretextual recitation of compactness and contiguity that was facially consistent with the final redistricting plan. *Whitford v. Gill*, 218 F. Supp. 3d 837, 891–96, 922–27 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct.

1916 (2018). In that case, although the electoral districts were largely compact and contiguous, the court rejected the State of Wisconsin's claim that the redistricting plan could be justified in terms of legitimate state interests because the redistricting body had considered and intentionally rejected numerous alternative maps that achieved the same degree of compactness and contiguity in favor of maps with greater and more durable partisan effect. *Id.*[5]

The necessary inquiry into illegitimate partisan purpose also may be helpfully informed by empirical measures of partisan effect such as the "efficiency gap" metric put forward by Eric McGhee. *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55 (2014). As recognized below and in *Whitford*, empirical measures of partisan effect are probative as to the true purpose of the redistricting body in implementing the redistricting plan at issue.

In addition to empirical measures of a partisan effect, other indicia of impermissible intent can be helpful in identifying partisan purpose: the settings for computers in the design of maps, the timing of the redistricting effort (e.g., mid-decade versus constitutionally mandated decennial redistricting), the deviation from prior proce-

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[5] This Court vacated the district court's judgment in *Gill* based on the plaintiffs' failure to demonstrate standing, and remanded the case to provide the plaintiffs the opportunity to prove standing consistent with its opinion. *See Gill*, 138 S. Ct. at 1933–34. On remand, the district court "delay[ed] the trial and any decision on the merits" pending this Court's decisions in these cases (*Common Cause* and *Benisek*). *Whitford v. Gill*, No. 18-cv-763-jdp, 2019 WL 294800, *1 (W.D. Wis. Jan. 23, 2019).

dural norms in the redistricting process, the proportion of same-party incumbents forced to compete in the same district, the use of partisan experts in drawing redistricting, the choice of a plan based on the relative partisan effect of various proposed maps as compared to the selected redistricting plan, and the contemporaneous statements from individuals involved in the redistricting process as well as their subsequent testimony.

While pretextual explanations can be discredited, under the Court's current standards, many legislators do not even bother with a pretext. In view of this Court's decisions which have served to effectively encourage rather than discourage partisanship in designing plans, members of redistricting bodies have with increasing frequency openly acknowledged that the motivation underlying a redistricting plan was to entrench one political party at the expense of another. *See, e.g.*, *LULAC*, 548 U.S. at 453 ("According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, 'political gain for the Republicans was 110% of the motivation for the Plan, . . . it was the entire motivation.'") (quotation omitted) (Stevens, J., concurring in part and dissenting in part).

Legislators have not infrequently advanced a facially neutral rationale, but then have felt free to speak in more candid terms that provide direct evidence of partisan intent. For example, in the run-up to the 2012 presidential election, Pennsylvania House Republican leader Mike Turzai asserted that Pennsylvania's voter-identification law, which had purportedly been designed to protect the integrity of the ballot from voter fraud, was "gonna allow [Republican presidential nominee Mitt] Romney to win the state of Pennsylvania, done." Mac-

kenzie Weinger, "Pa Pol: Voter ID Helps GOP Win State," *Politico* (June 25, 2012) (quoting Rep. Turzai).[6]

While a purpose-focused standard would provide a meaningful check against partisan gerrymandering, it would not prevent political bodies from playing their traditional role in redistricting. Just as under the "one person, one vote" doctrine, it would neither burden political actors with a standard of conduct that would be difficult to meet nor pose a risk that all redistricting decisions would become subject to judicial challenge. As Justice Breyer explained in *Vieth*, "[t]he use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends." 541 U.S. at 360 (Breyer, J., dissenting). Under the purpose-based standard *Amicus* advocates, an inquiry into legislative purpose will arise only when a plaintiff is able to present evidence of a partisan bias in a redistricting plan, and would lead to the overturning of a redistricting plan only if a state is unable to put forward a legitimate government interest explaining the redistricting plan's partisan effect. Just as the courts are not flooded with "one person, one vote" cases, under the same proposed standard only a small minority of redistricting plans are likely to raise serious questions regarding their constitutionality under a purpose-based standard.

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[6] *Available at* www.politico.com/story/ 2012/06/pa-pol-voter-id-helps-gop-win-state- 077811

B. Requiring the government to ground its decisions in a legitimate purpose would provide essential support for well-established constitutional norms.

While such a standard might directly invalidate only a relatively limited number of redistricting maps where the government cannot articulate a legitimate, non-pretextual purpose for the redistricting plan, the rule would provide a strong motivation for government officials to adhere to constitutional principles and to internalize a "sense of constraint" on partisan excesses in the redistricting process. This is precisely what has taken place in the context of racial gerrymandering, where, following *Shaw*, legislatures internalized the principles underlying that decision and have generally conformed the redistricting process to those principles. *See* Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 68–70 (2004). If the Court imposes a clear rule prohibiting partisan gerrymanders, legislators would be less likely to describe redistricting in terms of "cannibaliz[ation]" of the other party, *see Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), or assert that redistricting is "the business of rigging elections," *see* John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, Winston-Salem J. (Jan. 27, 1988) (quoting State Senator Mark McDaniel criticizing the North Carolina legislature). Instead, legislators would need to identify and articulate a basis for redistricting that adheres to democratic principles. Driven by the law requiring them to do so, legislatures would be far more likely to design districts that actually do conform to those principles.

CONCLUSION

Amicus respectfully proposes that the Court endorse the purpose-based standard set forth in this brief for resolving challenges to partisan gerrymandering, and submits that application of this standard is a basis for affirming the decisions below in *Rucho v. Common Cause*, No. 18-422 and *Lamone v. Benisek*, No. 18-726.

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March 8, 2019

Nos. 18-422 and 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL., *Appellants*,

v.

COMMON CAUSE, ET AL., *Appellees*.

LINDA H. LAMONE, ET AL., *Appellants*,

v.

O. JOHN BENISEK, ET AL., *Appellees*.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Ala. Legis. Black Caucus v. Alabama,
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Anderson v. Celebrezze,
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Arizona v. Inter Tribal Council of Ariz., Inc.,
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Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n,
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Bartlett v. Strickland,
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Benisek v. Lamone,
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Bethune-Hill v. Va. State Bd. of Elecs.,
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Burdick v. Takushi,
504 U.S. 428 (1992).....*passim*

Bush v. Vera,
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Clark v. Roemer,
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Connor v. Finch,
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Cooper v. Harris,
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Crawford v. Marion Cty. Elec. Bd.,
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Evenwel v. Abbott,
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Ga. State Conf. of NAACP v. Georgia,
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Ga. State Conf. of NAACP v. Georgia,
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Gaffney v. Cummings,
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Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964).....18

Karcher v. Daggett,
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Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193 (2009) 1

Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017) 18

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Storer v. Brown, 415 U.S. 724 (1974) 13

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Wash. State Grange v. Wash. State Repub. Party, 552 U.S. 442 (2008) 14

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Williams v. Rhodes,
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Wittman v. Personhuballah,
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Zivotofsky v. Clinton,
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2 Debates on the Federal Constitution
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Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*,
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Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*,
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Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*,
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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Promoting and defending the voting rights of African Americans and other racial minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Bethune-Hill v. Va. State Bd. of Elecs.*, 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*,

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that all parties have granted blanket consent to *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeals because they raise important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

These cases are about partisan gerrymandering. But they also have implications for longstanding efforts to root out racial gerrymandering. Race and politics are often correlated—as the history behind the North Carolina congressional map in *Rucho v. Common Cause* confirms. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465-66 (2017). Partisan gerrymandering can therefore inflict the same harm as racial gerrymandering: diluting the voting strength of racial minorities. Yet states often assert partisan gerrymandering as a defense to racial gerrymandering claims. If the Court were to declare partisan gerrymandering nonjusticiable, but continue to allow states to assert it as a defense, states could diminish the voting strength of racial minorities with impunity merely by couching their gerrymandering in political terms. To prevent that result, this Court should reaffirm that partisan gerrymandering claims are justiciable.

The defendants in *Rucho v. Common Cause* and *Lamone v. Benisek* argue that courts lack judicially manageable standards for resolving partisan gerrymandering claims. They are mistaken. Over the past several decades, this Court has developed a "flexible standard" for resolving challenges to state election laws that burden the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983). Under that standard, courts

(1) consider the character and magnitude of the alleged injuries to First and Fourteenth Amendment rights, (2) evaluate the state's purported justifications, and (3) measure the injuries against the justifications to determine whether the challenged law is constitutional. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789.

The Court should apply this "flexible standard" to partisan gerrymandering claims. Partisan gerrymandering burdens the same First and Fourteenth Amendment rights as the state election laws in decisions such as *Anderson* and *Burdick*. And courts can readily apply the *Anderson/Burdick* framework to partisan gerrymandering claims by considering the character and magnitude of the constitutional injuries that partisan gerrymandering inflicts, evaluating the state's purported justifications, and weighing the injuries against those justifications. Far from being unmanageable, this approach would bring the same methods of judicial analysis to bear on partisan gerrymandering that courts routinely use in other cases.

For example, in assessing the character and magnitude of the injuries from a partisan gerrymander, courts can draw upon cognate principles from racial gerrymandering cases. They can consider, in particular, whether partisan advantage was the predominant factor—the factor that could not be compromised—in drawing district lines. *Cf. Bethune-Hill*, 137 S. Ct. at 798. And in determining whether partisanship predominated, courts can draw on this Court's guidance concerning the types of evidence that are probative of discriminatory legislative intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-

68 (1977). Courts can also use various metrics to evaluate the magnitude of the effects of an alleged partisan gerrymander on voting and associational rights.

That is not to say, however, that the Court should use the cases now before it to fashion a one-size-fits-all approach to evidentiary matters in partisan gerrymandering cases. Rather, after confirming that partisan gerrymandering claims are justiciable and subject to the general *Anderson/Burdick* framework, the Court should allow subsidiary standards of proof within that framework to evolve over time.

The application of the *Anderson/Burdick* standards to the evidence in *Rucho* confirms that those standards are judicially manageable in partisan gerrymandering cases—and that the *Rucho* plaintiffs should prevail. North Carolina's 2016 congressional plan imposes extreme burdens on the *Rucho* plaintiffs' First and Fourteenth Amendment rights. And the State's justifications for imposing those burdens have no merit. This Court should therefore affirm the rulings in both *Rucho* and *Lamone* that partisan gerrymandering claims are justiciable, and affirm the *Rucho* district court's judgment that most of the districts in North Carolina's plan are unconstitutional.[2]

Finally, even if this Court were to rule that partisan gerrymandering claims are not justiciable, it should foreclose the all-too-common invocation of partisan gerrymandering as a defense to claims of racial gerrymandering. Partisan gerrymandering is an illegitimate practice that cannot justify denying an otherwise meritorious racial gerrymandering claim. And ruling out such a defense would prevent states from

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[2] The Lawyers' Committee takes no position on the merits of *Lamone*.

diluting the voting strength of racial minorities in the guise of partisan gerrymandering—a limitation that would become even more important in the event that partisan gerrymandering could not be affirmatively challenged.

ARGUMENT

I. The justiciability of partisan gerrymandering claims has important implications for racial gerrymandering claims.

States have a long and unfortunate history of diluting the voting strength of racial minorities through gerrymandering. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Despite efforts to eliminate it, racial gerrymandering remains a problem today. *See, e.g.*, *Cooper*, 137 S. Ct. 1455 (2017); *Bethune-Hill*, 137 S. Ct. 788 (2017).

Partisan gerrymandering can equally dilute the voting strength of racial minorities. Because, in many jurisdictions, "racial identification is highly correlated with political affiliation," a district gerrymandered on partisan grounds can look the same as a district gerrymandered on racial grounds. *Cooper*, 137 S. Ct. at 1473 (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)). Thus, in districts with racially polarized voting patterns and substantial minority populations, partisan gerrymandering can be the functional equivalent of—and inflict the same harm as—racial gerrymandering.

States nevertheless assert partisan gerrymandering as a defense to racial gerrymandering claims. North Carolina, for example, has taken this approach at least twice. *See Cooper*, 137 S. Ct. at 1465-66, 1473; *Easley*, 532 U.S. at 239-40. Other states have done the same. *See, e.g.*, *Ga. State Conf. of NAACP v. Georgia*,

312 F. Supp. 3d 1357, 1364 (N.D. Ga. 2018) (Georgia); *Bush v. Vera*, 517 U.S. 952, 967-68 (1996) (plurality op.) (Texas).

It can be difficult for plaintiffs bringing a racial gerrymandering claim to overcome a partisan gerrymandering defense. Even when they have compelling evidence of race-based districting, plaintiffs may need to show that those racial considerations predominated over partisan ones. *See Cooper*, 137 S. Ct. at 1473-74 & n.7. Because race and politics are correlated, however, it can be challenging "to disentangle race from politics and prove that the former drove a district's lines." *Id.* at 1473.

The litigation in *Georgia State Conference of NAACP v. Georgia* exemplifies this difficulty. In that case, the plaintiffs asserted a racial gerrymandering claim concerning two state legislative districts redrawn in 2015. 312 F. Supp. 3d at 1359. Georgia defended those districts as partisan gerrymanders. *Id.* at 1364.

When the plaintiffs moved for a preliminary injunction, the district court found that the plaintiffs had "compelling" evidence that "race predominated" in redrawing the challenged districts. 312 F. Supp. 3d at 1365. For example, the plaintiffs showed that the motivation for redrawing the districts was that their racial demographics were changing. *See id.* at 1359-60, 1365. Recent elections in both districts had been close and featured racially polarized voting patterns, and both districts were experiencing an influx of racial minorities. *See id.* at 1360. The Republican-dominated Georgia legislature did not want these demographic changes to imperil Republican incumbents. *See id.*

The plaintiffs also showed that the new maps had the desired effect: They moved just enough African Americans out of the districts to swing the results of the 2016 election in the incumbents' favor. *See* 312 F. Supp. 3d at 1363. The redistricting caused the African American share of the voting age population in each district to decrease by more than 2% (or roughly 1,000 people). *See id.* The Republican incumbents then prevailed in the 2016 election by razor-thin margins: 222 votes in one district, and 946 votes in the other. *See Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1272 (N.D. Ga. 2017). Even Georgia's in-house redistricting expert agreed that, but for the redistricting, both incumbents likely would have lost. *See* 312 F. Supp. 3d at 1360, 1363.

The plaintiffs also presented "persuasive" evidence that the map drawers redrew the districts based on racial data. 312 F. Supp. 3d at 1365. For example, the plaintiffs introduced "compelling" proof that the map drawers could only have relied on racial data when they split a number of precincts—because racial data existed at the sub-precinct level, but partisan data did not. *Id.* at 1365-66.

Despite this evidence, the district court denied a preliminary injunction. 312 F. Supp. 3d at 1369. It identified the conundrum that the state's partisan gerrymandering defense created:

> [Proving racial gerrymandering] is particularly hard to do when the State offers a defense rooted in partisan gerrymandering, as it did here. We did not move these voters because they are black, the State tells us. We moved them because they were Democrats. And under current Supreme Court precedent,

> the State tells us this motive is perfectly acceptable.

Id. at 1364. Confronted with this problem, the district court punted: It observed that the State's principal map drawer testified that she had relied only on political data, and not on racial data. *Id.* at 1367. Reasoning that the case therefore turned on a "credibility determination," the court gave the State the benefit of the doubt. *Id.*

That result epitomizes the consequences of permitting a state to assert a partisan gerrymandering defense to a racial gerrymandering claim. The Georgia legislature treated minority voters like pawns due to their race and their presumed political affiliation. Because minority voters' electoral power was increasing, the legislature stacked the deck by moving them out of competitive districts and into safe districts to ensure a particular electoral outcome. Whether the map drawer relied more heavily on political or racial data, the effect was the same: the dilution of African American voting strength. Yet the district court denied relief.

If this Court were to rule that partisan gerrymandering is not justiciable, yet still allow states to raise partisan gerrymandering as a defense to racial gerrymandering claims, it would intensify the problems highlighted by the Georgia case. States would be emboldened to engage in even more extreme partisan gerrymandering—knowing all the while that the effects would include the dilution of minority votes. The Court would, in effect, be licensing the disenfranchisement of racial minorities.

In contrast, confirming that political gerrymandering claims are justiciable, and identifying judicially manageable standards for those claims, would impose a much-needed check on the practice of asserting partisan gerrymandering as a defense to racial gerrymandering claims. That is because, in asserting such a defense, the state would be admitting that it committed an actionable constitutional violation. States would therefore be unable to inflict the harm of a racial gerrymander in the guise of a partisan gerrymander.

II. Declaring partisan gerrymandering claims non-justiciable would erroneously depart from this Court's precedent.

For over three decades, a majority of this Court has ruled that partisan gerrymandering cases are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 307-68 (2004) (Kennedy, J., concurring in the judgment; Stevens, J., dissenting; Souter and Ginsburg, JJ., dissenting; Breyer, J., dissenting). That conclusion is consistent with the bedrock equal protection principle that challenges to redistricting plans containing malapportioned districts do not present non-justiciable political questions. *See Baker v. Carr*, 369 U.S. 186, 237 (1962). To reverse course and declare that partisan gerrymandering challenges are not justiciable would be unprecedented. This Court has never before moved a class of cases from the justiciable to the non-justiciable category.

Barring judicial review of partisan gerrymandering claims would be particularly anomalous because the practice is incompatible with the core democratic tenet that "the voters should choose their representatives, not the other way around." *Ariz. State Legis. v.*

Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *see also McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 192 (2014) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The Framers would have agreed. Having considered the effects of "rotten boroughs" in Great Britain, *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), they shared a concern about political mischief infecting redistricting. They thus included a provision in Article I, § 4, permitting Congress to "make or alter" congressional districts for the purpose of "check[ing] partisan manipulation of the election process by" state legislatures. *Vieth*, 541 U.S. at 275 (plurality op.) *see also id.* at 275-76. "[T]he people should choose whom they please to govern them," Alexander Hamilton stated at the New York constitutional convention, and "[t]his great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 541 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot 2d ed. 1836)).

Modern elections are indisputably influenced by partisan gerrymanders, which have become "ever more extreme and durable" due to technology that enables "pinpoint precision in designing districts." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring). As one of the district courts below put it, "cancerous" gerrymandering has become "widespread . . . in modern politics." *Lamone* J.S. App. 35a (internal quotation marks omitted).

The consequences are profound. Lawmakers, having chosen their voters, may disregard the citizenry's needs and concerns. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable*

Standard and Other Reform Options for Partisan Gerrymandering, 46 Harv. J. on Legis. 243, 244 (2009). Even worse, "districts intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is readily measurable or not." Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2028-29 (2018).

Like the defendants here, the State of Georgia argued in *Georgia State Conference of NAACP* that partisan gerrymandering cases cannot be adjudicated until courts identify a standard measuring the precise amount of partisanship that violates the Constitution. 269 F. Supp. 3d at 1281-83. That argument conflates standards with metrics. While this Court may continue to wrestle over the proper metric for measuring discriminatory partisan effect in any particular case, *see, e.g.*, *Gill*, 138 S. Ct. at 1932-33 (discussing the utility of efficiency gap analysis), that debate does not preclude the Court, in the meantime, from identifying a general, judicially manageable legal standard that applies to all cases. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1510 (2018) ("One important point about the array of gerrymandering metrics that now exist is that no winner need be chosen among them. In other areas of election law, numerous measures happily coexist—for example, indices of population inequality, racial polarization, and geographic compactness. The same should be possible in the gerrymandering domain.").

This Court should therefore do what it has done before: identify a workable legal principle that lends

itself to a manageable test and allow lower courts to refine that test over time. In one-person, one-vote cases, for example, the Court declined to employ a specific substantive standard in concluding that Alabama's apportionment plans violated the Equal Protection Clause. It instead declared that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." *Reynolds v. Sims*, 377 U.S. 533, 569 (1964). Although Chief Justice Warren declared in *Reynolds* that "mathematical nicety is not a constitutional requisite" in such cases, *id.*, the Court later determined that certain numerical thresholds were in fact appropriate. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). By not crystallizing the particulars of the one-person, one-vote principle at the outset, *Reynolds* gave lower courts latitude to rein in severe malapportionment in the short term while allowing judicially manageable standards to evolve over time.

This Court should follow that example here and use these cases to identify the foundational legal principles guiding the adjudication of partisan gerrymandering claims.

III. This Court's decisions concerning challenges to state election laws provide judicially manageable standards for partisan gerrymandering claims.

Partisan gerrymandering implicates both the First Amendment freedom of association and the Fourteenth Amendment right to cast an effective vote. This Court has already developed standards for resolving challenges to state election laws that implicate those rights. *See, e.g., Burdick*, 504 U.S. at 433-34; *An-*

derson, 460 U.S. at 789. These decisions provide a judicially manageable framework for adjudicating partisan gerrymandering claims.

A. The Court has developed judicially manageable standards for challenges to state election laws.

State election laws can burden "two different, although overlapping, kinds of rights." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). One is a First Amendment right: "the right of individuals to associate for the advancement of political beliefs." *Id.* The other is a Fourteenth Amendment right: "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.*

These rights "rank among our most precious freedoms." *Williams*, 393 U.S. at 30. But they are not absolute. *Burdick*, 504 U.S. at 433. The states have the power to regulate elections, and "[e]lection laws will invariably impose some burden upon individual voters." *Id.* The question, therefore, is how to protect these fundamental rights while recognizing that, "as a practical matter, there must be a substantial regulation of elections." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

This Court has answered that question by adopting a "flexible standard" for challenges to state election laws. *Burdick*, 504 U.S. at 434. A court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789. "It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it must weigh the

constitutional injuries against the asserted state interests, taking into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The rigorousness of this inquiry depends on the extent of the injuries to First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434. Election laws that impose "severe burden[s]" on these rights are subject to strict scrutiny and must be "narrowly tailored to serve a compelling state interest." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 451 (2008) (internal quotation marks omitted); *see also Burdick*, 504 U.S. at 434. But election laws that impose only "reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights are subject to lesser scrutiny, and "the State's important regulatory interests are generally sufficient to justify" them. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

There is no question that this "analytical process" is judicially manageable. *Anderson*, 460 U.S. at 789. Indeed, it "parallels [the] work" that courts do "in ordinary litigation." *Id.* And the Court has applied it to resolve challenges to state election laws for decades. *See, e.g., Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 189-91, 202-04 (2008) (opinion of Stevens, J.); *id.* at 204-05, 209 (Scalia, J., concurring in the judgment); *Wash. State Grange*, 552 U.S. at 458; *Calif. Democratic Party v. Jones*, 530 U.S. 567, 582-86 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-70 (1997); *Burdick*, 504 U.S. at 438-40; *Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 213-14, 217-25 (1986); *Anderson*, 460 U.S. at 790-806.

B. The standards for challenges to state election laws can be applied to partisan gerrymandering claims.

These well-established standards also provide a judicially manageable framework for resolving partisan gerrymandering claims. Under that framework, the Court should (1) consider the character and magnitude of the injuries that a partisan gerrymander causes to rights protected by the First and Fourteenth Amendments, (2) identify the state's purported justifications for causing those injuries, and (3) measure the asserted injuries against the purported justifications to determine whether those justifications pass muster. *See Anderson*, 460 U.S. at 789.

1. Assessing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights

Courts are well equipped to examine the "character and magnitude" of the constitutional injuries inflicted by partisan gerrymandering. *Anderson*, 460 U.S. at 789. Those injuries include the infringement of equal protection rights that have been before this Court in its racial gerrymandering cases, as well as injuries to the associational and voting rights at issue in decisions such as *Anderson* and *Burdick*.

a. Equal protection rights. When assessing the "character and magnitude" of the constitutional injuries inflicted by a partisan gerrymander, courts should consider the state's intent. In particular, courts should analyze whether the predominant factor motivating the state—"the criterion that, in the State's view, could not be compromised," *Bethune-*

Hill, 137 S. Ct. at 798 (internal quotation marks omitted)—was to "subordinate adherents of one political party and entrench a rival party in power." *Rucho* J.S. App. 142a (quoting *Ariz. State Legis.*, 135 S. Ct. at 2658). If so, partisan gerrymandering burdens equal protection rights under the Fourteenth Amendment—and should therefore be subject to heightened scrutiny under this Court's election law cases. *See, e.g.*, *Anderson*, 460 U.S. at 786 n.7 (recognizing that the Court's election law cases have drawn on equal protection principles); *Williams*, 393 U.S. at 30 (explaining that "'invidious' distinctions" violate the Equal Protection Clause, and recognizing that equal protection rights are intertwined with the rights to associate and cast an effective vote in the election law context).

This predominant intent analysis has its roots in the Court's racial gerrymandering cases. In those cases, plaintiffs must show not merely that the legislature had some intent to gerrymander based on race, but that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (emphasis added; internal quotation marks omitted). The Court should apply a similar predominance analysis in partisan gerrymandering cases to avoid an outcome in which partisan gerrymandering would receive greater scrutiny than racial gerrymandering—which would be at odds with the principle that "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause." *Vieth*, 541 U.S. at 293 (plurality op.).

This Court's racial gerrymandering cases establish that a predominant intent analysis is judicially manageable. Indeed, those cases provide a roadmap

for analyzing the legislature's intent in the gerrymandering context. As those decisions explain, predominant intent can be proven through direct evidence, circumstantial evidence, or both. *Cooper*, 137 S. Ct. at 1464.

Direct evidence of intent includes official expressions of legislative purpose and public statements by legislators concerning their motivations. *See Cooper*, 137 S. Ct. at 1475-76; *Rucho* J.S. App. 156-57; *Lamone* J.S. App. 49a-50a. It also includes proof that the legislature considered the illicit factor at issue—for example, testimony or other evidence demonstrating that the legislature looked at political data—when drawing district lines. *See, e.g.*, *Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring); *Rucho* J.S. App. 157-59; *cf. Vera*, 517 U.S. at 961-63 (plurality op.) (determining that the state's consideration of racial data in its redistricting process contributed to the conclusion that race predominated).

Plaintiffs can also use circumstantial evidence to demonstrate the legislature's predominant intent. *See Cooper*, 137 S. Ct. at 1464. This Court's decisions concerning racial gerrymandering, as well as its decisions on racial discrimination more generally, provide guidance on the types of circumstantial evidence that bear on legislative intent—and that can therefore be used to show a predominant partisan intent. For example:

- The "historical background" of the challenged state action may be probative of unlawful intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Here, historical background could include evidence that

the state previously districted for partisan advantage. *Cf. Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 224 (1964) (finding racially discriminatory intent where "the end result of every action" taken by the county board before the challenged decision "was designed to preserve separation of the races in the schools of Prince Edward County" (internal quotation marks omitted)).

- Procedural irregularities, such as "rush[ing] the map-drawing and Committee review process," can also be probative of improper intent. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 723 (S.D. Tex. 2017); *see also Arlington Heights*, 429 U.S. at 267.

- Disregard for "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" can also contribute to a showing of predominant intent to gerrymander for partisan advantage. *Shaw*, 509 U.S. at 647 (concluding that such evidence was probative of racial gerrymandering).

Courts can consider these types of evidence, among others, to determine whether the legislature acted with a predominantly partisan intent, and thus to evaluate the "character and magnitude" of the injuries to equal protection rights caused by an alleged partisan gerrymander.

b. Associational and voting rights. Courts should also consider the "character and magnitude" of the injuries that an alleged partisan gerrymander causes to the First and Fourteenth Amendment rights addressed in decisions such as *Anderson* and *Burdick*.

Like other state election laws, partisan gerrymandering burdens the First Amendment freedom of association. It does so by "imposing burdens on a disfavored party and its voters." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). For example, "deprived of their natural political strength by a partisan gerrymander," members of the disfavored party "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also id.* (explaining that *Anderson* concluded that "similar harms inflicted by a state election law amounted to a burden imposed on associational rights" (internal quotation marks and alteration omitted)).

Partisan gerrymandering also burdens the Fourteenth Amendment right to cast an effective vote. It does so by diluting the voting strength of members of the disfavored party who reside in districts that have been packed or cracked along partisan lines. It causes, in other words, the vote of a citizen in a gerrymandered district "to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931; *see also id.* at 1935-36 (Kagan, J., concurring); *Bandemer*, 478 U.S. at 132 (plurality op.) (observing that partisan gerrymandering can result in unconstitutional vote dilution when it "consistently degrade[s] a voter's or a group of voters' influence on the political process as a whole.").

Courts are well equipped to assess the character and magnitude of these constitutional injuries from partisan gerrymandering. The analysis here is focused on effects rather than intent: The extent to

which partisan gerrymandering burdens the freedom of association and the right to cast an effective vote depends on the extent of the partisan advantage that it creates. And courts can consider a variety of evidence in analyzing the effects of a partisan gerrymander. For example, they can consider election results and expert analysis of metrics such as partisan asymmetry. *See Rucho* J.S. App. 188. And they can evaluate the durability of a gerrymander through expert evidence on other metrics, such as the sensitivity of election results to changes in circumstances. *See id.* at 190-91.

When considering such evidence, context is important, and each case will need to be evaluated on its own merits. In a "pinpoint" gerrymander like the one in *Georgia State Conference of NAACP*, which concerned only two districts rather than an entire plan, *see* 312 F. Supp. 3d at 1359, the magnitude and durability of the effects may not be as important as the direct evidence of the surgical precision with which the map drawers went about their business. In such cases, factors including deviation from traditional districting principles, *see id.* at 1362 ("more often, the new maps had a negative impact on these principles"), and unnecessary mid-cycle redistricting may, together with direct evidence of predominant partisan intent, be sufficient to show unconstitutional partisan gerrymandering, even if the durability and magnitude of the changes were relatively minor. *See id.* at 1368.

2. Considering the state's purported justifications

After analyzing the character and magnitude of the asserted injuries to First and Fourteenth Amendment rights, the next step in the *Anderson/Burdick*

framework is to assess the state's purported justifications. That step is also judicially manageable in the partisan gerrymandering context.

A state might conceivably assert a number of different justifications in a partisan gerrymandering case. For example:

- A state might contend that any burdens on First and Fourteenth Amendment rights result not from partisan intent, but instead from "political geography," such as the natural packing of Democratic voters in urban communities. *See, e.g., Gill*, 138 S. Ct. at 1933; *Vieth*, 541 U.S. at 289-90 (plurality op.); *Rucho* J.S. App. 215.
- A state might also contend that its districting decisions were grounded in traditional districting principles, such as compactness, contiguity, and preservation of local government boundaries. *Cf. Gill*, 138 S. Ct. at 1927; *id.* at 1941 (Kagan, J., concurring).
- A state might further contend that it drew district lines based on a legitimate interest in minimizing the pairing of incumbents. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Courts also have judicially manageable methods for evaluating the strength of these asserted justifications. For example, the parties can submit alternative district maps that incorporate traditional redistricting principles and account for political geography. Courts can then compare the constitutional burdens imposed by those alternative maps to the burdens imposed by the actual map. If the alternative maps and the actual map impose similar burdens, the state's

justifications are strong. But if the actual map imposes greater burdens than the alternative maps, the state's justifications are weak. *See, e.g., Rucho* J.S. App. 217-22. This type of analysis—drawing on expert evidence to assess the strength of a party's explanations for its conduct—fits comfortably within the institutional capabilities of the judiciary.

3. Measuring the asserted injuries against the purported justifications

The final step in the *Anderson/Burdick* framework is to weigh the injuries to First and Fourteenth Amendment rights against the state's justifications. This step is also judicially manageable in partisan gerrymandering cases.

To be sure, evaluating the constitutional burdens vis-à-vis the state's justifications will require a case- and fact-specific analysis. And "[t]he results of this evaluation will not be automatic." *Anderson*, 460 U.S. at 789. "[H]ard judgments" will sometimes be needed. *Id.* at 790. But this Court does not declare a question non-justiciable merely because it may be hard. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring in part and concurring in the judgment). Rather, it does so when a question "turn[s] on standards that defy judicial application." *Id.* at 201 (majority op.) (internal quotation marks omitted).

Far from defying judicial application, resolving an issue of constitutional law by measuring First and Fourteenth Amendment injuries against state justifications is a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196. Indeed, it is the same exercise that this Court has applied again and again in ruling on challenges to state election laws. *See supra* at 14.

Moreover, this Court's election law decisions provide even more particularized guidance for conducting this evaluation in a judicially manageable way. Those decisions instruct that, if a state districting plan imposes severe burdens on First and Fourteenth Amendment rights, courts should apply the well-known standard of strict scrutiny. *See Burdick*, 504 U.S. at 434. That will be true, for example, if the plaintiffs have powerful evidence both that (1) the legislature's predominant intent was to draw district lines for partisan advantage, and (2) the resulting map imposes substantial burdens on the voting strength and associational rights of members of the disfavored party. In the face of such evidence, it would be difficult for the state to satisfy strict scrutiny and show that its plan is narrowly tailored to serve compelling state interests.

If, in contrast, a state plan imposes only "reasonable, nondiscriminatory" burdens, courts should generally uphold the plan based on the state's "important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Thus, for example, if the plaintiff cannot demonstrate that the legislature's predominant intent was partisan, or cannot show substantial vote dilution or associational injuries, the state will typically prevail based on its important interests in adhering to traditional districting principles.

IV. The application of these proposed standards to *Rucho* confirms that the standards are judicially manageable, and that the *Rucho* plaintiffs should prevail.

When the standards drawn from this Court's election law decisions are applied to the facts of *Rucho*, it

reinforces the conclusion that these standards are judicially manageable in the partisan gerrymandering context, and that the *Rucho* plaintiffs succeeded in proving an unconstitutional partisan gerrymander.

A. The *Rucho* plaintiffs have shown that the challenged districts impose severe burdens on their First and Fourteenth Amendment rights.

The *Rucho* plaintiffs' evidence proves that the districting plan at issue (the "2016 Plan") severely burdens their rights under the First and Fourteenth Amendments. Their evidence establishes both (1) a predominant intent to draw district lines to achieve a discriminatory partisan advantage, and (2) substantial injuries to their freedom of association and right to cast an effective vote.

1. Plaintiffs demonstrated that the General Assembly drew the 2016 Plan with a predominantly partisan intent.

The 2016 Plan had its genesis in an earlier congressional map adopted by a Republican-controlled General Assembly: the 2011 Plan. Representative David Lewis and Senator Robert Rucho were responsible for the 2011 Plan, and they engaged Dr. Thomas Hofeller to prepare it. *Rucho* J.S. App. 10. Their efforts exemplified the connection between racial and partisan gerrymandering: They designed the 2011 Plan both to achieve partisan advantage for Republicans and (based on a mistaken view of § 2 of the Voting Rights Act) to draw two majority-black districts. *See id.* at 12-13. Indeed, when voters challenged those districts as racial gerrymanders, North Carolina defended one of them as a partisan gerrymander. *See*

Cooper, 137 S. Ct. at 1473. The district court nevertheless held, and this Court agreed, that both districts were unconstitutional racial gerrymanders. *See id.* at 1481-82.

The General Assembly adopted the congressional map at issue here—the 2016 Plan—in a purported effort to remedy the racial gerrymanders in the 2011 Plan. The architects of the 2016 Plan were the same as the architects of the 2011 Plan: Representative Lewis, Senator Rucho, and Dr. Hofeller. *See Rucho* J.S. App. 15.

The *Rucho* plaintiffs offered overwhelming evidence, both direct and circumstantial, that the General Assembly's predominant intent in drawing the 2016 Plan was "to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation." *Rucho* J.S. App. 222.

a. Express statements of partisan intent. The direct evidence in *Rucho* includes numerous unabashed statements by Republican state officials that the 2016 Plan was meant to favor Republicans and disfavor Democrats.

For example, Representative Lewis and Senator Rucho instructed Dr. Hofeller that he should use political data from previous elections to draw a map that maintained the partisan makeup of North Carolina's congressional delegation under the racially gerrymandered 2011 Plan, which had produced 10 Republicans and 3 Democrats. *Rucho* J.S. App. 15.

The Republican leaders also proposed—and the Joint Committee on Redistricting adopted—criteria for the 2016 Plan that included "Political Data" and

"Partisan Advantage." *Rucho* J.S. App. 20. The "Political Data" criterion contemplated that "[t]he only data other than population data to be used to construct congressional districts shall be election results in statewide contests." *Id.* According to Representative Lewis, the purpose behind using this data was "to gain partisan advantage." *Id.* at 22. And the "Partisan Advantage" criterion itself provided that the Committee would "make reasonable efforts . . . to maintain the current partisan makeup of North Carolina's congressional delegation." *Id.* at 20.

Representative Lewis also made numerous additional statements that laid bare the Republican leadership's partisan intentions for the 2016 Plan. For example, he "acknowledged freely that [the 2016 Plan] would be a political gerrymander," and stated that the Plan was designed "to give a partisan advantage to 10 Republicans and 3 Democrats because he did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats." *Rucho* J.S. App. 22 (alterations omitted).

b. Use of political data. The *Rucho* plaintiffs also presented evidence that the General Assembly followed through on its pledge to use political data to draw district lines for the 2016 Plan.

When Dr. Hofeller drew those lines, he "was constantly aware of the partisan characteristics of each county, precinct, and [census voting district]." *Rucho* J.S. App. 17. He used past political data to assign a "partisanship variable" to each precinct based on the likelihood that it would favor Republicans or Democrats. *Id.* at 157-58. He "used the partisanship variable to assign a county, [voting district], or precinct to one congressional district or another," and "as a par-

tial guide in deciding whether and where to split [voting districts], municipalities, or counties." *Id.* at 158 (internal quotation marks omitted). Then, after drawing each draft map, Dr. Hofeller "assess[ed] the partisan performance of the plan on a district-by-district basis and as a whole." *Id.* at 159.

This evidence establishes that political data was not merely *a* factor in drawing the 2016 Plan. It was the predominant factor. Political data determined where Dr. Hofeller drew district lines. It also provided the metric by which each draft map was assessed. The 2016 Plan is thus a paradigmatic example of a plan in which partisan advantage was "the criterion that, in the State's view, could not be compromised." *Bethune-Hill*, 137 S. Ct. at 798.

c. Historical background. The history behind the 2016 Plan corroborates the conclusion that the General Assembly drew the Plan with invidious partisan intent.

As explained above, the 2016 Plan arose after this Court ruled that two of the districts in North Carolina's 2011 Plan were unconstitutional racial gerrymanders. *Cooper*, 137 S. Ct. at 1481-82. In addition to being tainted by racial considerations, the 2011 Plan was also tainted by partisan ones. Indeed, the "primary goal" of the 2011 Plan was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office," and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Rucho* J.S. App. 180 (emphasis omitted).

This history of pursuing partisan advantage in the 2011 Plan renders the 2016 Plan suspect. That is

particularly so because the General Assembly "expressly sought to carry forward the partisan advantage obtained by Republicans under the unconstitutional 2011 Plan," *Rucho* J.S. App. 179, because it aimed "to change as few of the district lines in the 2011 Plan as possible in remedying the racial gerrymander," *id.* at 15-16 (internal quotation marks omitted), and because the same Republican leaders, and the same map drawer, led the redistricting process in 2011 and 2016, *see id.* at 10, 14.

d. Irregular procedures. The 2016 Plan is also the product of procedural irregularities.

The 2016 Plan was crafted without input from the public or Democratic members of the General Assembly. Dr. Hofeller had already completed a "near-final 2016 Plan" and presented it to Representative Lewis before public hearings even began. *Rucho* J.S. App. 18-19. When a public hearing was subsequently held and comments were received, Dr. Hofeller "was not apprised of any of th[ose] comments." *Id.* at 19. And Democratic members of the Joint Committee on Redistricting were neither "allowed to consult with Dr. Hofeller" nor given access to "the state computer systems to which he downloaded the 2016 Plan" after drafting it on his personal computer. *Id.* at 23. In a gross departure from procedural norms, therefore, Republican leaders shut the public and their Democratic colleagues out of the process for developing the 2016 Plan at every turn.

e. Departure from traditional redistricting principles. The many ways in which the 2016 Plan substantively departs from traditional redistricting principles further confirm its predominant partisan intent.

"To achieve the goal of concentrating Democratic voters" and "diluting Democratic voting strength," the 2016 Plan "divides municipalities and communities of interest along partisan lines" in all but one of North Carolina's thirteen congressional districts. *Rucho* J.S. App. 228, 232; *see also id.* at 227-73. For example, in District 6, the Plan cracks apart Guilford County and the City of Greensboro, "both of which traditionally support Democratic candidates," "mov[ing] individual [voting districts] from District 6 to District 13 . . . or vice versa, for political impact." *Id.* at 244. The consequence, consistent with partisan intent, is to "submerg[e Democratic] voters in a 'safe' Republican district." *Id.*

In a number of instances, the 2016 Plan also violates the traditional principle of geographic compactness. District 2, for example, "takes on a highly irregular shape," "includ[ing] a horseshoe-shaped section of Wake County." *Rucho* J.S. App. 232. This shape allows the district to "encompass[ ] the predominantly Republican suburbs of Raleigh, but exclude[ ] the Democratic core of Raleigh, which the General Assembly placed in [a] predominantly Democratic" district. *Id.*; *see also, e.g., id.* at 259 (explaining that District 10 has "a bizarre, bulbous protrusion into Buncombe County and the City of Asheville in the Appalachian Mountains" to crack Democratic voters).

2. Plaintiffs established that the 2016 Plan burdens their voting and associational rights.

In addition to proving that the predominant intent of the 2016 Plan was invidious partisan discrimination, the *Rucho* plaintiffs offered compelling evidence that the Plan imposes severe burdens on their First Amendment freedom of association and Fourteenth Amendment right to cast an effective vote.

Plaintiffs offered evidence of widespread, enduring vote dilution at the state and district levels. At a statewide level, plaintiffs showed that the 2016 Plan "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office." *Rucho* J.S. App. 188. Similarly, at the district level, plaintiffs established that "the General Assembly cracked or packed Democratic voters in [twelve of North Carolina's thirteen] districts and thereby diluted such voters' votes." *Id.* at 273. Plaintiffs also showed that these burdens "likely will persist through multiple election cycles." *Id.* at 190. Indeed, even if "Democratic candidates captured the same percentage of the vote (53.22%) that elected Republican candidates in ten districts in 2016, Democratic candidates would prevail in only four districts." *Id.* at 191 (emphasis omitted); *see also, e.g., id.* at 197 (efficiency gap analysis shows that the 2016 Plan's effects are "durable").[3]

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[3] To be clear, a plaintiff should not be required to present evidence that vote dilution has already occurred in past elections, or that it will persist for an entire election cycle, to prevail on a partisan gerrymandering claim. Evidence that vote dilution will occur in the future, even if only in a single election, establishes a

Plaintiffs also established that the 2016 Plan burdens their associational rights. *Rucho* J.S. App. 290-91. For example, plaintiffs testified that their "get-out-the-vote efforts" have been less successful because voters feel that their votes do not "count"; that they have difficulty recruiting Democratic candidates because those candidates are unlikely to be elected; and that elected representatives in "safe" districts lack incentive to respond to constituents with opposing political views. *Id.* at 152, 292-93. "[T]hese chilling effects on speech and association . . . represent cognizable, and recognized, burdens on First Amendment rights." *Id.* at 292-93.

B. The evidence belies North Carolina's purported justifications for the 2016 Plan.

In the face of this compelling evidence that the 2016 Plan imposes severe burdens on plaintiffs' constitutional rights, the *Rucho* defendants identified two supposed justifications: (1) North Carolina's political geography (reflecting the "natural packing" of Democratic voters), and (2) an interest in protecting incumbents. *Rucho* J.S. App. 215. Neither holds weight.

Defendants' reliance on natural geography fails for a number of reasons. *See Rucho* J.S. App. 215-18. For example, plaintiffs' experts drew tens of thousands of maps based on traditional districting principles and non-partisan criteria. *Id.* at 217. Those maps accounted for North Carolina's political geography. *Id.* But none achieved the level of pro-Republican bias in the 2016 Plan. *Id.* Those maps therefore demonstrate

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sufficient threat of constitutional injury to require the state to justify that threat under the *Anderson/Burdick* framework.

that political geography cannot justify the burdens that the 2016 Plan imposes on plaintiffs' constitutional rights. *See id.*

Defendants' interest in protecting incumbents fares no better. The 2016 Plan paired two incumbents. *Rucho* J.S. App. 220. But plaintiffs' expert, Dr. Jowei Chen, drew 1,000 maps that avoided pairing *any* incumbents—and did so without the partisan skew of the actual 2016 Plan. *See id.* This analysis confirms that partisan intent, not an interest in minimizing the pairing of incumbents, drove the 2016 Plan.

C. The injuries inflicted by the 2016 Plan easily outweigh the State's purported justifications.

Because the predominant factor in drawing the 2016 Plan was partisan advantage, and because the 2016 Plan imposes substantial burdens on plaintiffs' First and Fourteenth Amendment rights, it is subject—at minimum—to close scrutiny. *See supra* at 23. No matter what level of scrutiny applies, however, the State's purported justifications are far too weak to validate the extreme burdens imposed by the 2016 Plan. The district court was therefore correct not only in ruling that partisan gerrymandering claims are justiciable, but also in ruling for the *Rucho* plaintiffs on the merits.

V. At minimum, partisan gerrymandering should not be a valid defense to racial gerrymandering claims.

If this Court were nevertheless to rule that partisan gerrymandering is not justiciable, it should also bring an end to the use of partisan gerrymandering as a defense in racial gerrymandering cases. It is true that the Court, in decisions such as *Cooper v. Harris*,

has previously treated partisan gerrymandering as a potential defense to racial gerrymandering claims. *See* 137 S. Ct. at 1473-78. But it has done so against the backdrop of its rulings, in *Bandemer* and *Vieth*, that partisan gerrymandering claims are justiciable. If the Court were to change course and rule that partisan gerrymandering claims are not justiciable, it should also revisit the question whether partisan gerrymandering can be a valid defense to claims of racial gerrymandering—and hold that it cannot.

That conclusion would help to avoid the troubling consequences described in Section I of this brief. It would also reflect a simple but venerable principle: Two wrongs do not make a right. This Court has determined that partisan gerrymandering is an illegitimate practice that is "incompatible with democratic principles." *Ariz. State Legis.*, 135 S. Ct. at 2658 (quoting *Vieth*, 541 U.S. at 292 (plurality op.) (alterations omitted)). The state should not be permitted to defend one illegitimate practice (racial gerrymandering) by asserting that it engaged in another illegitimate practice (partisan gerrymandering)—particularly if voters can no longer challenge the latter practice on its own terms.

Finally, at the very least, the Court should make clear that any ruling that partisan gerrymandering claims are not justiciable does not call into question the rule that states cannot use race as a proxy for politics when drawing district lines. *See Cooper*, 137 S. Ct. at 1464 n.1, 1473 n.7.

* * *

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must

live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry*, 376 U.S. at 17-18.

Drawing electoral maps with the intent to minimize particular voices in the democratic process is inconsistent with our most fundamental constitutional values. The harm from partisan gerrymandering can also be amplified by the correlation between race and politics and the resulting risk that partisan gerrymanders will dilute the voting strength of racial minorities. To prevent that harm, this Court should reaffirm that partisan gerrymandering claims are justiciable.

CONCLUSION

This Court should hold that partisan gerrymandering claims are justiciable and affirm the judgment in *Rucho*.

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March 8, 2019

Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,

v.

COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,
Appellants,

v.

O. JOHN BENISEK, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Maryland

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Chapman v. Meier,
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Common Cause v. Rucho,
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Elrod v. Burns,
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Evenwel v. Abbott,
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Frost & Frost Trucking Co. v. Railroad Commission,
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Gray v. Sanders,
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Hadley v. Junior College District,
397 U.S. 50 (1970) 10

Karcher v. Daggett,
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Keyishian v. Board of Regents,
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Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 9

Lane v. Wilson,
307 U.S. 268 (1939) 10

Miller v. Johnson,
515 U.S. 900 (1995) 10

Perry v. Sindermann,
408 U.S. 593 (1972) 13

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Rogers v. Lodge,
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Rutan v. Republican Party of Illinois,
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Snowden v. Hughes,
321 U.S. 1 (1944) 11

Speiser v. Randall,
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United States v. Classic,
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United States v. Mosley,
238 U.S. 383 (1915) 7

United States v. Saylor,
322 U.S. 385 (1944). 2, 6, 7, 12

Vieth v. Jubelirer,
541 U.S. 267 (2004) 15

Wesberry v. Sanders,
376 U.S. 1 (1964) 6, 8, 14

Whitcomb v. Chavis,
403 U.S. 124 (1971) 11

White v. Regester,
412 U.S. 755 (1973) 11

Other authorities

Persi Diaconis,
The Markov Chain Monte Carlo Revolution,
Bulletin of the American Mathematical Society,
April 2009 16

Moon Duchin, et al.,
Locating the Representational Baseline: Republicans in Massachusetts, MGGG (Oct. 22, 2019) 26

Peter L. Galison,
Image & Logic: A Material Culture of Microphysics (1997) 17

Karen Kemp,
Nonpartisan Redistricting Panel Reveals Unofficial NC Congressional Voting Map, Duke Sanford School of Public Policy (Aug. 29, 2016) 23

Richard H. Pildes,
Redistricting Reform and the 2018 Elections,
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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of mathematicians and law professors and a supporting team of students. Moon Duchin and the other *amici* mathematicians are members of a mathematical community that has worked to develop benchmarks for statistical and computational techniques that can be used to evaluate districting plans. Some have critically compared the work of other redistricting analysis teams, and some have developed their own algorithms and analytical techniques. Several *amici* have published in this area in popular forums in addition to their scholarly work.

Bridging the fields of law and mathematics, the *amici* have worked together in this brief to articulate a legal standard for adjudicating partisan-gerrymandering claims and to develop ideas for making the mathematics responsive to the needs of the Court. *Amici* write to inform the Court of the relevance and availability of reliable computational methods for evaluating these claims—methods that are illustrated using data in the North Carolina case now before the Court. A complete list of the *amici* is set forth in an addendum to this brief.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

SUMMARY OF ARGUMENT

The right to vote is more than just the right to cast a ballot. The Constitution protects an individual's right to an *undiluted* vote—a right to cast a vote that is free from being "impaired, lessened, diminished, diluted, and destroyed." *United States v. Saylor*, 322 U.S. 385, 388 (1944). The government violates the Constitution when it intentionally dilutes an individual's vote, whether on grounds of race, sex, geography, or partisanship.

An equality principle undergirds "one person, one vote": under the Constitution, the government unconstitutionally dilutes the right to vote when it draws district lines in a manner that arbitrarily distinguishes among voters. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963). This equality principle is a judicially manageable standard. A plaintiff can prove a claim of vote dilution by showing that the manner in which the government drew the district lines diminished the equal weight, power, and value of the plaintiff's vote.

Because vote dilution violates basic constitutional rights, it is essential for courts to be able to detect and act on intentional dilution where it exists. But adjudicating the potential abuses of line-drawing for partisan advantage has bedeviled this Court for decades. Drawing on many years of experience in the fields of mathematics and computational science, this brief presents and illustrates a computational method that is designed to efficiently produce representative samples—in this application, by sampling alternative valid districting plans. Courts can then reasonably infer the presence of intentional discrimination by assessing a given district in the context of valid alternative plans. Such a comparison allows courts to see whether a challenged district falls within the wide range of plans that you would expect to

see from a neutral decision-maker, or is instead an outlier.

This brief thus offers a way forward that is based on reliable and well-established tools that have been used in science and industry for decades—in applications ranging from weapons development to weather prediction. The process of generating these large, diverse ensembles of possible districts also meets the demands of our constitutional framework by taking state-specific redistricting criteria and a state's unique political geography into account before flagging certain districts as outliers.

Unconstitutional vote dilution turns on the idea that the state has departed from a baseline of equal treatment. The method we describe here identifies that baseline by quantitatively determining a normal range for a given district's composition, making dilutive "packing and cracking" clearly visible to courts, legislatures, and the public when a district is an extreme outlier from that range. An outlier finding means that the design of the district is not explained by state-specific rules or political geography, but is far better explained by partisan motives.

In one of the two cases before the Court, the State of North Carolina expressed an explicit intent to produce a partisan outcome by sorting voters into districts on the basis of partisanship, thereby admitting to singling out voters to downgrade the value of their votes. Even without an explicit statement of intent, the methods described here demonstrate impermissible intent through extreme effects. The effects of unequal treatment of individual voters in multiple districts are so stark—and are so clearly shown not to be explained by

the rules and geography—that the only reasonable inference is one of intentional discrimination.

ARGUMENT

I. Claims of vote dilution on the basis of partisanship are justiciable.

The Constitution prohibits the state from intentionally infringing on an individual's right to vote, whether through denial, "debasement[,] or dilution." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Vote dilution can take many forms—for example, stuffing a ballot box or intentionally mis-tabulating the votes. In the districting context it means that, to secure an outcome that it prefers, the state has drawn district lines in a way that intentionally discriminates among voters or treats voters differently. As a consequence of this intentional treatment, the state has minimized the weight, value, or power of certain votes. Vote dilution thus turns on the idea that the state has departed from a baseline of equal treatment and, by doing so, has intentionally diminished the weight, power, and value of an individual's vote. This Court has held for decades that the state violates the constitutional guarantee to an undiluted vote when it intentionally prefers some voters over others, whether based on race, sex, or geography. Now, this Court has the opportunity to affirm that the state likewise violates that constitutional guarantee when it prefers some voters based on their political affiliation or their political beliefs.

A. The Constitution supplies an equality principle that protects each individual from intentional vote dilution by the state.

The vote has long been regarded as among the most fundamental rights, and indeed as preservative of all other rights. *See, e.g.*, *Reynolds*, 377 U.S. at 562. This

Court has found "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. The right is personal to the individual. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) ("The right to vote is 'individual and personal in nature.'") (quoting *Reynolds*, 377 U.S. at 561).

While the "One Person, One Vote" principle can be conceptualized as a collective harm to principles of equal representation as a whole, *see Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 (2016), the constitutional right to have an undiluted vote described by this Court can best be understood as an individual right that arises from an individual conception of injury. The state unconstitutionally diminishes this individual right when it draws districts to intentionally minimize or cancel out the votes of some voters, just as if it had stuffed the ballot box or intentionally miscounted votes to achieve its preferred outcome. *See id.* at 557–58. This constitutional violation occurs whether the state singles out specific voters based on race, geography, or political affiliation.

1. The Constitution protects an individual's right to an undiluted vote.

Every voter has an individual right to an undiluted vote. This Court has long recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. A citizen's constitutional "right to vote free of arbitrary impairment by state action" encompasses a right to an election free "from dilution by a false tally" or "by a stuffing of the ballot box." *Baker v. Carr*, 369 U.S. 186, 208 (1962). Thus, the right to vote is not

merely the right to cast a ballot; it is the right to cast a ballot that is "honestly counted." *United States v. Saylor*, 322 U.S. 385, 388 (1944). The Constitution protects each voter's individual "right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed." *Id.* at 386.

It is similarly well established that a state's drawing of its voting districts can dilute votes, thereby infringing on the individual right to vote. For example, in *Wesberry v. Sanders*, this Court struck down the State of Georgia's congressional apportionment plan for impermissibly diluting votes. 376 U.S. 1, 4 (1964). This Court expressly framed the constitutional violation in individual terms, explaining that when the state intentionally discriminates against some voters in the construction of voting districts, it "debas[es] the weight of the [plaintiffs'] votes." *Id.* This debasement "abridge[s] the right to vote for members of Congress guaranteed . . . by the United States Constitution." *Id.*; *see also Avery v. Midland Cty.*, 390 U.S. 474, 478 (1968) ("Every qualified resident, *Reynolds* determined, has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population."); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) ("It might well be that . . . a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.").

The fact that vote dilution in apportionment cases requires a comparison with the voting power of other voters does not change the individualized character of

the right recognized in this Court's early cases. As this Court articulated, "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in substantial fashion diluted when compared with votes of citizens living in other parts of the state." *Reynolds*, 377 U.S. at 568; *cf. id.* at 580 ("Citizens, not history or economic interests, cast votes. . . . Again, people, not land or trees or pastures, vote."). This Court's prior precedents are clear: the Constitution protects an individual voter from having their vote debased or diluted.

2. The government acts unconstitutionally when it intentionally dilutes an individual's vote.

The Constitution forbids the government and its officials from intentionally interfering with or impairing an individual's right to vote. *See United States v. Classic*, 313 U.S. 299 (1941); *see also Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("The path the Court has sometimes used to enter this political thicket is marked by the label 'intent.'"). This Court has upheld this prohibition on intentional interference in a variety of contexts, finding that a state unconstitutionally dilutes or impairs an individual's vote when it artificially inflates vote counts by stuffing ballot boxes, *see Classic*, 313 U.S. at 314 (citing *United States v. Mosley*, 238 U.S. 383 (1915)), arbitrarily refuses to count ballots from certain precincts, *see Reynolds*, 377 U.S. at 555 (citing *Saylor*, 322 U.S. at 386), redistricts with the purpose of disenfranchising a distinct segment of minority voters, *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), restricts access to the primary when the primary is an instrumental mechanism of choice, *see Classic*, 313 U.S. at 314 (1941), and diminishes the strength of urban votes in

malapportioned systems, *see Reynolds*, 377 U.S. at 568. In each of these contexts, this Court reaffirmed that unconstitutional harm is done when the state manifests an intent to impair the participation of otherwise eligible voters.

The state cannot create a preferred class of voters. *See Gray*, 372 U.S. at 379–80 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."). A fundamental equality principle, grounded in the Equal Protection Clause, requires that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.* at 379.

The state impairs the participation of otherwise eligible voters when it creates a preferred class of voters. Thus, in *Gray*, this Court explained that a system in which a voter's ballot has more weight than a similarly situated voter in a neighboring county unconstitutionally discriminates between eligible voters. *Id.* at 381. The equality principle applies with the same force and with the same logic in the apportionment context and in all contexts in which the state delineates voting districts. For example, in *Wesberry*, the Court found that Georgia "grossly discriminate[d]" against the plaintiffs because its apportionment statute "contract[ed] the value of some votes and expand[ed] that of others." 376 U.S. at 7; *see also id.* at 17–18 ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the] right" to vote). Put simply, this Court has articulated and enforced a principle of equality among voters as a standard: all eligible voters have an equal right for their ballots to be cast, counted, and duly

registered free from state impairment, manipulation, and diminishment. And, as this Court has stated, the equality principle protects both the right of the voter to equal treatment and the right of the voter to equal representation. *Evenwel*, 126 S. Ct. at 1130.

Reynolds embraced this equality principle. There, this Court considered the constitutionality of the apportionment of the Alabama Legislature. *See Reynolds*, 377 U.S. at 545–46. This Court acknowledged that, together, *Gray* and *Wesberry* stand for the proposition that "in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State." *Id.* at 560. With this doctrinal foundation, the relevant question in *Reynolds* was "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in the legislature." *Id.* at 561. In other words, the fundamental equality principle *presumptively controlled*; the only question was whether there was a reason *not* to apply the fundamental equality principle to the issues presented in *Reynolds*. This Court found no such reason and affirmed the district court's order for the Alabama Legislature to be reapportioned. *See id.* at 587.

Since *Reynolds*, this Court has continually found attempted justifications to be insufficient to sustain population deviations that discriminate against similarly situated eligible voters based on their geographies—even though these claims do not implicate any suspect classifications. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1, 24 (1975); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). This Court has also affirmed that states cannot discriminate against voters under the guise of exercising "power wholly within the domain of state interest" in

their role facilitating elections. *Gomillion*, 364 U.S. at 347. Indeed, "[i]t is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 345 (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926)).

Because "the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination,'" this Court looks beyond the statutory language and stated legislative purpose for evidence of unconstitutional intent to diminish the weight of certain individuals' votes. *Reynolds*, 377 U.S. at 562–64 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Specifically, the real-world effects of state decisions can be used to discern unconstitutional intent. In *Gomillion*, this Court found an analysis of the effects of redistricting plan made a demonstration, "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U.S. at 341; *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that intent can be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose").

B. The equality principle extends to cases in which the government intentionally dilutes votes based on partisanship.

As this Court has repeated, "in situations involving elections, the States are required to insure that each person's vote count as much, insofar as it is practicable, as any other person's." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970). Insuring that each person's vote

counts equally means that the state cannot dilute the power of votes by making distinctions—such as those based upon sex, geography, or race—among voters. This standard, the equality principle, applies to cases in which the government draws voting districts that intentionally discriminate against voters because of their political affiliation just as it applies to intentional discrimination against voters based on race, sex, or geography. When this Court is confronted with districts that show clear intent to dilute the power of voters based on political belief or party affiliation—as it is in this case—it must conclude that these cases are justiciable, consistent with this Court's prior precedents.

Vote dilution based on voters' political beliefs is structurally no different than vote dilution on other bases, such as race or geography, that this Court has found justiciable. As this Court explained in *Baker*, "if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" 369 U.S. at 209–10 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). *See also Rogers v. Lodge*, 458 U.S. 613 (1982) (reaffirming the justiciability of race-based vote dilution claims and deciding one such claim on the merits); *White v. Regester*, 412 U.S. 755, 766–67 (1973) (same); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (same). This Court has stated that dilution based on sex would not be "allowable." *Gray*, 372 U.S. at 379. And this Court has repeatedly found justiciable claims of vote dilution based on discrimination by geography, in which urban voters were systematically assigned to larger districts, amounting to a lesser weight being afforded to their votes. *See, e.g., id.*; *Reynolds*, 377 U.S. at 562–64. In *Gray*, this Court explained that the justiciability of geography-based vote dilution claims follows logically from the

justiciability of race- and sex-based vote dilution claims. When "none could successfully contend" that race- and sex-based vote dilution "was allowable," "[h]ow then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Gray*, 372 U.S. at 379.

The same reasoning applies in cases alleging vote dilution on the basis of partisanship. There is no principled basis on which the merits of claims alleging party-based dilution can be distinguished from those of claims alleging intentional dilution based on race, sex, and geography. The justiciability of party-based dilution claims flows ineluctably from geography-based and race-based dilution claims. If the state impermissibly impairs the right to a vote when it dilutes the votes of those who reside in the city, *id.* at 379, draws racial gerrymanders, *see id.*, stuffs ballot boxes, *Saylor*, 322 U.S. at 389, or discriminates based on sex, *Gray*, 372 U.S. at 379, then it is difficult to see why it would not also be an impermissible impairment for the state to discriminate based on political affiliation.

Just as it would violate the Constitution if the state decided to give double votes to urban voters or to White voters, but only single votes to suburban voters or to Black voters, it would also violate the Constitution if the state gave double votes to some voters and only single votes to others on the basis of partisanship. And just as it would violate the Constitution for the state to dilute the votes cast by individuals because they reside in the city or because they are Black, it also violates the Constitution when the state dilutes votes because the voters are associated with Republicans or with Democrats. In all these intentional vote dilution cases, this Court must

conduct the *Reynolds* inquiry, and determine whether there is any constitutionally valid justification for treating voters differently, and thus violating "the basic standard of equality among voters." *Reynolds*, 377 U.S. at 561.

Here, this Court should affirm that there is no such constitutionally valid justification from departing from presumptive voter equality. *Baker* protected the "right to a vote free of arbitrary impairment by state action." 369 U.S. at 208. No person may be given greater voting power merely because of her race, her sex, or where she lives. Surely, then, she may not be given greater voting power because she is a Democrat. This is especially so given that the First Amendment protects individuals from state discrimination on the basis of their political beliefs.

For example, the government may not determine access to government employment or benefits on partisan grounds, except in certain cases in which party affiliation is relevant to the office. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74–75 (1990); *Elrod v. Burns*, 427 U.S. 347, 359–60 (1976) (opinion of Brennan, J.). Similarly, membership in a particular political organization cannot be the basis for termination from the civil service. *See Keyishian v. Board of Regents*, 385 U.S. 589, 607–08 (1967). By denying a benefit to certain persons because of their partisan affiliation or their political beliefs, their "exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). So too here: by disfavoring individuals based on their political affiliation, the state not only treats them

unequally in the exercise of the franchise, but it also penalizes and inhibits their First Amendment freedoms—a result it could not command directly.

* * *

In short, there is no constitutional principle that can explain why intentional, selective treatment based on individuals' partisanship should be adjudicated differently from intentional dilution on other grounds—race, sex, or geography. This Court has explained that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray*, 372 U.S. at 380. Moreover, there *is* a constitutional principle, embodied in the First Amendment, for why partisan association and beliefs should be protected. As *Wesberry* put it, "the right to vote is too important in our free society to be stripped of judicial protection." 376 U.S. at 7. *Reynolds* reaffirmed that, "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civic and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. at 562. The equality standard is judicially manageable, as reflected by this Court's prior precedents. Thus, this Court can, and should, conclude that these cases of intentional vote dilution on the basis of partisanship are justiciable, and that individuals deserve protection from this form of vote dilution just as for other forms already held to be unconstitutional.

II. Claims of vote dilution on the basis of partisanship can be evaluated by a reliable and well-established computational method.

In this section, we describe a powerful method to evaluate the districts in contested plans, setting a high

bar to distinguish extreme outliers from those within the range of reasonable outcomes for that state. Unconstitutional vote dilution can be proved by showing that the manner in which the government drew the lines departed from a baseline of equal treatment by diminishing the weight, power, and value of an individual's vote. The district court in the North Carolina case framed matters similarly, observing that "there needs to be a baseline from which to measure to what degree a districting plan drawn on the basis of partisan favoritism deviates from the universe of 'fair and effective' plans." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 876 n.33 (M.D.N.C. 2018) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring)). Thus, a key to adjudicating cases of partisan gerrymandering is the determination of this baseline: we must have a reliable method to distinguish a normal, neutral, or non-gerrymandered district from an intentionally abusive, gerrymandered, dilutive district. After all, a great many legally valid congressional districting plans exist for North Carolina—not simulations, but true alternative plans—and they come in enormous variety. We must therefore create a benchmark understanding of neutral districting plans in a state-specific setting. Once we have such a benchmark, we can compare it to the challenged districting plan to determine whether, in light of the evidence, an intent to discriminate is the best explanation for a district's design.

The North Carolina case provides a demonstration of how such a model can work in practice. Here, there is no doubt about the intent behind the districting plan. David Lewis, the Republican official who led the redistricting process, admitted that his caucus had selected a map designed to produce a 10-3 split "because I do not believe it's possible to draw a map with 11 Republicans and two

Democrats." Compl. at 13, *Common Cause v. Rucho*, No. 1:16-CV-1016 (M.D.N.C. 2017), 2017 WL 3981300. Representative Lewis elaborated: "I think electing Republicans is better than electing Democrats, so I drew this map to help foster what I think is better for the country." *Id.* Months later, the map produced precisely the expected 10–3 outcome.

The method outlined below demonstrates how, even without such a helpfully clear statement of intent, such discrimination could be reasonably inferred. A simple forensic analysis reveals that six of the thirteen districts are extreme outliers in their partisan composition, both in the North Carolina Congressional Plan enacted in 2012 and in its 2016 replacement that has been held unconstitutional by the district court in the current case (the "2012 Plan" and "2016 Plan," respectively).

A. A reliable and well-established computational method provides a baseline that enables the identification of outliers.

For many decades, scientists, mathematicians, technologists, and government officials have used a technique known as *Markov chain Monte Carlo* ("MCMC") for prediction, modeling, and analysis of large data sets. MCMC gets its name from combining a class of algorithms known as Monte Carlo methods with a probabilistic process called a Markov chain. It has a sixty-year track record of success in studying configurations of complex systems, and has been famously applied in settings from weapons development to weather prediction to finance to number theory to quantum mechanics. *See generally* Persi Diaconis, *The Markov Chain Monte Carlo Revolution*, Bulletin of the American Mathematical Society, April 2009, at 179; Peter L. Galison, *Image & Logic: A Material Culture of Micro-*

physics (1997). For its use in redistricting, see Br. for Eric Lander, as Amici Curiae Supporting Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

MCMC permits us to carry out a comparative analysis of districting plans by generating a large and diverse sample of districting plans—tens of thousands, millions, or billions can be efficiently generated on a standard laptop. The search can be restricted to plans that comply with a given state's districting laws, and hold constant the state's geography and voting patterns. These collections, or "ensembles," of plans provide a baseline understanding of the range of possible legally valid plans, which enables us to compare any given plan with that range and flag extreme outliers. We can refer to this assessment technique as "the method of ensembles."

Scientific consensus in the mathematics and statistics community increasingly endorses this approach to the problem of discriminatory redistricting. Many technical teams are now using this method independently of each other to understand redistricting in the United States. These teams each set up their own algorithms, running chains of map generation until they achieve high confidence that the ensemble is mathematically representative of the full universe of possibilities and provides robust, reliable results.

In the North Carolina case, plaintiff's expert Jonathan Mattingly adopted this approach and created an ensemble of 24,518 maps using a popular MCMC variant known as simulated annealing. *See districtingDataRepository*, Gitlab Community Edition, https://bit.ly/2HrB9mj. Other groups have similarly created redistricting ensembles using their own MCMC approaches. *See mggg*, Github, https://bit.ly/2TEHXTS; *redist*, Github, https://bit.ly/2EI1p8M; https://bit.ly/2XKe1F9.

Significantly, even though MCMC approaches vary, the results in the current case can be replicated. For instance, *amici* were able to compare Mattingly's ensemble to one that we prepared independently with an entirely different MCMC technique called tree-based recombination ("ReCom"), producing remarkably consonant results. To make the box-and-whisker plots shown below in Figure 1, the resulting maps were laid over Senate 2016 voting patterns to benchmark the expected partisan composition for each district in North Carolina—a similar plot could be made with respect to any other electoral data. The boxes show the middle 50 percent of plans, and the whiskers bracket the first to 99th percentile. Crucially, the two ensembles flag exactly the same districts as extreme outliers in both the 2012 Plan and 2016 Plan. This outlier finding will be illustrated for Districts #10 and #11 below (see Fig 2 and 3).

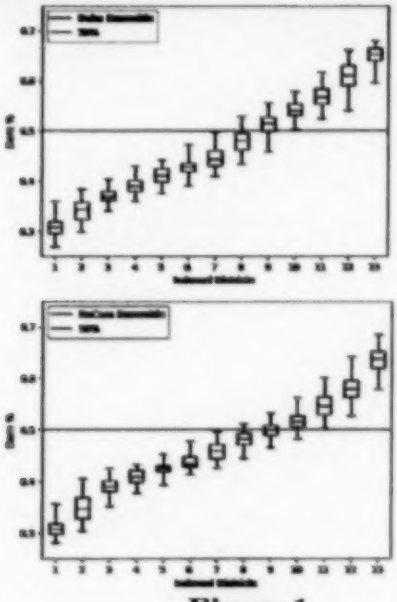

Figure 1.

These identical outlier findings, despite different MCMC designs and ensemble sizes, demonstrate the robustness of the approach. They also demonstrate that the method of ensembles is reliable and replicable, bolstering the plausibility of using outlier analysis as a legal tool.

B. This method takes into account the legal and political landscape of each state.

Individual states can and do set their own districting rules and criteria. This presents us with an explicit *ex ante* framework in each state, containing both federal rules, like equal population and the Voting Rights Act, and state-specific rules—Arizona's priority for competitive districts, Iowa's requirement that counties be preserved whole, Colorado's guidance to minimize the total perimeter of the districts, and so on.

In addition to laws governing districting, each state also has idiosyncratic physical and human geography: The Black population is concentrated in the Delta region of Mississippi; Democratic votes are concentrated in cities in Pennsylvania but in rural areas in Alaska; Iowa is a nearly-perfect grid of nearly-square counties; and so on.

The political geography, in particular, matters enormously for the determination of district behavior. For instance, if every household in a state casts three Republican votes and two Democratic votes, then as long as district lines do not split a house, every single district—no matter how its lines are placed—must necessarily reflect this 3–2 Republican tilt. This forces 100 percent of the representation to be Republican, irrespective of districting choices, which should clearly not support a finding of unconstitutional vote dilution. On the other hand, if the same 40 percent share of Demo-

cratic votes fell into several enclaves, then substantial Democratic representation would be normal and expected, and a 100 percent Republican outcome should be flagged as an outlier.

With MCMC, it is easily demonstrable that legal and political geography work together to create measurably different baselines in some states than in others. In other words, the outcomes of the districting process will and should vary a great deal from state to state, even without any discriminatory intent.

It is worth emphasizing that the technique we describe here is a *method*—not a new score of partisan skew. The method of ensembles does not produce a number or score. Instead, it generates a neutral baseline that can be used to interpret scores for a challenged district plan. The examples in the figures shown here demonstrate the method with respect to vote share, but the method applies equally to other measures or metrics of partisan skew. Thus, ensemble analysis can be flexibly applied to any one or several measures of partisanship that are specified in state rules or doctrinal criteria. A state can certainly name preferred scores of partisan fairness, as some are starting to do—Utah's new law cites partisan symmetry measures, while Missouri's uses efficiency gap. *See generally* Richard H. Pildes, *Redistricting Reform and the 2018 Elections*, Harvard Law Review Blog (Oct. 26, 2018), https://bit.ly/2TC1tAq. These methods then generate legally valid plans to benchmark state-specific reasonable values for each metric, rather than relying on universal *a priori* presumptions about ideals and thresholds. Ensembles only provide benchmarks and baselines once metrics have been selected.

C. Unconstitutional vote dilution can be identified in specific districts.

By identifying some districts as extreme outliers, the method of ensembles makes dilutive "packing and cracking" clearly visible to courts, legislatures, and the public. Packing and cracking are familiar concepts in the history of redistricting. Packed districts have elevated vote levels for a disfavored group, far beyond 50 percent and far from the baseline of the sample. Cracked districts have depressed vote share for the disfavored group, usually well under 50 percent even though the bulk of the ensemble is over that level. Because of asymmetrical geographical patterns, it may well be that very high or very low vote share in a district is completely expected without any discriminatory intent, so neither packing nor cracking is a manageable or usable concept without a method of distinguishing outliers from expected outcomes.

Exploring further the partisan composition data displayed above, we can sort the districts in order of their Democratic share and obtain a clear finding of extreme packing and cracking. The figure below uses the cracked 13th District from the 2016 Plan and the packed 4th District from that plan to illustrate how extreme outliers are made manifest by comparison with an ensemble. (These districts appear as #10 and #11, respectively, when sorted by Democratic vote share as in Figure 1.)

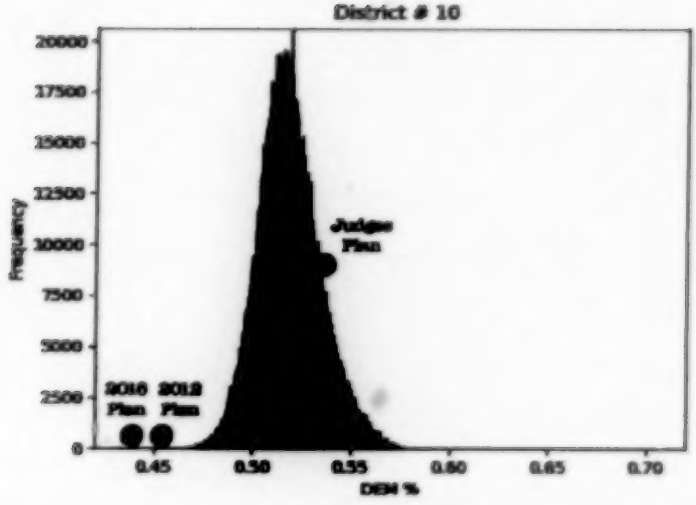

Figure 2

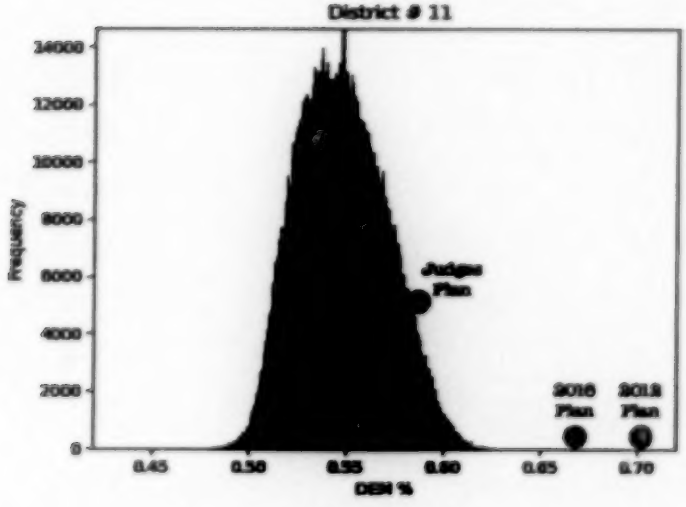

Figure 3

The extreme outlier status of these districts in both the 2012 Plan and the 2016 Plan is clearly visible here,

further thrown into relief by comparison with the corresponding districts in a plan made by a bipartisan panel of retired judges ("Judges' Plan"). Karen Kemp, *Nonpartisan Redistricting Panel Reveals Unofficial NC Congressional Voting Map*, Duke Sanford School of Public Policy (Aug. 29, 2016), https://bit.ly/2HjYyG8. Intentional minimization of the weight of votes for those districts' inhabitants is the clear inference from such extreme outlying effects.

The same effects may be observed if the comparison ensemble is sorted geographically rather than by party share, which we have done by designating a central Charlotte precinct and its district in the 2016 plan. Partisan composition in that district can then be compared to corresponding districts in the ensemble, averaged over their respective precincts. The figure below shows that the 2016 Plan clearly packs Charlotte voters. The 2012 Plan is not depicted in the figure because its packing is so pronounced that it is out of range of the plot. As with the other findings described in this section, Charlotte's outlier status is a matter of complete agreement between the Mattingly and the ReCom ensembles.

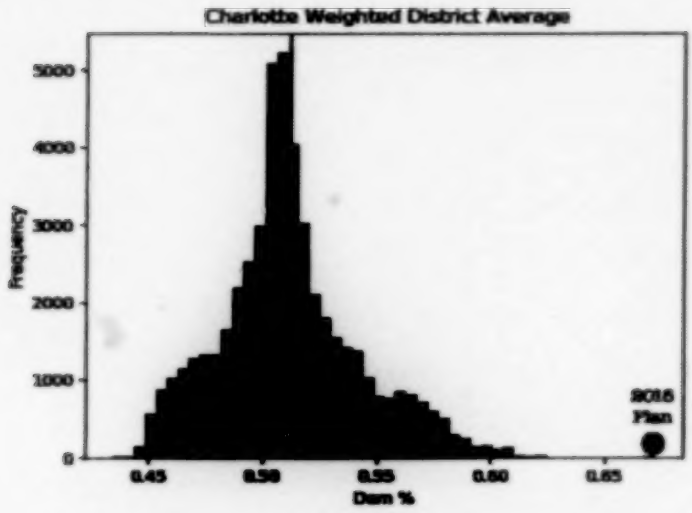

Figure 4

In sum, individual voters are harmed by living in districts that are intentionally designed to instrumentalize rather than to fully register their votes. When district design serves to effectively preordain an outcome far from the neutral baseline, it does not properly weight the votes in those districts.

Consider a scenario in which the North Carolina legislature decides to design the districts *after* a vote has been conducted, with knowledge of how votes were cast in each precinct. Having decided to concede three districts to Democrats, it can then sort the heavily Democratic precincts into those designated districts, clearly serving to diminish the weight, power, and value of those votes. The debasement of vote weight is as clear as in ballot-stuffing scenarios. The difficulty is to distinguish intentional manipulation by the state from the natural patterns of higher and lower concentration present in the vote distribution itself.

A plan composed of districts that fall far from the baseline constructed by the state's rules and geography, and in a pattern that benefits the controlling party, is not rationally explained by the rules and geography. Absent plausible justification by permissible principles, the reasonable inference is one of intentional discrimination.

D. This method is limited in scope.

A method that flags extreme outliers does not infringe on states' ability to set the rules and add districting criteria, nor on their latitude to select a plan that broadly comports with those criteria. We emphasize that the use of the method of ensembles for districting is proposed as an assessment technique, not proposed for optimization or map selection. This will never amount to usurping the state's authority to select a plan, because billions of substantially different plans remain viable, under any conception of outlier. This method does not choose a winner from among the abundance of options. This balances between state prerogatives and constitutional principles.

Importantly, even some districts or plans that look gerrymandered on their face will not be flagged as outliers by this method. For instance, Massachusetts had ten House seats in the 2000–2010 census cycle, and in that period, a Republican share of 30-37% was typical in statewide races. However, not a single Republican was elected to Congress in the five races in that cycle. This may seem to provide a cause of action for a potential claim. What an ensemble analysis clearly shows, however, is that for most elections in that cycle, no valid districting plan *whatsoever* will have even a single Republican-favoring district. Moon Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, MGGG (Oct. 22, 2019), https://bit.ly/

2SPW2cL. Not only a majority of possible plans, but indeed *every single* possible plan, produces a completely Democratic delegation. This is because Massachusetts at the time behaved much like the hypothetical state in which every household has the same voting preference: the statewide share of Republican votes is nearly replicated in every town and even precinct around the state. Thus the method of ensembles contradicts the *prima facie* suggestion of a gerrymander. This example also demonstrates that the method of ensembles does not covertly enforce a proportionality standard, but instead defers to the consequences of the state's rules and political geography.

CONCLUSION

The right to vote is personal and individual. That right is violated when a state singles out voters—in this case, because of their political beliefs—and acts with an intention to dilute their votes. The districting process by its very nature draws lines, thereby treating some voters differently from others. Thus, the process of distinguishing between this permissible line drawing and intentional, unconstitutional vote dilution is not always straightforward. The methods described here, however, demonstrate that these distinctions can be reliably made and thus that these claims can be justiciable. By flagging some districts as extreme outliers, these methods can make clearly visible to courts, legislatures, and the public when there is no rational justification for the drawing of a district and the only reasonable inference is one of intentional discrimination.

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Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AND MARYLAND

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; LATINOJUSTICE PRLDEF; ASIAN AMERICANS ADVANCING JUSTICE; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF APPELLEES

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287244

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OTHER AUTHORITIES

Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867 (2016) 31

Art Harris, *Blacks, Unlikely Allies Battle Miss. Redistricting*, Wash. Post, June 1, 1982 26

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Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004) 32

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Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017) .. 10

Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018) 8, 9

INTEREST OF *AMICI CURIAE*[1]

Amici, listed individually in the Appendix to this brief, are among the country's leading civil rights organizations. They have a significant interest in ensuring the full, proper, and continued enforcement of the United States Constitution and the federal, state, and local statutes guaranteeing full and equal political participation, including the Voting Rights Act of 1965.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[E]lected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). The same is true with respect to the pursuit of partisan advantage. Both Democratic and Republican legislatures have used the power of the state to enact extreme partisan gerrymanders, retaining or enhancing their own grip on power and methodically subordinating voters who support an opposing party.

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[1] Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission.

Minority communities have often been pawns deployed or sacrificed in the pursuit of this partisan entrenchment.

There is no active claim that the maps presently before the Court built their partisan advantage on the backs of minority voters. But the North Carolina plan at issue here is the successor to a map that impermissibly packed minority voters to achieve similar partisan gains, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Rucho* J.S. App. 155, 180-81. Jurisdictions in both Maryland and North Carolina—among many others—have in the past used racial discrimination, provable and less provable, as a tool to achieve partisan ends. If the Court withdraws the judiciary from policing the boundaries of partisan excess manifested by the record in these cases, brazen partisan misconduct will follow here and in other jurisdictions with unified partisan control of the redistricting process. History teaches that minority voters will inevitably be caught again in the crossfire.

Amici hope to assist this Court in considering the ramifications of the doctrine and practice of partisan gerrymandering on minority voters. In particular, as *amici* explain, a partisan gerrymandering claim requiring proof of invidious intent—driven by the desire to subordinate some voters based on their party affiliation and the desire to entrench an opposing party in power—will help to establish an administrable standard that guards against excessive partisanship in the redistricting process without undermining critical protections for minority voters.

When this Court as a whole last meaningfully considered the merits of a cause of action for partisan gerrymandering, all nine Justices recognized that "an excessive injection of politics" in the redistricting process is incompatible with the Constitution. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality); *id.* at 312, 316-17 (Kennedy, J., concurring in the judgment); *id.* at 318, 326 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., and Ginsburg, J., dissenting); *id.* at 355, 360 (Breyer, J., dissenting). No consensus emerged, however, with respect to identifying when the role of politics in redistricting becomes excessive.

As Appellees make clear, such standards exist, and can be fully compatible with federal law protecting minority representation and political participation. This Court should establish a standard for adjudicating claims of partisan gerrymandering that ensures that such claims succeed only when plaintiffs prove invidious discrimination distinct from legitimate political choices. In the instant cases, each three-judge court found that the political party controlling state government intended to lock in partisan dominance of the state's congressional delegation, not through the persuasive force of its policies, but by manipulating district lines to entrench the power of certain voters and subordinate others based on their partisan political affiliation. *See Rucho* J.S. App. 155, 222, 286-88, 306; *Benisek* J.S. App. 12a, 16a, 23a-24a, 48a, 51a. Indeed, in each case at issue here, the intent to use government authority to subordinate opposition voters on the basis of their political affiliation was plain—and at times, both public and proud. *See Rucho* J.S. App. 156-57, 185; *Benisek* J.S. App. 23a-24a. It is entirely consistent

with the Court's prior jurisprudence to find that such extreme conduct entails impermissible discrimination, and requires no more than the deployment of familiar evidentiary tools. And as the Court's experience already demonstrates, such a holding would not likely subject federal courts to a flood of insubstantial claims.

Indeed, a viable cause of action addressing egregious partisan gerrymandering may assist the courts. Causes of action in which race and racial discrimination are central to the legal doctrine are essential in addressing some of the deepest and most pernicious forms of discrimination. That includes legislation abusing race as a proxy for party, or otherwise targeting minorities for disfavored treatment based on other underlying motives, including the pursuit of partisan gain. But when both race and party play a role in legislators' pursuit of impermissible advantage, real partisan harms may accompany very real racial harms; in these instances, a claim to root out unconstitutional partisan excesses, alongside doctrine tailored to address racial discrimination, would ensure the presence of a distinct, properly tailored tool to address each distinct injury. And at times, we have also observed that litigants whose primary concerns are partisan will occasionally attempt to misuse unwarranted race-based voting claims for their own ends. A properly structured cause of action for partisan gerrymandering can help courts better distinguish and channel claims down the appropriate litigation paths, avoiding unwelcome doctrinal distortion and providing full redress for invidious discrimination of all forms.

ARGUMENT

A. A Cause of Action for Partisan Gerrymandering Is Justiciable and Requires Proof of Invidious Discrimination Against Voters Based on Their Political Party Affiliation

This Court has previously determined claims of unconstitutional partisan gerrymandering to be justiciable. *See, e.g.*, *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 414 (2006); *Davis v. Bandemer*, 478 U.S. 109, 125 (1986).

Among the questions presented in this case, however, are issues concerning the particular standard or standards for adjudicating claims of partisan gerrymandering under various constitutional theories. Each three-judge court correctly determined that invidious intent was an essential element of such a standard no matter the constitutional clause involved, and found facts supporting proof of invidious intent. *Rucho* J.S. App. 141-42, 155-87, 227-74, 280-88, 305-13; *Benisek* J.S. App. 42a-43a, 51a, 59a, 61a, 76a n.3. A justiciable standard for claims that partisan gerrymandering violates the Constitution—drawn from any of several textual predicates, and whatever its other elements—ought to require proof of invidious intent to subordinate voters, driven by a focus on their partisan affiliation and with the goal of entrenching an opposing political party's power. And this Court need not determine the outer bounds of such a requirement to recognize that neither three-judge court clearly erred in finding the record in these cases sufficient to support a finding of constitutionally invidious action.

Requiring proof of this sort of invidious intent to subordinate is consistent with this Court's doctrine. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court found no constitutional concern with a plan intended to allocate political power to parties in accordance with each party's voting strength. But the Court also noted that an otherwise acceptable redistricting plan would be vulnerable under the Fourteenth Amendment if it is invidiously discriminatory: intended to "minimize or cancel out the voting strength of racial or *political* elements of the voting population." *Id.* at 751 (internal quotation marks and citations omitted) (emphasis added).

This Court has also clearly held that the First Amendment prohibits the government from deploying state power with an invidious intent to harm on the basis of partisan affiliation. A public employer may demote an employee for many reasons that do not offend the Constitution. But the First Amendment normally prevents a public employer from demoting an employee out of a desire to punish the employee's support for a political candidate. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417-18 (2016). That is, "the government's reason for demoting [the employee] is what counts here." *Id.* at 1418. *See also Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (three-judge court) ("Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's

redistricting legislation—a discernable and manageable standard.").

The manifestation of invidious intent also played a central role in last year's oral argument in *Gill v. Whitford*. Justice Kennedy repeatedly asked whether a law facially proclaiming the use of all legitimate redistricting factors to favor one party (and disfavor another) would be constitutional—a hypothetical Justice Alito described as incorporating a "perfectly manageable standard." *See* Transcript of Oral Argument at 19-20, 26-27, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). The question sets aside methods of proof, and highlights instead the legal crux of the matter: a driving insistence on using state authority to entrench the political power of a group of voters favored based on their partisan preferences, and to similarly subordinate a group singled out as disfavored based on different partisan preferences. The attorney representing Wisconsin's legislature correctly acknowledged that such a statute would violate both the Equal Protection Clause and the First Amendment. *Id.* at 27; *see also* Transcript of Oral Argument at 46-47, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333) (revealing Justice Kennedy's return to the same question, with a similar answer).

To be sure, the evidence of unconstitutional conduct will not always be as clear as in Justice Kennedy's hypothetical. Some violations will be plainly marked and some will be perpetrated under pretext, to be smoked out via familiar judicial tools, *cf., e.g., Vill. of Arlington Heights v. Metro. Hous. Dev'p Corp.*, 429 U.S. 252, 266 (1977). The fact that

some plaintiffs will fail to muster the necessary evidence to prevail is not reason to deny the existence of a cause of action. Justice Kennedy's questions reveal that there is a fundamental and widely acknowledged harm at the heart of these cases.

A gerrymandering cause of action that requires proof of invidious intent to subordinate voters driven by a desire to harm them for their partisan affiliation does not risk undue interference with the legitimate political process. As this Court has recognized, redistricting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality); *see also Gaffney*, 412 U.S. at 752-73. But this does not mean that redistricting is, or need be, root-and-branch an attempt to subordinate voters on the basis of their political affiliation. There is a distinction between proper political contestation and improper partisan subordination of voters because of their preferred group affiliation. The vast majority of legislation involves choices that are inherently political—for example, how much revenue to allocate to different government programs, or what should be eligible for tax deductions. These are charged political questions that present opportunities for partisan posturing, but they do not necessarily involve a conscious effort to subordinate voters because they are Republicans or Democrats. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2013-18 (2018).

Beyond the requirements of federal and state law, including those that protect minority voters from discrimination, there are many political and practical choices in the drawing of any redistricting map. In

most states, these include choices about whether to follow certain county, city, or precinct lines but not others, or certain roads, rivers, or rail lines but not others; about the degree to which lines should follow geometric patterns or patterns of residential development; about allowing certain communities to congregate within one district or to span district lines; and about the degree to which a district should have a distinct character or span multiple competing interests, and which of those interests should dominate. They include choices about whether to protect the relationship of incumbents to their constituents, by consistently maintaining the cores of prior districts (as distinct from selectively protecting incumbents from their constituents by siphoning off opposing partisans). *See LULAC*, 548 U.S. at 440-41; *White v. Weiser*, 412 U.S. 783, 791 (1973). They include choices about whether to resolve each of these decisions in the same way throughout a jurisdiction, or whether to resolve them differently, with different priorities, in different portions of the jurisdiction. All of these may properly be political and practical choices. Prohibiting state action driven by the invidious intent to subordinate on the basis of partisan affiliation leaves each of these legitimate political choices intact. *See* Levitt, *supra*, at 2025-27.

A state actor's invidious intent to methodically subordinate voters on the basis of their partisan affiliation is also distinct from the natural desire of legislators chosen in partisan elections to seek legitimate partisan advantage. The appropriate means by which a legislator gains partisan advantage is through policy action that increases the legislator's appeal to voters with partisan policy preferences.

Such conduct is quite distinct from state action driven by a design to lock in a legislator's electoral success not by appealing to voters, but by targeting presumed opposing voters for systematic subordination through changes to the electoral landscape itself. *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428-29 (1996) (recognizing constitutional limits on government restrictions of speech because that speech may threaten incumbent self-interest).

Finally, focusing on the invidious intent to subordinate does not demand a process blind to partisan inputs or partisan outcomes. Neither a legislator's knowledge that certain communities are more likely to vote for Democratic or Republican candidates, nor that given districts are more likely to lean Democratic or Republican, is itself indicative of the intent to entrench power at opponents' expense. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 352, 368 (2017); *cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). And this Court has long recognized the proper distinction between a legislature's permissible consideration of community characteristics and the impermissible intent to subordinate community voting power because of those characteristics. *See LULAC*, 548 U.S. at 513-14 (Scalia, J., concurring in the judgment in part and dissenting in part).

Both state and federal courts have been able to identify legally cognizable invidious intent, distinct from the standard rough-and-tumble of other political

choices. In *Larios v. Cox*, a three-judge court determined that population disparities that would not otherwise have raised prima facie constitutional concern were constitutionally invalid because they were driven by invidious partisan intent to subordinate. 300 F. Supp. 2d 1320, 1329-30, 1334 (N.D. Ga. 2004) (three-judge court). This Court summarily affirmed that decision. 542 U.S. 947 (2004). Similarly, the Fourth Circuit recently invalidated a county redistricting plan that would otherwise have passed muster, based on proof that the districts' population deviations were driven by the invidious partisan intent of the North Carolina state legislature. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 345-46, 351 (4th Cir. 2016); *see also City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 937, 939, 943 (M.D.N.C. 2017) (North Carolina state legislature); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1050 (S.D. Ill. 2001) (Madison County, Illinois, county board). Florida and Pennsylvania state courts have also examined redistricting plans for invidious partisan intent under their respective state constitutions. *See* FLA. CONST. art. III, § 16(c); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 598, 617-19, 641-45, 648-51, 654, 659-62, 669-73, 676-78, 679-80 (Fla. 2012); *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So.3d 872, 881-82, 887-91 (Fla. 2012); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 378-86, 391-93, 402-13 (Fla. 2015); *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 271-74, 279-80, 284 (Fla. 2015); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 817-21 (Pa. 2018). And, of course, the three-judge courts in

the instant actions were able to distinguish invidious partisan intent to subordinate from the many other legitimate political and practical choices involved in drawing the particular districts at issue. *Rucho* J.S. App. 155-87, 227-74; *Benisek* J.S. App. 55a-56a; *see also Whitford v. Gill*, 218 F. Supp. 3d 837, 883-98 (W.D. Wis. 2016) (three-judge court), *vacated on other grounds*, 138 S. Ct. 1916 (2018) (Wisconsin state legislative map).

In other cases, the evidence has not supported the allegations of invidious unconstitutional action in the redistricting process. For instance, this Court affirmed the rejection of a claim premised on invidious partisanship in the redistricting process, based not on the impossibility of making such a determination, but on the insufficiency of proof offered by the plaintiffs. *Harris v. Ariz. Ind. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). And in the instant North Carolina case, the three-judge court rejected a district-specific showing of invidious intent with respect to District 5. *Rucho* J.S. App. 243.

All of these courts used familiar tools to test for invidious partisan intent in the redistricting process, seeking "an understanding of official objective emerg[ing] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). Following this Court's direction for assessing official purpose in a variety of contexts, each tribunal conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266. Particularly when a redistricting plan

proved to be a significant outlier, its excessive partisan impact occasionally provided "an important starting point," *Feeney*, 442 U.S. at 279 (quoting *Vill. of Arlington Heights*, 429 U.S. at 266), for such an analysis. However, recognizing that legitimate redistricting factors will inevitably yield a partisan impact, no court relied on an assessment of impact alone. Instead, these courts further examined the redistricting context, including but not limited to: statements by mapmakers themselves, the conduct of the legislative session, the progression of draft maps up to the final product, and the map's fit with traditional redistricting principles. *See Raleigh Wake Citizens Ass'n*, 827 F.3d at 346; *City of Greensboro*, 251 F. Supp. 3d at 943-49; *League of Women Voters of Fla.*, 172 So.3d at 380-86, 390-91; *Hulme*, 188 F. Supp. 2d at 1050-51. Moreover, these courts also considered whether this evidence of invidious intent was effectively rebutted by evidence revealing that the district boundaries were, in fact, materially driven not by invidious partisan intent to subordinate but by legitimate legislative motives. *Id.*

Courts do not lightly make such determinations. Nor do plaintiffs lightly bring such cases. Appellants suggest—as defendants in such circumstances often do—that once the judicial doors are opened they will be torn off in a flood of frivolous litigation. *Rucho* App. Br. 39. Experience indicates otherwise. Since at least 2004, federal courts have been available to hear claims that invidious partisanship impermissibly motivated minor variations in district population. Since 2004, there have been thousands of state and local legislative maps, pre-existing and newly drawn, with a minor

population variance. But *Larios* has been cited only seven times by federal appellate courts substantively reviewing allegations of improper political motivation in the redistricting process.

Still, even if the marginal case posed concerns, the records here stand far from the marginal case. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), just last Term, may provide an apt analogy. *Lozman* concerned the arrest of a civic gadfly at a city council meeting, allegedly pursuant to a premeditated city policy to intimidate him in retaliation for his activism. *Id.* at 1954. The legality of the arrest turned on proof of impermissible motive, and the court expressly noted the "risk that the courts will be flooded with dubious retaliatory arrest suits." *Id.* at 1953. But in the face of objective evidence of a potentially premeditated plan, this Court decided the case before it and left the floodgate concerns for the future. *Id.* at 1954. "[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." *Id.*

There will likely be no official policy to subordinate voters on the basis of partisan affiliation clearer than the policy firmly established here — and openly acknowledged by the governing political parties in North Carolina and Maryland. Each three-judge court found that plaintiffs proved not merely that the legislature had partisan information or was aware of a partisan impact, but that it drew the map in question specifically "because of" its ability to entrench one party in power and subordinate voters affiliated with an opposing party. *Rucho* J.S. App.

155; *Benisek* J.S. App. 48a-51a; *see also Feeney*, 442 U.S. at 279. In North Carolina, this purpose was officially declared in the formal criteria established by the state, and proudly promoted in the public hearings of the legislature's redistricting committee. *Rucho* J.S. App. 156-57, 183. The public record established by the North Carolina legislature is, in effect, Justice Kennedy's hypothetical question from the oral arguments in *Gill* and *Benisek* come to life. Likewise, in Maryland, legislators acknowledged in talking points and floor speeches their drive to accomplish similar partisan entrenchment with respect to the district at issue. *Benisek* J.S. App. 23a-24a.

The three-judge courts also found that in each state, the mapmakers' intent was clear not only from express statements, but also from other familiar evidentiary sources—such as the redistricting process itself, the information relied upon in drawing the map, and empirical evidence of the strong partisan advantage present in the final maps approved by the legislatures. In North Carolina, the Republican Party held exclusive control of the map drawing process, working with a consultant to finalize the map *before* the bipartisan redistricting committee had even met or adopted governing redistricting criteria and before public hearings were held. *Rucho* J.S. App. 156. No public input was considered as a part of the map drawing process; however, mapmakers relied strongly on past election results in their analysis to develop a map that "would favor Republicans for the remainder of the decade." *Id.* at 158. Indeed, in a 50-50 state, the map was designed to elect 10 Republicans and 3 Democrats, only because (as the legislative leadership bragged) they did "not believe it[would be] possible to

draw a map with 11 Republicans and 2 Democrats," *id.* at 183—and the map achieved its primary goal in a manner that left it an "extreme statistical outlier," *id.* at 159-172.

Likewise, in Maryland, the court found that "with respect to the mapmakers' intent, the process described in the record admits of no doubt." *Benisek* J.S. App. 48a. Although the Redistricting Advisory Committee held public hearings and was ostensibly tasked with recommending a map, privately, Democratic representatives retained a consulting firm to draw proposed maps with the exclusive goals of maximizing Democratic incumbent protection and enlarging Democratic congressional power. *Id.* at 14a. Maryland Democratic officials were guided by "a narrow focus on diluting the votes of Republicans." *Id.* at 48a. Accordingly, the mapmakers relied on a custom-tailored partisan index to ensure that a generic Democratic candidate would win the Sixth District, and rejected alternative maps that placed the outcome in greater doubt. *Id.* at 15a-17a. As a result, according to analysis by the Cook Political Report, as compared to the preexisting map, under the new redistricting plan, the Sixth District "experienced the single largest [partisan] swing of any district in the Nation." *Id.* at 24a-25a. The map was approved by the Advisory Committee and subsequently, the General Assembly, both without a single Republican vote. *Id.* at 20a, 23a.

Amici recognize that neither the North Carolina and Maryland legislatures' partisan excesses nor their candor may presently or in the future reflect the norm. Absent this Court's

affirmation of the three-judge courts' decisions, however, it is difficult to understand why they would not become the new status quo, demonstrating to citizens that expressions of political affiliation are not constitutionally protected but available grounds for punishment by the state. Surely, this Court is capable of policing the worst excesses of partisan discrimination to preserve the ability of voters to express their political views through the ballot box without fear of reprisals from the governing political party.

Indeed, intervention here is vital even if it yields malfeasance less explicit in the future. (If less explicit malfeasance is likely to also be a bit less excessive, that would be a welcome consequence on its own.) Invidious intent cannot be assumed, *see Feeney*, 442 U.S. at 278-79, but must instead be proven. The standard is a demanding one, and necessarily means that a doctrinal requirement to prove the invidious intent to subordinate voters based on their partisan preference will inevitably leave some invidious partisanship unaddressed. *Cf. McCreary Cnty.*, 545 U.S. at 863 (recognizing that some legitimate intent cases may founder on the absence of proof). That litigation reality, however, does not detract from the value of the ability to confront and correct invidious discrimination that *can* be proven, including that which is open and notorious on its face. *Cf. Batson v. Kentucky*, 476 U.S. 79, 102, 105-08 (1986) (Marshall, J., concurring) (endorsing doctrine to confront racially discriminatory peremptory challenges, while acknowledging that illegitimate peremptory challenges beyond the doctrine's reach are inevitable).

Even though a doctrinal requirement to prove invidious partisan intent leaves some invidious partisanship unaddressed, the requirement is necessary to a manageable constitutional claim. *See, e.g.*, *Bandemer*, 478 U.S. at 127; Kagan, *supra*, at 509-11. Consistent with this premise, no party in the instant cases has requested, no three-judge court has proposed, and this Court should not adopt, any single quantitative metric as irrebuttable proof of an unconstitutional partisan gerrymander. This brief takes no position on the comparative merits or limitations of any particular quantitative measure in providing evidence of constitutional irregularity, or even whether such measures, however helpful in other cases, are necessary given the records at hand. Modest "scores" using any of these measures may flag plans produced by legislatures heeding only traditional redistricting principles without improper motivation, and therefore constitutionally unremarkable. Extreme "scores," on any of several of these quantitative measures, may indicate partisan results sufficiently anomalous to constitute, *inter alia*, circumstantial evidence of invidious partisan intent to subordinate. But as the three-judge courts in these cases emphasized, a jurisdiction should always have the opportunity to demonstrate that even an extreme quantitative score was actually caused by legislative focus on constitutionally legitimate factors, including

traditional redistricting principles.[2] *See, e.g.*, *Rucho* J.S. App. 215-22; *Benisek* J.S. App. 41a-43a.

B. A Properly Structured Claim for Partisan Gerrymandering Is Consistent with the Voting Rights Act

A properly structured partisan gerrymandering claim—one that requires proof of invidious intent to subordinate voters driven by their partisan affiliation—is entirely consistent with the Voting Rights Act of 1965 ("VRA"). Of course, compliance with the VRA does not insulate an unconstitutional partisan gerrymander from judicial scrutiny. Legislatures might produce maps that comply with the VRA along the way to implementing an unlawful plan premised on invidious partisan intent, just as legislatures might produce plans that are fair along partisan lines even as they violate the VRA (or Fourteenth and Fifteenth Amendments) by discriminating based on race. Neither is lawful. But compliance with the VRA and the absence of invidious

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[2] As this Court recently emphasized in a different redistricting context, this inquiry into legislative intent turns on "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *cf. McCreary Cnty.*, 545 U.S. at 864 (refusing to credit a hypothetically permissible purpose that is merely a sham). Particularly in the arena of invidious discrimination, jurisdictions should not be permitted to rescue actual manifestations of unlawful intent to subordinate with hypothetical interests invented for litigation purposes.

partisan intent are not in any way inherently in conflict.

Section 2 of the VRA, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* § 10301(a).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. *See Thornburg v. Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); *see also* 52 U.S.C. § 10301(a)-(b); S. Rep. No. 417, 97th Cong., 2d Sess. (1982). In the redistricting context, a jurisdiction may comply with the prohibition on discriminatory intent by drawing district lines without the intent to harm voters based on their race or ethnicity. It is obvious that a jurisdiction can satisfy this standard without drawing lines intended to subordinate voters on the basis of their partisan political affiliation.

Similarly, a jurisdiction may comply with the VRA's prohibition on discriminatory results without setting out to subordinate voters on the basis of their political affiliation. Based on local demographic, historical, and political contexts, jurisdictions may have an obligation under Section 2 to draw districts preserving minority voters' equal "opportunity . . . to elect representatives of their choice." 52 U.S.C. § 10301(b). Where a compact and sizable minority

community is politically cohesive, and where voting is sufficiently polarized that the surrounding electorate would otherwise usually prevent the minority community from electing a candidate of choice, jurisdictions have an obligation to ensure that districts, in the totality of circumstances, do not create a discriminatory abridgement of electoral opportunity. *Gingles*, 478 U.S. at 44-45, 50-51.

Compliance with Section 2 of the VRA will thus often require attention to, *inter alia*, the voting and electoral patterns in a local community. *Id.* at 45 (recognizing that "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process"); *id.* at 79 (noting that this determination "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms"); *see also Goosby v. Town of Hempstead*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997) (using a myriad of factors identified by a bipartisan Congress, "district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used").

The VRA does not, however, require districts drawn with the intent to entrench or subordinate Democrats, Republicans, or members of any other political party. And a district that is drawn favoring Democrats or favoring Republicans but that does not provide a minority community the equitable "opportunity . . . to elect representatives of *their* choice," 52 U.S.C. § 10301(b), fails to satisfy the jurisdiction's VRA obligations. The VRA is rigorously

focused on the distinct preferences of minority communities facing discrimination, not on generic partisan results. *Cf., e.g., Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("[T]he Act's guarantee of equal opportunity is not met when, in the words of Judge Richard Arnold, '[c]andidates favored by blacks can win, but only if the candidates are white.'") (quoting *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court)).

This means that while the VRA requires attention to local voting patterns, it does not require districts drawn for voters because of their partisan affiliation. *A fortiori*, it in no way requires an invidious intent to subordinate voters based on their partisan affiliation. Indeed, many courts, including this Court, have required jurisdictions to comply with their obligations under the VRA, without ever intimating that doing so would require invidious partisan intent. And just recently, in a case involving population disparities, this Court unanimously affirmed the rejection of a claim of invidious partisan intent when the facts instead supported the conclusion that the disparities were driven by good-faith efforts to comply with the VRA. *Harris*, 136 S. Ct. at 1309-10. That is, this Court recognized that legitimate VRA compliance did not—and does not—produce unconstitutionally invidious partisanship.

Beyond the VRA, other legitimate redistricting considerations, including traditional redistricting principles, may similarly further the concerns of minority voters without running afoul of a properly structured partisan gerrymandering claim. For example, in some circumstances, the political

interests of minority voters may be served by efforts to keep that community of interest intact within a district, even where there is no federal mandate to do so. Keeping that community intact raises no inference that a legislature intends to subordinate voters based on their partisan affiliation.

Similarly, in some circumstances, the political interests of minority voters may be served by preserving the core of an existing district, and hence the relationship of a population with a longstanding incumbent. Doing so raises no inference that a legislature intends to subordinate voters based on their partisan affiliation. A robust requirement of invidious intent ensures that legitimate compliance with traditional redistricting principles, including those that advance the interests of minority voters, is not inadvertently conflated with illegitimate partisanship.

C. A Properly Structured Claim for Partisan Gerrymandering Will Help Avoid Detrimental Distortion in Cases Brought Under Doctrines Involving Race

Cases involving claims of racial discrimination under the VRA and the Fourteenth and Fifteenth Amendments play an essential role in remedying the deepest and most pernicious forms of discrimination in voting. *See, e.g.*, *LULAC*, 548 U.S. at 438-42 (finding vote dilution in violation of Section 2 of the VRA with respect to Congressional District 23 in Texas); *Gingles*, 478 U.S. at 34, 80 (finding vote dilution in violation of Section 2 of the VRA with respect to state legislative districts in North

Carolina); *Rodgers v. Lodge*, 458 U.S. 613 (1982) (finding vote dilution in violation of Fourteenth and Fifteenth Amendments with respect to county commission in Georgia); *White v. Regester*, 412 U.S. 755, 765-70 (1973) (finding vote dilution in violation of the Fourteenth Amendment with respect to state house districts in Texas); *cf. Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016) (three-judge court) (finding unconstitutional racial gerrymander with respect to state legislative districts in North Carolina), *aff'd*, 137 S. Ct. 2211 (2017).

No doubt they will continue to do so. As this Court has recognized, "racial discrimination and racially polarized voting are not ancient history," and "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality); *see also Shelby Cnty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that.").

Racial discrimination, of course, is morally, historically, and legally distinct from partisan subordination. Partisan impulses have, however, repeatedly provided disturbing incentives for officials of both major parties to draw districts that disadvantage minority voters. The absence of a meaningful partisan gerrymandering doctrine has not only fostered this abuse, but also led to further detrimental impacts for voters and for the law. Jurisdictions in race-based redistricting cases have inappropriately and sometimes successfully claimed invidious partisan purpose as a defense. And

claimants with partisan motives may bring inappropriate race-based cases that distort the jurisprudence of racial harm. The distinct harms of partisan and racial discrimination in redistricting merit two distinct causes of action, for the benefit of the law and the courts, and voters of all kinds.

History shows that in the absence of a firm understanding of the illegality of invidious partisan gerrymandering, *both* major political parties—Democratic and Republican—have drawn electoral districts in pursuit of their excessive partisan interests in ways that have harmed minority voters.

Following the 1970 Census, for example, Texas Democrats drew multimember districts in Dallas and Bexar counties that were "unconstitutional in that they dilute the votes of racial minorities." *Graves v. Barnes*, 343 F. Supp. 704, 708-709, 724-34 (W.D. Tex. 1972) (three-judge court). A three-judge district court did not reach the partisan gerrymandering claim brought by Republican voters and officials because the claim of racial vote dilution delivered the requested relief. *Id.* at 735. This Court unanimously affirmed that finding of unconstitutional vote dilution. *Regester*, 412 U.S. at 765-70.

Similarly, in Mississippi, following the 1980 Census, Black voters challenged the state's congressional redistricting plan, drawn by Democrats, which "divided the concentration of black majority counties located in the northwest or 'Delta' portion of the state among three districts." *Jordan v. Winter*, 604 F. Supp. 807, 809 (N.D. Miss. 1984) (three-judge court), *aff'd sub nom.*, *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). The districts

were drawn to protect three incumbent Democrats from Republican challengers (and thus maintain the Democrats' control of the state's congressional delegation), and Republican officials in Mississippi "lobb[ied] the Justice Department on behalf of Mississippi black[voters] and Republicans to reject the legislature's redistricting plan." Art Harris, *Blacks, Unlikely Allies Battle Miss. Redistricting*, Wash. Post, June 1, 1982. The Department of Justice interposed an objection under Section 5 of the VRA, and a three-judge district court then held that a subsequent iteration of the redistricting plan continued to discriminate against Black voters in violation of Section 2 of the VRA. *Jordan*, 604 F. Supp. at 809, 813-15.

As noted above, the Democratic Party is not alone in pursuing redistricting plans that seek excessive partisan advantage at the expense of minority voters. In 2003, after Texas Republicans "gained control" of "both houses of the [state] legislature," they drew a new congressional redistricting plan with "the dual goal of increasing Republican seats in general and protecting [Republican Henry] Bonilla's incumbency." *LULAC*, 548 U.S. at 423-24. In doing so, however, the legislature diluted Latino voting strength in Congressional District 23, in violation of Section 2 of the VRA. *Id.* at 438-42. As this Court observed, "[t]he State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district." *Id.* at 441. "This b[ore] the mark of intentional discrimination that could give rise to an equal

protection violation." *Id.* at 440. In 2011, the Republican legislature again redrew the lines, including District 23. "As it did in 2003, the Legislature [ ] reconfigured the district to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district." *Perez v. Abbott*, 253 F. Supp. 3d 864, 884 (W.D. Tex. 2017) (three-judge court). Indeed, a three-judge court described the map as a whole as follows:

> It is undisputed that Defendants engaged in extreme partisan gerrymandering in drawing the map, ignoring many if not most traditional redistricting principles in their attempt to protect Republican incumbents, unseat [a Democratic incumbent], gain additional Republican seats, and otherwise gain partisan advantage. Defendants do not really dispute the fact that minority populations are divided or "cracked" in the plan . . . .

Id. at 945. Ultimately, the court found that the state's treatment of minority voters in 2011 amounted to multiple violations of Section 2 of the VRA and the Constitution. *Id.* at 908, 938, 962.

And the North Carolina map now before the Court is the successor plan to a 2011 map that, in the words of its own author, sought to "create as many districts as possible" that Republicans would win and "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Rucho* J.S. App. 180. As part of its means to this end, the legislature chose an

equally impermissible path: intentionally and unjustifiably overpacking minority voters in two specific districts.[3] *Harris*, 137 S. Ct. at 1469-78.

In cases of this type, jurisdictions often seek to defend themselves by asserting that the complaints turn more substantially on partisanship than they do on race. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 567, 586 (N.D. Ill. 2011) (three-judge court); *Harris*, 137 S. Ct. at 1473, 1476. The absence of meaningful partisan gerrymandering doctrine allows such arguments to flourish.

In statutory vote dilution cases, such a defense has no purchase. *See, e.g.*, *Gingles*, 478 U.S. at 63-67, 74 (plurality); *id.* at 100 (O'Connor, J., concurring in the judgment); *Goosby v. Town of Hempstead*, 180 F.3d 476, 492-94, 495-96 (2d Cir. 1999) (rejecting the argument that partisan explanations for otherwise proven racial vote dilution can defeat a VRA claim).

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[3] It is not inconsistent to understand that North Carolina pursued invidious partisan advantage and that it did so through the predominant and unjustified use of race. The particular reason why specific individuals were moved within or without certain identified districts was predominantly based on their race and without adequate legitimate justification. *Harris*, 137 S. Ct. at 1469-78. And the underlying reason to move these individuals based on their race was the drive to entrench Republicans and subordinate Democrats. *Rucho* J.S. App. 180. The legislature employed an impermissible means to obtain an unconstitutional objective. *See Harris*, 137 S. Ct. at 1473 n.7; *infra* at 28-29.

Similarly, in constitutional claims, where the evidence establishes that voters have been targeted based on their race or ethnicity, as a proxy for party, such a defense is irrelevant. Courts have repeatedly affirmed that the unjustified targeting of minority voters for injury based on their race is unlawful, whether they are targeted based on animus or as the means to achieve ultimate partisan ends. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 241 n.30 (5th Cir. 2016) (en banc) (Haynes, J.) (noting that "[i]ntentions to achieve partisan gain and to racially discriminate are not mutually exclusive" and that accordingly, "acting to preserve legislative power in a partisan manner can also be impermissibly discriminatory"), *cert. denied*, 137 S. Ct. 612 (2017); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (noting that "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"), *cert. denied*, 137 S. Ct. 1399 (2017); *Garza*, 918 F.2d at 778 & n. 1 (Kozinski, J., concurring and dissenting in part) (explaining that incumbents may pursue intentional racial discrimination for political gain without displaying racial animus); *One Wis. Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 924-25 (W.D. Wis. 2016) (holding that a voting measure in Wisconsin "was motivated in part by the intent to discriminate against voters on the basis of race" and that "suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve [a] political objective"), *appeal docketed*, No. 16-3091 (7th Cir. Aug. 3, 2016); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (finding, in the circumstances of that case, that "there is little

point . . . in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus"); *cf. Harris*, 137 S. Ct. at 1473 n.7 (noting, in the context of racial gerrymander claims, that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests").

However, as this Court and other federal courts have recognized, race and party are, in certain contexts, closely intertwined. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Harris*, 137 S. Ct. at 1474 (noting evidence that in North Carolina, "racial identification is highly correlated with political affiliation" (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001))); *United States v. Charleston Cnty.*, 365 F.3d 341, 352 (4th Cir. 2004) (Wilkinson, J.) (noting evidence that in South Carolina, party affiliation and race were "inextricably intertwined"); *Perez*, 253 F. Supp. 3d at 945 (noting evidence that "race and political party affiliation are strongly correlated in Texas").[4] Particularly in those circumstances, defendants may attempt to shield themselves from claims of racial discrimination by claiming partisan

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[4] Of course, even where such correlation exists, it in no way renders race and party legally equivalent or fungible. As described above, targeting minority voters for injury has long been recognized as unlawful, period, whether as a proxy for party or not. And minority voters continue to face unlawful discrimination within closed party primaries, where opposition on the basis of party is not at issue. *See, e.g.*, *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037, 1044 (11th Cir. 1984).

intent—and where the evidence is insufficient to distinguish the two, an egregious gerrymander may inflict its damage without evidence sufficient to prove that voters were specifically targeted because of their race or ethnicity. *See, e.g.*, *Perez*, 253 F. Supp. 3d at 969-72. Confessing to one misdeed may supply a narrow defense to another, but it should not yield blanket exculpation. Where the intent to entrench favored partisans and subordinate opposing voters based on their partisanship works its own material harm, doctrines designed to combat racial injustice should not provide the exclusive source of relief. In these circumstances, the recognition of a properly structured claim for partisan gerrymandering could not only lessen the need for courts to disentangle race and party, but also better ensure that the fundamental rights of all voters are fully protected. *See, e.g.*, Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 871, 904 (2016) (noting that "racial, partisan, and administrative motives have blurred" and that "if the Court decides to adjudicate partisan gerrymandering claims, it would obviate much of the quagmire . . . on how racial motivations may be disentangled from partisan ones").

Finally, in the absence of a legal standard for claims of partisan gerrymandering, some partisan actors—both Democrats and Republicans—have also attempted to bring unwarranted race-based claims to address partisan excesses. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630-31 (2002) ("One of the perverse consequences of the absence of any real constitutional vigilance over partisan

gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the . . . category of race.").

As demonstrated above, some circumstances raise both partisan and racial harm. But some do not. Litigation that stems from partisan and not racial discrimination but is brought under race-based causes of action raises the risk that courts would tailor facts or doctrine (*i.e.*, to try to fit a square peg into a round hole) in ways that are potentially detrimental to the development of the law. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 569 (2004) (noting "the spillover effects" of litigation brought to "attack political gerrymanders" under "doctrinal rubrics, such as section 2 of the [VRA] or the *Shaw* cases," and suggesting that "the cost of repackaging essentially partisan claims of excessive partisanship under one of these labels is something that needs to be considered"). Injury based on race and injury based on partisan affiliation are of different legal, moral, and historical character, and should be neither confused nor conflated. The notion that partisan claims may occasionally be merely masquerading as race-based causes of action may warp the law and generate skepticism around true race-based harms.

Legal doctrines focused on addressing racial discrimination should remain dedicated to that goal, without being subverted to contend with litigation incentives more suitable for claims in which the principal alleged injury is partisan. The recognition of a distinct litigation framework including a properly

structured claim for partisan gerrymandering would allow such cases to be channeled toward the most appropriate doctrinal paths and to avoid any negative spillover effect.

CONCLUSION

For the foregoing reasons, the judgments of the three-judge courts should be affirmed.

March 8, 2019

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APPENDIX

APPENDIX

List of Amici Curiae

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan law organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in numerous precedent-setting litigation relating to minority political representation and voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating minority voting rights. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991);

Thornburg v. Gingles, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

LatinoJustice PRLDEF ("LJP") champions an equitable society by using the power of the law together with advocacy and education. Since its founding as the Puerto Rican Legal Defense and Education Fund, LJP has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. LJP has engaged in and supported law reform civil rights litigation across the country combatting discriminatory policies in numerous areas and has worked to secure the voting rights and political participation of Latino voters since 1972 when it initiated a series of suits to create bilingual voting systems throughout the United States. LJP has been involved in state and federal litigation regarding Latino political representation and voting rights, including constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating voting rights. *See, e.g.*, *Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014); *Favors v. Cuomo* (*Favors I*), 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974).

Asian Americans Advancing Justice ("Advancing Justice") is a national affiliation of five independent nonprofit organizations that actively works to advocate for the civil and human rights of Asian Americans and other underserved communities to promote a fair and equitable society for all. The Advancing Justice affiliation is comprised of our nation's oldest Asian American legal advocacy center located in San Francisco (Advancing Justice – Asian Law Caucus), our nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders located in Los Angeles (Advancing Justice – Los Angeles), the largest national Asian American policy advocacy organization located in Washington D.C. (Advancing Justice – AAJC), the leading Midwest Asian American advocacy organization (Advancing Justice – Chicago), and the Atlanta-based Asian American advocacy organization that serves one of the largest and most rapidly growing Asian American communities in the South (Advancing Justice – Atlanta). Collectively, Advancing Justice has a long-standing history of serving the interests of immigrant and language minority communities, and has operated a voting rights program for the last several decades that ensures equal access to the voting process, language assistance in voting for limited-English proficient voters, and fair redistricting that empowers Asian American communities through engagement and representation of Asian Americans during redistricting efforts at all levels.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the

civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965. AALDEF has litigated cases around the country under the language access provisions of the Voting Rights Act, and seeks to protect the voting rights of language minority, limited English proficient and Asian American voters. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans. *See, e.g.*, *Favors v. Cuomo* (*Favors I*), 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Diaz v. Silver*, 978 F.Supp. 96 (E.D.N.Y. 1997); *OCA-Greater Houston v. Texas*, No. 16-51126 (5th Cir. 2017); *Alliance of South Asian American Labor v. The Board of Elections in the City of New York*, Civ. No. 1:13-CV-03732 (E.D.N.Y. 2013); *Chinatown Voter Education Alliance v. Ravitz*, Civ. No. 06-0913 (S.D.N.Y. 2006).

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of people who are lesbian, gay, bisexual, or transgender ("LGBT"), or living with HIV—many of whom are members of racial and ethnic minorities—through impact litigation, education, and public policy advocacy. Lambda Legal works to challenge the

intersectional harms caused by invidious discrimination based on sexual orientation, gender identity, race, and ethnicity. It has participated in this Court and lower courts in numerous cases addressing First Amendment, Equal Protection, voting rights, and other civil rights principles affecting LGBT individuals and members of additional minority groups. For example, Lambda Legal was party counsel in *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 135 S. Ct. 2594 (2015); and participated as amicus in *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) and *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

Nos. 18-422, 18-726

In The Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, et al.,

Appellants,

v.

O. JOHN BENISEK, et al.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF DAVID ORENTLICHER AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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Alan Blinder, *The Quiet Revolution: Central Banking Goes Modern* (2004) 6

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Kathleen Dolan, *Gender Stereotypes, Candidate Evaluations, and Voting for Women Candidates: What Really Matters?*, 67 Pol. Res. Q. 96 (2014).....14

Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. Rev. 1483 (2007).....3

Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013).....3

European Parliament, *Dissenting Opinions in the Supreme Courts of the Member States* (2012).....4, 11

Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493 (2013).....2, 10

Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?: Executive Summary* (2002).....11

Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proc. Nat'l Acad. Sci. 16385 (2004).....6

David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. Cal. L. Rev. Postscript PS29 (2018).....2

TABLE OF AUTHORITIES – Continued

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Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007) 6

Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 Wm. & Mary L. Rev. 1 (2014) 2

Gabriel Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 Pepp. L. Rev. 1109 (2011) 10

Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FiveThirtyEight (Mar. 29, 2012) 13

Geoffrey R. Stone, *Chief Justice Roberts and the Role of the Supreme Court*, Huffington Post (May 25, 2011) 5

Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769 (2015) 5

The Federalist No. 10 (James Madison) 7

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Hope Yen, *Roberts Seeks Greater Consensus on Court*, Wash. Post (May 21, 2006) 5

INTEREST OF AMICUS CURIAE[1]

This brief amicus curiae is filed by and on behalf of David Orentlicher, Cobeaga Law Firm Professor at UNLV William S. Boyd School of Law.[2] Prof. Orentlicher teaches and writes about constitutional law and also served for six years as a state representative in the Indiana General Assembly. His recent scholarship has examined the problem of ideological partiality in the judiciary, and he submits this brief in the hope that its discussion of due process and ideological balance will be of value to the Court.

SUMMARY OF ARGUMENT

While this brief takes no position on the merits of the cases, it does present a position on the manner in which the cases should be decided. The Due Process Clause promises litigants that they will receive an impartial hearing before a neutral court. And a neutral court decides cases without any personal, political, or

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Reimbursement for printing expenses may be sought from funds made available by UNLV William S. Boyd School of Law to faculty for their professional activities.

[2] Institutional affiliation is provided for identification purposes only. This brief does not purport to present the institutional views, if any, of amicus' university.

other partiality. However, like other appellate courts, this Court brings an ideological leaning to its work. This compromises the due process principle of fairness which is critical to the resolution of any legal matter and especially matters such as political gerrymandering that go to the heart of our representative system of government. Accordingly, principles of due process require the Court to ensure that it decides these cases in an ideologically-balanced way.[3]

ARGUMENT

I. IDEOLOGICAL BALANCE AND DUE PROCESS

When the Constitution provides its fundamental guarantee of due process, it promises individuals that they will receive an impartial hearing before a neutral court.[4] And a neutral court decides cases without any personal, political, or other partiality.[5]

But this Court and other appellate courts typically are not neutral courts. They generally have either a conservative or liberal majority of Justices or judges,

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[3] Much of the argument in this brief is drawn from David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. Cal. L. Rev. Postscript PS29 (2018).

[4] Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 Wm. & Mary L. Rev. 1, 34, 36–37 (2014).

[5] Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 499–509 (2013).

and overall, that makes for either a conservative or liberal predilection. When a court has a liberal majority, parties promoting a conservative viewpoint will be disadvantaged. Similarly, when a court has a conservative majority, parties promoting a liberal viewpoint will be disadvantaged.

To be sure, if judging entailed a purely objective application of legal rules and principles to the facts, a jurist's ideology would not matter. But as empirical evidence demonstrates, a jurist's ideology does matter.[6] Some Justices and judges take more conservative positions, while others take more liberal positions.[7] A conservative majority will render different decisions on campaign finance, environmental regulation, or religious freedom than will a liberal majority. When this Court's decisions reflect the philosophical leanings of the Justices, and decisions can be determined by a majority on one side of the ideological spectrum, our judicial system denies an impartial hearing to parties on the other side of the ideological spectrum. And that is fundamentally unfair in a constitutional system that promises litigants due process in court.

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[6] Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 103 (2013).

[7] Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. Rev. 1483, 1491 (2007). Amicus recognizes that things are more nuanced. From case to case, a judge or Justice will sometimes take more conservative positions and other times more liberal positions. Nevertheless, for many cases, either a conservative or liberal majority will prevail.

Because it is unfair for litigants to have their cases decided by an ideologically-skewed court, due process requires reforms to ensure that decisions by this Court reflect both sides of the ideological spectrum. Scholars and others have proposed a number of approaches to bring ideological balance to this Court, including changes in the judicial appointment process. The simplest path to ideological balance would be for the Court to follow the example of the jury, and render its decisions unanimously. That way, Justices on both sides of the ideological spectrum would have to support the Court's opinions.[8]

The example of juries fits well. Amicus believes that to be impartial, this Court should issue decisions that reflect the views of Justices from both sides of the ideological spectrum. Similarly, in defining the meaning of an impartial jury, this Court has required that jurors be drawn from a fair cross-section of the community.[9] As this Court also has noted, the due process standards for jury size and jury unanimity reflect the goal of group deliberation undertaken by a jury that is representative of the community.[10]

This Court itself has observed a norm of consensual decision-making for most of its history. Until 1941,

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[8] Many European high courts also decide their cases on the basis of consensus. European Parliament, *Dissenting Opinions in the Supreme Courts of the Member States* (2012), http://www.europarl.europa.eu/sdocument/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

[9] *Taylor v. Louisiana*, 419 U.S. 522, 526–27 (1975).

[10] *Williams v. Florida*, 399 U.S. 78, 100 (1970).

Justices typically spoke unanimously.[11] Only about 8% of cases included a dissenting opinion. Now, one or more Justices dissent in about 60% of rulings.[12] Amicus agrees with the Chief Justice that greater consensus on the court is desirable[13] and that this Court functions best "when it can deliver one clear and focused opinion."[14] More importantly, decision-making by consensus would bring this Court into conformity with the constitutional requirement of due process.[15]

Due process is important not only for the litigants before a court but also for the public generally. This is especially the case when this Court decides issues of great moment and that go to the heart of our representative system of government, such as the question of political gerrymandering in these cases. For such issues, it is critical that the public feel that the Court reaches its decisions fairly.

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[11] Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769, 771 (2015).

[12] *Id.* at 776–77.

[13] Hope Yen, *Roberts Seeks Greater Consensus on Court*, Wash. Post (May 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html.

[14] Geoffrey R. Stone, *Chief Justice Roberts and the Role of the Supreme Court*, Huffington Post (May 25, 2011), https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html.

[15] Concerns about ideological balance also arise with intermediate courts of appeal so they also should adopt unanimous decision-making. While a panel of three judges often can have either three conservative or liberal members, ideological balance can be readily achieved when cases are heard *en banc*.

But concerns about the role of judicial ideology have markedly increased in recent years. A majority of Americans once expressed strong confidence in this Court. According to a July 2018 Gallup poll, only 37% do now.[16] Ensuring ideological balance would do much to restore public faith in the Court's decision-making process. As a corollary, it also would do much to defuse the highly contentious nature of judicial appointments. If people on both sides of the ideological spectrum knew their views would be reflected in Court decisions, they would not have to fight over appointments to the Court.

In addition to ensuring a fairer process, decision-making by consensus provides other important benefits. For example, it generates a more effective decision-making process. Studies on group decision-making demonstrate that better outcomes result when the decisions incorporate a range of perspectives.[17] In addition, unanimous decision-making ensures greater stability in the law. When this Court can decide cases by a majority vote, changes in the composition of the Court can lead to major changes in the Court's

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[16] Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, Gallup (July 2, 2018), https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx.

[17] Alan Blinder, *The Quiet Revolution: Central Banking Goes Modern* 43 (2004); Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 2–3 (2007); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proc. Nat'l Acad. Sci. 16385 (2004).

jurisprudence. With unanimous decision-making, legal doctrine will develop along a steadier path.

II. IDEOLOGICAL BALANCE AND ORIGINAL INTENT

What would the Framers think about this? On one hand, they did not include in Article III of the Constitution a requirement for ideological balance on the Supreme Court. On the other hand, they did not reject ideological balance. Moreover, they recognized the need to amend the Constitution with a Bill of Rights that includes the Due Process Clause's guarantee of impartial courts.

The Framers' intent is consistent with this brief's due process analysis. With ideological balance, this Court would be more faithful to the Framers' design for our constitutional system. The Founding Fathers worried greatly about "factions" pursuing their self-interest to the detriment of the overall public good. Accordingly, the constitutional drafters devised a system that they thought would contain the influence of factions.[18] With regard to the judicial branch, the Framers did not expect—nor did they want—a Supreme Court that would reflect the views of only one side of the ideological spectrum. Indeed, when Alexander Hamilton explained the Constitution's appointment provisions in *The Federalist Papers*, he emphasized the need to

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[18] *The Federalist No. 10* (James Madison).

avoid nominations that reflect partiality instead of the overall public interest.[19]

The Due Process Clause and original intent both support ideological balance on this Court. As discussed in the next section, the Court's precedents are consistent with such a requirement.

III. IDEOLOGICAL BALANCE AND SUPREME COURT PRECEDENT

In previous cases, this Court has observed that constitutional concerns are not raised when a judge favors one or another ideological view.[20] Anyone with the appropriate training and experience for the judiciary will have opinions on important legal issues. According to the Court, due process prohibits partiality toward a party to a proceeding, not partiality toward a legal view that the party might advocate.[21]

But there are important reasons to distinguish Court discussions of the issue. First, the question whether an appellate court must exhibit overall ideological balance has not been decided by this Court. Rather, the Court has considered the question of partiality for individual judges. Moreover, it has done so in cases addressing other issues of judicial neutrality.

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[19] *The Federalist No. 76* (Alexander Hamilton) (discussing the appointment provisions generally).

[20] The opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), provides a nice summary of this Court's discussions of the topic.

[21] *Id.* at 777–78.

In *Republican Party of Minnesota v. White*, for example, the issue before this Court was whether a state could prohibit judicial candidates from announcing their positions on issues that might come before them if elected.[22] In another case, *Tumey v. Ohio*, the issue before this Court was whether judges could have a financial stake in the outcome of their decisions.[23]

Second, this Court's reasoning is consistent with a due process argument in favor of a Court that decides cases in an ideologically-balanced way. In *Republican Party of Minnesota*, the Justices discussed the kinds of partialities that should disqualify a judge, and this Court wrote that a judge's ideological predilection is not disqualifying in the way that a personal financial interest is disqualifying. It took that view in *Republican Party of Minnesota* and earlier cases because anyone who has the experience and training that would be desirable in a judge will inevitably develop an ideological leaning.[24] And as discussed, there are benefits to having a bench of Justices with a range of ideological perspectives. But the fact that we have individual Justices with ideological leanings does not prevent us from ensuring an overall ideological balance on the Court. Under a fair reading of the Constitution, litigants

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[22] *Id.* at 768. This Court held that the prohibition violated the First Amendment. *Id.* at 788.

[23] *Tumey v. Ohio*, 273 U.S. 510, 514–15 (1927). The Court held that the judges' financial interests violated due process. *Id.* at 534.

[24] *Republican Party of Minnesota*, 536 U.S. at 777–78.

ought to be able to ensure that their cases are decided in an ideologically-balanced way.

In addition, it is difficult to identify a good reason for permitting this Court's holdings to be decided by a majority on one side or the other of the ideological spectrum. While we can point to the principle of majority rule to justify conservative or liberal control in the executive or legislative branches, popular majorities do not deserve special recognition in a judicial branch that should be guided by legal principle rather than prevailing sentiment.

IV. POTENTIAL CONCERNS WITH A REQUIREMENT OF IDEOLOGICAL BALANCE

In general, concerns about cost, efficiency, and fairness have limited policies to address judicial partiality.[25] For example, one solution is recusal of the partial judge. But if reasons for recusal are not strictly limited, litigants might clog the courts with baseless recusal motions,[26] and lawyers might exploit the rules to game the system in favor of their clients.[27] Members of this Court also have worried about strict recusal rules because there is no one who can step in for a disqualified Justice.[28]

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[25] Geyh, *supra* note 5, at 514–15.

[26] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890–91, 899–900 (2009) (Roberts, C.J., dissenting).

[27] *Id.* at 903 (Scalia, J., dissenting).

[28] Gabriel Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 Pepp. L. Rev. 1109, 1136–38 (2011).

A requirement of unanimity avoids the concerns raised by judicial disqualification. It promotes impartiality not by removing partial Justices, but by counterbalancing their partialities. Moreover, it can be adopted by the Court on its own without the need for legislative or executive action.

Still, one might worry that a unanimity requirement would lead this Court to deadlock with some frequency and leave too many issues to be decided by the lower courts. However, a few considerations indicate that it is unlikely to do so. First, this Court has an obligation to resolve critical legal questions, and we can expect Justices to fulfill the duties of their position.

Second, decision-makers adjust their behavior to their decision-making rules. When a simple majority can prevail, people may look for simple majority positions. On the other hand, when unanimity is required, people look for positions that can generate consensus.

Empirical evidence supports this analysis. High courts operate successfully with a requirement of consensus in other countries.[29] So do juries in this country. Criminal court juries typically have twelve members, and they have to reach unanimous decisions.[30] Hung juries occur, but not very often.[31] Moreover, juries reach

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[29] European Parliament, *supra* note 8, at 17-20.

[30] State juries in Oregon are the lone exception, where a supermajority of ten out of twelve is required for most cases. Or. Const. art. I, § 11; Or. Rev. Stat. § 136.450.

[31] Studies suggest an average hung jury rate of around 6% nationwide. Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?: Executive Summary* 2 (2002).

their unanimous decisions in a setting that allows for less compromise than does a decision by a judicial bench. A criminal jury must acquit or convict.[32]

To be sure, this Court has not always required unanimous jury verdicts under the Due Process Clause, but it also has rejected non-unanimous jury verdicts when the jury size shrinks.[33] A Supreme Court with twelve members might satisfy due process with a supermajority vote of ten, but with only nine members, unanimity would be needed on many occasions to ensure ideological balance.

Of course, requirements of jury unanimity reflect the gravity of the decisions at stake. Whether a jury convicts or acquits has enormous consequences for the defendant. Just as much is at stake with this Court. Its decisions can have the same consequences for defendants when it hears criminal appeals. Other constitutional decisions also can have profound consequences for the parties and the public generally. And even with civil juries, while it is more common among the states to require supermajority rather than unanimous verdicts, unanimity is required under the federal rules of procedure.[34]

Consensus-based decision-making also works well in non-governmental settings. The American Medical

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[32] In some cases, juries can compromise if they have the option of convicting on a less serious charge.

[33] *Burch v. Louisiana*, 441 U.S. 130 (1979).

[34] Fed. R. Civ. Pro. 48(b). The parties can waive the unanimity requirement. *Id.*

Association's Council on Ethical and Judicial Affairs (CEJA) provides a useful example. CEJA develops guidelines for physicians on the full range of ethical questions in medical practice, including genetic testing, end-of-life decisions, and conflicts of interest. CEJA also hears appeals of disciplinary proceedings against physicians by state and other medical societies. CEJA has nine members who reach all of their decisions by consensus. Under its requirement of unanimity, CEJA has been able to decide its appeals and issue a comprehensive ethics code that includes guidelines on many controversial matters.[35]

One might wonder whether decision-making by consensus really would yield ideological balance. If all Justices were either conservative or liberal, then even unanimous decisions would have an ideological tilt. This is a theoretical rather than practical concern. The Martin-Quinn scores that have measured the ideological leanings of Justices since 1937 have found a mix of conservative and liberal Justices throughout the entire eight-decade period.[36]

If due process requires ideological balance, does it also require other kinds of balance? Concerns about partiality on this Court reflect concerns about ideological differences, which is not surprising. People's views

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[35] AMA Council on Ethical and Judicial Affairs, *Code of Medical Ethics* (2017). Amicus previously served for more than six years as Secretary to CEJA.

[36] Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FiveThirtyEight (Mar. 29, 2012), https://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/.

on policy questions are influenced more by their ideology than their other traits. Thus, for example, female voters care more about the political party than about the sex of candidates for political office and therefore vote their ideology rather than their sex.[37] Moreover, an important virtue of decision-making by consensus is that it ensures not only ideological balance but also balance across a range of attributes that Justices or judges bring with them to the bench.

CONCLUSION

As the principle of due process recognizes, it is not only important that a court reach the legally correct decisions, but also that it make its decisions in an impartial way. To ensure impartiality in these, and other, cases, this Court should render decisions that are based on a consensus of all nine Justices and therefore reached in an ideologically-balanced manner.

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[37] Kathleen Dolan, *Gender Stereotypes, Candidate Evaluations, and Voting for Women Candidates: What Really Matters?*, 67 Pol. Res. Q. 96, 98, 104 (2014).

Nos. 18-422, 18-726

In The
Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of North Carolina

LINDA H. LAMONE, et al.,

Appellants,

v.

O. JOHN BENISEK, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

BRIEF OF *AMICI CURIAE* POLITICAL SCIENCE PROFESSORS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CASES

Benisek v. *Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018) 24

City of Greensboro v. *Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935 (M.D.N.C. 2017) 31

Common Cause v. *Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018) 23

Davis v. *Bandemer*, 478 U.S. 109 (1986) 2, 5

Gill v. *Whitford*, 138 S. Ct. 1916 (2018) 6, 8

League of Women Voters of Mich. v. *Johnson*, No. 2:17-cv-14148, 2018 WL 6257476 (E.D. Mich. Nov. 30, 2018) 31

Raleigh Wake Citizens Ass'n v. *Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) 31

Whitford v. *Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) 24

OTHER AUTHORITIES

2016 Fall Election Results, Wis. Elections Comm'n, Nov. 8, 2016, http://bit.ly/2Eprcmf 8

2016 Maryland House Election Results, N.Y. Times, Aug. 1, 2017, https://nyti.ms/2GKPtGH 13

2018 Fall Election Results, Wis. Elections Comm'n, Nov. 6, 2018, http://bit.ly/2St3hXI 8

2018 Maryland Election Results, N.Y. Times, Jan. 28, 2019, https://nyti.ms/2EyvVmD 13

TABLE OF AUTHORITIES—Continued

Page

2018 Michigan Election Results, Mich. Dep't of State, Nov. 26, 2018, http://bit.ly/2018Michigan Elections 10

Abby Vesoulis, *The 2018 Elections Saw Record Midterm Turnout*, Time Magazine, Nov. 13, 2018, https://bit.ly/2sqvbJq 15

Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U Chi. L. Rev. 553 (2011) 29, 30

Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016) 17, 18, 19

Alexander G. Theodoridis, *Me, Myself, and (I), (D), or (R)? Partisanship and Political Cognition through the Lens of Implicit Identity*, 79 J. of Pol. 1253 (Oct. 2017) 16

Amy Gardner, *N.C. board declares a new election in contested House race after the GOP candidate admitted he was mistaken in his testimony*, Feb. 21, 2019, https://wapo.st/2Tt0aUi 12

Andrew Gelman & Gary King, *A unified model for evaluating electoral systems and redistricting plans*, 38 Am. J. of Pol. Sci. 514 (1994) 4

Anthony J. McGann et al., *Gerrymandering in America* 56 (2016) 6

AutoBound, http://bit.ly/2TnXxU0 23

TABLE OF AUTHORITIES—Continued

Page

Benjamin Fifield, Michael Higgins, Kosuke Imai & Alexander Tarr, *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (May 24, 2018) (unpublished manuscript), http://bit.ly/2VqCDRx 32

Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 278 (2018), http://bit.ly/2BTrnpj 23

Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium* 183 (Peter Galderisi ed., 2005) 5

Bill Barrow, *Inside Stacey Abrams' strategy to mobilize Georgia voters*, AP News, Oct. 12, 2018, http://bit.ly/2NqsIbN 21

Brian Schaffner & Stephen Ansolabehere, *2010-2014 Cooperative Congressional Election Study Panel Survey (Version 10)*, Harvard Dataverse (June 10, 2015), http://bit.ly/2BUbeA5 ..... 14, 15

Briana Biersbach, *DFL Retakes Minnesota House; MN Senate Stays with GOP*, MPR News, Nov. 6, 2018, http://bit.ly/2XpFImr 9

Camila Domonoske, *A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High*, NPR, Nov. 8, 2018, https://n.pr/2GZB9JI 6

TABLE OF AUTHORITIES—Continued

Page

Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147 (2017) 27

Charles S. Bullock III, *Redistricting: The Most Political Activity in America* 110 (2010) 6

Chris Evans, *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 Minn. J.L. Sci. & Tech. 867 (2012) 21

Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 William & Mary L. Rev. 1601 (2018) 28, 29, 30

Civis Analytics, *Data science and the midterm elections: breaking down the results*, Nov. 28, 2018, http://bit.ly/2XpRIjB 22

Civis Analytics, *Political Campaign Tools—Running a Digital Campaign* 14 (2018), http://bit.ly/2SoTWjX 20

Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365 (2017) 16

Dan Keating & Kate Rabinowitz, *Turnout was high for a midterm and even rivaled a presidential election*, Wash. Post, Nov. 8, 2018, https://wapo.st/2U6Gzq4 15

TABLE OF AUTHORITIES—Continued

Page

Dan Patterson, *How campaigns use big data tools to micro-target voters*, CBS News, Nov. 6, 2018, https://cbsn.ws/2BTWKjp 20

Daniel B. Magleby & Daniel Mosesson, *A New Approach for Developing Neutral Redistricting Plans*, 26 Pol. Analysis 147 (2018) 31

Daniel J. Hopkins, *The Increasingly United States: How and Why American Political Behavior Nationalized* (University of Chicago Press 2018) 19

Daron Shaw, *If Everyone Votes Their Party, Why Do Presidential Election Outcomes Vary So Much?*, 10 The Forum 3 (2012) 15

David A. Lieb, *Election Shows How Gerrymandering is Difficult to Overcome*, U.S. News & World Report, Nov. 17, 2018, http://bit.ly/2BRSDVh 10, 11, 12

David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, 10 The Forum 1 (2012) 18

David Hawkings, *The Incredible Shrinking Split Tickets*, Roll Call, Feb. 1, 2017, http://bit.ly/2IBrtHS 19

David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. Econ. Persp. 51 (2014) 26, 27, 28, 30

TABLE OF AUTHORITIES—Continued

Page

Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Hearts and Minds* 6 (2002) 15, 16

Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Stability: Evidence from Aggregate Data, in Controversies in Voting Behavior* 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001) 16

Editorial, *Gerrymandering failed for GOP in state Senate loss*, Buff. News, Nov. 12, 2018, http://bit.ly/2U97NfZ 23

Eitan D. Hersh, *Hacking The Electorate: How Campaigns Perceive Voters* (2015) 20, 26

Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5 7

Harry Enten, *There Were No Purple* States On Tuesday*, FiveThirtyEight, Nov. 10, 2016, https://53eig.ht/2XoDDHk 20

James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, McKinsey Global Institute (May 2011), https://mck.co/2VhvlPC 22

John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 Am. Econ. Rev. 113 (2008) 29

TABLE OF AUTHORITIES—Continued

Page

John Nichols, *The States That Elected Trump Have Turned Against Him*, The Nation, Nov. 8, 2018, http://bit.ly/2Xquf6j 8

Jonathan N. Katz, Gary King, & Elizabeth Rosenblatt, *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, Dec. 2, 2018 (working paper), http://j.mp/2BkgYTP 4

Jonathan Oosting, *Why Democrats Won More Votes, But GOP Won More Legislative Seats in Michigan*, Detroit News, Nov. 20, 2018, http://bit.ly/2GMEL2z 10

Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. Pol. 1 (2009) 16

Jowei Chen & David Cottrell, *Evaluating partisan gains from Congressional gerrymandering: using computer simulations to estimate the effect of gerrymandering in the U.S. House*, 44 Electoral Stud. 329 (2016) 31

Karen L. Haas, Clerk of the United States House of Representatives, *Election Statistics, 1920 to Present*, http://bit.ly/ElectionStats1920-Present (follow links to years 2012, 2014, and 2016) 11, 12

Laura Royden, Michael Li & Yurij Rudensky, Brennan Ctr. for Justice, *Extreme Gerrymandering & the 2018 Midterm* (2018), http://bit.ly/2Su4NJq 7, 9, 24

TABLE OF AUTHORITIES—Continued

Page

Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. Times, Nov. 29, 2018, https://nyti.ms/2Stpx3T 12

Maria Chikina, Alan Frieze & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. Nat'l Acad. Sci. 2860 (2017) 32

Maryland State Board of Elections, https://bit.ly/2Tmfbar, https://bit.ly/2T5ytlc 13

Michael P. McDonald, *Seats to Votes Ratios in the United States* (2009) (unpublished paper), http://bit.ly/2EhMB0B 7

Note, *Political Gerrymandering 2000-2008: "A Self-Limiting Enterprise"?*, 122 Harv. L. Rev. 1467 (2009) 5

November General Election Turnout Rates, United States Election Project, http://bit.ly/2tNijOt 6

Olivia Guest, Frank J. Kanayet, and Bradley C. Love, *Cognitive Capacity Limits and Electoral Districting* (Dec. 12, 2018), http://bit.ly/2TlmXBm 28

Paul Goren, *Party Identification and Core Political Values*, 49 Am. J. Pol. Sci. 882 (2005) 15

Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015), https://pewrsr.ch/2Exh4ci 17

Pew Research Ctr., *Partisanship and Political Animosity in 2016* (2016), https://pewrsr.ch/2NtK2MV 18

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Pew Research Ctr., *Political Polarization in the American Public* 6 (2014), https://pewrsr.ch/2Exx0v4 17

Phillip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, Wash. Post, Dec. 4, 2018, https://wapo.st/2Sq5Ppz 8, 9

Quantifying the Level of Gerrymandering in Michigan, Citizens Research Council of Mich. (June 2018), http://bit.ly/2Nyzn3O 10

Rich Exner, *A record turnout, big night for the GOP and gerrymandering's impact: Numbers takeaways from Ohio election 2018*, Cleveland.com, Nov. 7, 2018, http://bit.ly/2Srcmk4 ..... 9, 10

Samuel S.-H. Wang, *Pennsylvania 2018 Detailed Results*, Princeton Gerrymandering Project, http://bit.ly/2BVrm4a 11

Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. Times, Dec. 17, 2018, https://nyti.ms/2SsqlpR 21

Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690 (2015) 17

Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 Pub. Opinion Q. 405 (2012) 17

TABLE OF AUTHORITIES—Continued

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Stephen Ansolabehere & Bernard L. Fraga, *Do Americans Prefer Coethnic Representation? The Impact of Race on House Incumbent Evaluations*, 68 Stan. L. Rev. 1553 (2016) 16

Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds: Party Identification and Policy Preferences in the American Electorate*, 50 Am. J. Pol. Sci. 471 (2006).....16

Tom Perkins, *Once again, Michigan Dems get more state Senate and House votes, but GOP keeps power*, Detroit MetroTimes, Nov. 7, 2018, http://bit.ly/2H8MqHE 10

Voter Registration Statistics, N.C. St. Board Elections & Ethics Enforcement, http://bit.ly/2TkJ0rZ 24

Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351 (2016) 31

STATEMENT OF INTEREST[1]

Amici curiae are all nationally recognized university research scholars and political scientists whose studies on electoral behavior, voter identity, and redistricting in the United States have been published in leading scholarly journals and books. *See infra* Appendix at 1a.

Amici have extensive professional knowledge and experience that will be relevant and helpful to the Court. They are among the leading scholars to study the predictability of voter behavior and the tools mapmakers use to harness data relating to voter behavior and characteristics when preparing redistricting plans. *Amici* are well positioned to explain how gerrymandering affected this decade's elections, including the 2018 midterms, and predict how recent developments in the capabilities of mapmaking software and data analysis tools are likely to influence the 2020 redistricting cycle and beyond.

SUMMARY OF ARGUMENT

In 1986, Justice O'Connor observed that "political gerrymandering is a self-limiting enterprise" because

[1] No counsel for any party authored this brief in whole or in part. No person other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pietro Signoracci, Michael Pernick, Amitav Chakraborty, and Brittney Xu of Paul, Weiss, Rifkind, Wharton, and Garrison LLP contributed to the preparation of this brief. The parties have filed blanket consents.

a "swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). In other words, Justice O'Connor assumed that a "wave" election—an election in which one party wins the popular vote share by a significant margin over the other—would remedy partisan gerrymanders without judicial intervention. "There is no proof before us," Justice O'Connor observed, "that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves." *Id.*

When Justice O'Connor made this observation, Pac-Man was still a popular video game. Microsoft had just released its first Windows operating system. Bill Gates and Steve Jobs were unknown to the general public. And politicians did not have the sophisticated software, processing power, or data to exploit voter behavior that they have today. They lacked the tools to create durable partisan gerrymanders—one in which the gerrymandering party retains maximal control of the legislature for multiple election cycles spanning the entire decennial period following its implementation of the gerrymander.

The tools have arrived. Partisans are using exponentially greater computing power, sophisticated data analytics and data sets, and social science to create maps that are incompatible with democracy. Nevertheless, appellants urge this Court to repose its faith in "politically accountable" state legislatures. *Rucho* v. *Common Cause*, Appellants' Br. at 2, 21, 34, 36. Their

argument assumes that sooner or later a swing in the popular vote will produce a legislature that is accountable to the people. *Amici* here urge the Court to reject that assumption. Even if it were correct in the past, it is unwarranted today and for the foreseeable future. Today's partisan gerrymanders are technologically-designed to survive swings in the popular vote. As a result, voters in gerrymandered districts cannot cure them.

The 2018 midterm election results provide powerful new evidence demonstrating that modern partisan gerrymanders are durable and, as a result, state legislatures are not politically accountable. Significant swings in the popular vote in 2018 did not lead to electoral change in States with partisan gerrymanders, demonstrating a lack of responsiveness to voter preferences. Notwithstanding a significant surge in popular support—nationwide and in many States with gerrymandered maps—Democratic candidates were generally unable to gain seats in congressional and state legislative chambers with Republican gerrymanders. Similarly, in recent election cycles, Democratic gerrymanders were able to resist voter preferences for Republican candidates. Voters in gerrymandered districts need this Court's intervention to vindicate their constitutional rights. They cannot do so by voting when a state legislature has drawn their district to dilute their vote and render it ineffective.

Mapmakers today are able to devise gerrymanders that withstand partisan waves as a result of an explosion in granular voter data—now widely

available—that allow mapmakers to predict partisan behavior with a high degree of accuracy, coupled with advancements in map-drawing software that allow mapmakers to entrench maximal partisan bias.[2] As a result of these technological advances, modern gerrymanders are able to withstand wave elections such as the 2018 midterms, and gerrymandering techniques that were only theoretical in the 2010 redistricting cycle will become commonplace in the 2020 redistricting cycle and beyond.

Courts can and should provide redress for injuries caused by partisan gerrymandering. The same tools that enable politicians and their consultants to draw such precise and durable maps also enable courts to determine whether a partisan gerrymander is unconstitutional. Just as social science and technology have facilitated and will facilitate partisan gerrymandering, those same fields provide tools that can be used to identify and remedy such gerrymandering when it occurs.

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[2] An electoral map exhibits partisan bias or partisan asymmetry when one party wins a larger number of legislative seats with x% of votes that the other party would win if it had received the same percentage of votes under the same map. *See* Jonathan N. Katz, Gary King, & Elizabeth Rosenblatt, *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, Dec. 2, 2018 (working paper), http://j.mp/2BkgYTP; Andrew Gelman & Gary King, *A unified model for evaluating electoral systems and redistricting plans*, 38 Am. J. of Pol. Sci. 514-54 (1994).

ARGUMENT

I. EVIDENCE FROM THE 2018 ELECTIONS SHOWS THAT PARTISAN GERRYMANDERS ARE NO LONGER SELF-LIMITING

Before partisans had access to powerful computers, huge data sets, individual-level data, advanced software, and the latest social science, their gerrymandering efforts were sometimes prone to failure. In past years, an overly-ambitious gerrymander could fail to preserve legislative control for the majority line-drawing party if it misjudged the probable margin of victory or defeat in each district. *Davis*, 478 U.S. at 152 (O'Connor, J., concurring); *see also* Note, *Political Gerrymandering 2000-2008: "A Self-Limiting Enterprise"?*, 122 Harv. L. Rev. 1467, 1468-69 (2009) (evaluating partisan gerrymanders for years 2000-2008). These relatively unsophisticated redistricting efforts may be labeled as "dummymanders" today. *See* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium* 183-84 (Peter Galderisi ed., 2005). But yesterday's dummymanders have given way to today's unerringly effective partisan gerrymanders.

After the 2010 Census, partisans used sophisticated technology and newly-available data to redraw congressional and state legislative districts en masse. As a whole, the new maps displayed a sharp increase in partisan bias when compared to the prior cycle's maps, and have been unresponsive to voter preferences

throughout the course of the decade.[3] Anthony J. McGann et al., *Gerrymandering in America* 56-97 (2016). *Amici* made this observation to the Court last term, and the 2018 results confirm their analysis. *See* Brief for Political Science Professors as *Amici Curiae*, *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018). This problem of responsiveness has affected voters affiliated with both parties over the course of the decade.

In the 2018 midterm election, the surge in voter enthusiasm and turnout for Democratic candidates did not translate into Democratic electoral gains in States with extreme partisan gerrymanders.[4] In many States across the country, voter preferences for Democrats resulted in Democratic electoral gains in statewide elections but few gains in district-level elections under

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[3] Responsiveness "measures the degree to which the makeup of a legislative chamber will change when voter preferences change." Charles S. Bullock III, *Redistricting: The Most Political Activity in America* 110 (2010). When a map is responsive, a party will win more seats as it wins a larger share of votes. *Id.* Classic partisan redistricting techniques, such as packing or cracking voters of the opposing party, reduce responsiveness by ensuring that control of the district will not change, even if substantial numbers of voters change partisan preferences in an election year. *Id.* at 21.

[4] More than 49.3% of the voting-eligible population cast ballots in the 2018 midterm elections. *November General Election Turnout Rates*, United States Election Project, http://bit.ly/2tNijOt (last updated Dec. 14, 2018). An estimated 116 million Americans turned out to vote, marking the first time ever that midterm election turnout exceeded 100 million voters. Camila Domonoske, *A Boatload of Ballots: Midterm Voter Turnout Hit 50-Year High*, NPR, Nov. 8, 2018, https://n.pr/2GZB9JI.

gerrymandered congressional or state legislative maps.

A. Gerrymandered Districts Diluted Votes in the 2018 "Wave" Elections

In 2018, congressional Democrats won the national popular vote margin by 8.6 percentage points over Republicans. *See* Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5. Notwithstanding the 2018 Democratic wave, the election results in many districts were unresponsive to voter preferences. Under responsive maps, higher vote shares in favor of candidates of one party translate into gains in seat shares for that party.[5] But in 2018, as the percentage of the vote for Democratic candidates rose, the seat distribution under gerrymandered maps largely remained static. In fact, under many of these gerrymandered maps, despite significant fluctuations in party vote share since 2010, seat shares have not changed. The election results in Wisconsin, Ohio, Michigan, and North Carolina provide evidence of this phenomenon, while the results in Pennsylvania, in which

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[5] Estimates indicate that a national 1-point change in the vote for a party should result in about a 2-point change in the percentage of seats for that party. Michael P. McDonald, *Seats to Votes Ratios in the United States* (2009) (unpublished paper) (on file with the Jack W. Peltason Center for the Study of Democracy at the University of California, Irvine), http://bit.ly/2EhMB0B; *see also* Laura Royden, Michael Li & Yurij Rudensky, Brennan Ctr. for Justice, *Extreme Gerrymandering & the 2018 Midterm* 6 (2018), http://bit.ly/2Su4NJq.

non-politicians redrew gerrymandered lines, provide a counter-example.

Wisconsin. In Wisconsin, Democrats received 205,000 more votes than Republican candidates, but won only 36 of the 99 available seats in the State Assembly. *See 2018 Fall Election Results*, Wis. Elections Comm'n, Nov. 6, 2018, http://bit.ly/2St3hXI. Republicans have held nearly two-thirds of state legislative seats in Wisconsin since the 2011 passage of Act 43, Wisconsin's redistricting plan. Democrats have held only about one third of assembly seats since 2011—between 35 and 39 seats out of 99—despite receiving statewide vote shares between 48% and 53%. *See Gill* v. *Whitford*, 138 S. Ct. 1916, 1923 (2018); *2016 Fall Election Results*, Wis. Elections Comm'n, Nov. 8, 2016, http://bit.ly/2Eprcmf; Phillip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, Wash. Post, Dec. 4, 2018, https://wapo.st/2Sq5Ppz.

While Democrats were unable to make material gains in the gerrymandered State Assembly in 2018, Democratic candidates in statewide elections for Governor and Attorney General defeated Republican incumbents, and a Democratic Senator and Secretary of State were reelected. Bump, *supra*. For the first time since 1982, Democrats in Wisconsin swept all five statewide contests for executive offices. John Nichols, *The States That Elected Trump Have Turned Against Him*, The Nation, Nov. 8, 2018, http://bit.ly/2Xquf6j. Yet

at the same time Democrats gained only one seat in the gerrymandered State Assembly. Bump, *supra*.[6]

Ohio. In Ohio, Democrats won only four of 16 congressional seats despite receiving nearly 50% of the vote. Rich Exner, *A record turnout, big night for the GOP and gerrymandering's impact: Numbers takeaways from Ohio election 2018*, Cleveland.com, Nov. 7, 2018, http://bit.ly/2Srcmk4.

This result is all the more striking given that in 2018, Democrats had improved their performance over the 2016 election cycle by approximately five percentage points, but won only the same four seats that they won in 2016. In fact, notwithstanding the Democratic wave in 2018, the results under the Ohio congressional districts has remained unchanged in every election this decade—the State's congressional gerrymander has proved to be durable enough to absorb the electoral shifts and preserve the seat share of the mapmakers' preferred party.[7] In 2018, the four Ohio districts packed with Democratic voters voted for Democrats by a combined 71% to 29%, while Republicans cracked the

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[6] In Wisconsin's neighboring State of Minnesota, by contrast, where Democrats won statewide races and the popular vote statewide, the Democratic Party won 77 seats in the Minnesota House to the Republicans' 57 seats. *See* Briana Biersbach, *DFL Retakes Minnesota House; MN Senate Stays with GOP*, MPR News, Nov. 6, 2018, http://bit.ly/2XpFImr.

[7] Indeed, Democrats are not even expected to compete for a fifth congressional seat unless their statewide vote share reaches 52.78%, representing a 28.64% jump from the minimum of 26.07% required to gain four seats. Royden, Li & Rudensky, *supra*.

remaining Democratic voters and won their 12 seats by a combined 59% to 40%. Exner, *supra*.

Michigan. In Michigan, Democrats won a majority in vote share in the State Senate, but won only 16 seats, compared to 22 for Republicans. David A. Lieb, *Election Shows How Gerrymandering is Difficult to Overcome*, U.S. News & World Report, Nov. 17, 2018, http://bit.ly/2BRSDVh; Jonathan Oosting, *Why Democrats Won More Votes, But GOP Won More Legislative Seats in Michigan*, Detroit News, Nov. 20, 2018, http://bit.ly/2GMEL2z. In statewide races—thereby unaffected by gerrymandering—Democratic candidates won the previously Republican-held offices of Governor, Secretary of State, and Attorney General, and Democratic Senator Debbie Stabenow was reelected. *See 2018 Michigan Election Results*, Mich. Dep't of State, Nov. 26, 2018, http://bit.ly/2018MichiganElections.

Biased Michigan results have remained durable throughout the decade. The 2018 midterm election marked the third straight election in which the two parties had near-equal splits of vote share, but the party responsible for the gerrymander retained control of both chambers of the Michigan Legislature. Tom Perkins, *Once again, Michigan Dems get more state Senate and House votes, but GOP keeps power*, Detroit MetroTimes, Nov. 7, 2018, http://bit.ly/2H8MqHE; *Quantifying the Level of Gerrymandering in Michigan*, Citizens Research Council of Mich. (June 2018), http://bit.ly/2Nyzn3O.

Pennsylvania and North Carolina. The effect of partisan gerrymandering in 2018 is especially apparent when comparing the results in Pennsylvania and North Carolina. At the beginning of the decade, Republicans drew congressional maps in both States to benefit Republican candidates, and the results under both maps exhibited similar partisan bias: In Pennsylvania, Democrats won only the same five seats (out of 18), or 27.7% of the seats, in 2012, 2014, and 2016—despite receiving between 44.46% and 50.28% of the popular vote in each of those years. *See* Karen L. Haas, Clerk of the United States House of Representatives, ***Election Statistics, 1920 to Present***, http://bit.ly/ElectionStats1920-Present (follow links to years 2012, 2014, and 2016). Similarly, in North Carolina, Democrats won only the same three seats (out of 13), or about 23% of the seats, in 2014 and 2016, despite receiving between 43.95% and 46.6% of the votes in those years.[8] *Id.*

In the 2018 election, however, the Pennsylvania congressional map was replaced with a new court-drawn map. Democrats in Pennsylvania received 55.5% of the two-party vote, and now hold seats in nine of the State's 18 districts. Samuel S.-H. Wang, ***Pennsylvania 2018 Detailed Results***, Princeton Gerrymandering Project, http://bit.ly/2BVrm4a (click on Pennsylvania); Lieb, *supra*. As in Pennsylvania, Democratic

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[8] In 2012, Democrats in North Carolina won a fourth seat 50.1% to 49.9%. *See* Haas, *supra*.

candidates in North Carolina performed well statewide[9]—Democratic candidates won every statewide election on the ballot. But Democratic congressional candidates have won only three seats (out of 13)—the same three seats they won in previous years. Lieb, *supra*.[10]

B. Both Parties Relied on Modern Gerrymanders to Dilute the Votes of Opposing Party Voters

Republicans and Democrats alike deploy modern gerrymanders to dilute the votes of individual voters in gerrymandered districts. In States in which Democrats created gerrymanders, they were able to hold and even gain seats during the 2014 and 2016 election cycles, notwithstanding Republican gains in the popular vote in those years.

For example, in Maryland, Republicans have controlled only one of Maryland's eight congressional seats (or 12.5% of the seats) since 2011. Republicans

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[9] Democrats in North Carolina earned 48.3% of the total vote in 2018, which represented an increase over their vote share in the 2014 and 2016 elections. Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. Times, Nov. 29, 2018, https://nyti.ms/2Stpx3T; Haas, *supra*.

[10] Based on allegations and evidence of absentee-ballot fraud, North Carolina's Board of Elections did not certify the 2018 results of the McCready/Harris congressional race in North Carolina's Ninth District and has ordered a new election for that District. Amy Gardner, *N.C. board declares a new election in contested House race after the GOP candidate admitted he was mistaken in his testimony*, Feb. 21, 2019, https://wapo.st/2Tt0aUi.

have not won more than one congressional seat since 2011 despite wide swings in the congressional statewide Republican vote share in that time period ranging from 32.27% in the 2018 Democratic wave election to 41.36% in the 2014 Republican wave election. *2018 Maryland Election Results*, N.Y. Times, Jan. 28, 2019, https://nyti.ms/2EyvVmD.

The voters in Maryland's Sixth Congressional District had elected a Republican for the previous two decades before the enactment of the current maps. Under the new maps, Democrats were able to defeat the Republican incumbent, Roscoe Bartlett, who had held the seat since 1992. While Bartlett won the Sixth District with a 22.28% margin in 2010 (the year before the gerrymander), he lost by a 20.9% margin in 2012, the first election under the current maps. *See* Maryland State Board of Elections, https://bit.ly/2Tmfbar (2010 results), https://bit.ly/2T5ytlc (2012 results). Since then, Democrats consistently have won in the Sixth District despite two Republican wave elections in 2014 and 2016. *2016 Maryland House Election Results*, N.Y. Times, Aug. 1, 2017, https://nyti.ms/2GKPtGH.

II. PARTISANS CAN EXPLOIT NEW TECHNOLOGY AND VOTER DATA TO CREATE PARTISAN GERRYMANDERS THAT ARE MORE PRECISE AND DURABLE THAN EVER BEFORE

Modern partisan gerrymanders resist wave elections because of three phenomena, not all present in

prior redistricting cycles. *First*, partisan affiliation (self-identification with a party) and voter behavior are highly stable and predictable, making the partisan affiliation of voters a dependable trait on which mapmakers can rely. *Second*, a wealth of granular voter data now available to mapmakers enables them to predict voter behavior with an unprecedented degree of accuracy. *Third*, new and advanced statistical and map drawing applications enable partisans to translate voting data and analysis into districts that maximize partisan advantage.

A. Partisan Identity Is Highly Stable and Predictable

As a general matter—and despite suggestions to the contrary[11]—the partisan identity of voters is highly stable and mapmakers can use data about partisan identity to predict voter behavior with a very high degree of confidence from election to election.[12]

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[11] *See* Br. of Amicus Curiae Nat'l Republican Redistricting Trust in Supp. of Appellants 28-29 ("[V]oter choices fluctuate, and party affiliation is not enough to tie the interests of a group to the personal interests of voters for preferred candidates."); Br. of Amicus Curiae Nat'l Republican Cong. Comm. ("NRCC") in Supp. of Appellants 21 ("[V]oters' partisanship, partisan affiliation, political positions, and electoral choices are not immutable.").

[12] The National Science Foundation funded a panel survey that re-interviewed 9,500 voters in 2010 and 2014. *See* Brian Schaffner & Stephen Ansolabehere, *2010-2014 Cooperative Congressional Election Study Panel Survey (Version 10)*, Harvard Dataverse (June 10, 2015), http://bit.ly/2BUbeA5. The results provide an example of the high stability of partisan identity among voters: only 1% of respondents who identified as Democrats in

Voter predictability enables mapmakers to design maps that survive wave elections, which are largely driven by differential turnout between voters who identify with each party. Daron Shaw, *If Everyone Votes Their Party, Why Do Presidential Election Outcomes Vary So Much?*, 10 The Forum 3 (2012).[13]

Social science research shows that voters are "socialized" into a particular party at an early age, and partisan affiliation tends to harden in early adulthood. *See* Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Hearts and Minds* 6, 10-11 (2002). Once formed, these "identities are enduring features of citizens' self-conceptions," and "remain intact during peaks and lulls in party competition." *Id.* at 4-5. And an individual's partisan identification is, on average, more enduring and stable than his or her core values or positions on political issues. Paul Goren, *Party Identification and Core Political Values*, 49 Am. J. Pol. Sci.

2010 identified as Republicans in 2014 and only 1% of respondents who identified as Republicans in 2010 shifted to Democrats in 2014. *Id.*

[13] In 2018, for example, registered Democrats and Democratic-leaning independents—including groups that often skip midterms, such as youth voters—showed up to the polls in significantly higher numbers than Republicans. Approximately 51.7 million Democrats voted in midterm House races in 2018, compared to 47.4 million Republicans. In 13 States, Democratic vote counts surpassed those of the 2016 presidential election. Dan Keating & Kate Rabinowitz, *Turnout was high for a midterm and even rivaled a presidential election*, Wash. Post, Nov. 8, 2018, https://wapo.st/2U6Gzq4; Abby Vesoulis, *The 2018 Elections Saw Record Midterm Turnout*, Time Magazine, Nov. 13, 2018, https://bit.ly/2sqvbJq.

882, 891-94 (2005); Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds: Party Identification and Policy Preferences in the American Electorate*, 50 Am. J. Pol. Sci. 471, 473 (2006); *see also* Alexander G. Theodoridis, *Me, Myself, and (I), (D), or (R)? Partisanship and Political Cognition through the Lens of Implicit Identity*, 79 J. of Pol. 1253 (Oct. 2017).

Partisan attachment is a stronger predictor of voting behavior than gender, class, religion, and often race. Green, *Partisan Hearts and Minds*, *supra*, at 3; *see also* Stephen Ansolabehere & Bernard L. Fraga, *Do Americans Prefer Coethnic Representation? The Impact of Race on House Incumbent Evaluations*, 68 Stan. L. Rev. 1553, 1589 (2016). Thus, the distribution of partisan identities among the electorate "provides powerful clues as to how elections will be decided." Donald P. Green, Bradley L. Palmquist & Eric Schickler, *Partisan Stability: Evidence from Aggregate Data*, *in Controversies in Voting Behavior* 356, 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001).

In recent years, the predictive power of partisan identity has only increased. Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. Pol. 1 (2009). Based on an analysis of American National Election Studies time-series data conducted in 2015, the "observed rate of Americans voting for a different party across successive presidential elections has never been lower," indicating that each party has a reliable and predictable "base of party support that is

less responsive to short-term forces." Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 365, 379-81 (2017). A Pew Research Report notes that "[t]oday, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican." Pew Research Ctr., *Political Polarization in the American Public* 6 (2014), https://pewrsr.ch/2Exx0v4.

Political scientists also have detected an increase in the *intensity* of party preferences within the electorate. Although enthusiasm for partisans' own parties has remained relatively stable over time, empirical evidence shows that "partisans like their opponents less and less." Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 Pub. Opinion Q. 405, 412-15 (2012); *see also* Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016).

Increases in intensity across parties since the 1980s have two important implications: Today's partisans are less willing "to treat the actions of partisan opponents as legitimate," and today's partisan identification "is all encompassing and affects behavior in both political and nonpolitical contexts." Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690, 691, 705 (2015). Independent voters are not immune from the effects of partisan intensity, given that "[m]ost of those who identify as

independents lean toward a party." Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015), https://pewrsr.ch/2Exh4ci. Voters who identify as independents, but who lean towards a party, generally exhibit policy opinions and voting behavior similar to outright partisans. David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, 10 The Forum 1, 17 (2012). Furthermore, independents who lean to one party or another "are far more likely to cite negative than positive factors for why they form their loose partisan ties"—that is, independent voters are likely to lean Democratic or Republican because they view the other party's policies as harmful to the country. *See* Pew Research Ctr., *Partisanship and Political Animosity in 2016*, at 6 (2016), https://pewrsr.ch/2NtK2MV.

One metric that coincides with this shift towards increased and stable partisanship is the decline in split-ticket voting.[14] While split-ticket voting was commonly observed in the 1970s and 1980s, the 2012 election featured record high numbers of voters engaged in straight-ticket voting—that is, voting for the candidate for President from one party and voting for House or Senate members from the same party. *See* Abramowitz & Webster, *supra*, at 12, 13. The rate of straight-ticket voting in the presidential and House

[14] Split-ticket voting refers to the phenomenon of a voter opting for the candidate from one party in the presidential election and the candidate of another party in the House or Senate elections.

elections in 2012 was approximately 89%, up from 70% in 1972, resulting in a relationship between presidential and House election outcomes that was three times stronger than it was in the 1970s. *Id.* at 13, 18. The rate of straight-ticket voting in the presidential and Senate elections in 2012 was approximately 90%, resulting in a relationship between presidential and Senate election outcomes that was similarly much stronger than it was in the 1970s. *Id.* at 13, 19. Nationalized, party-line voting behavior also influences elections for state and local office. Daniel J. Hopkins, *The Increasingly United States: How and Why American Political Behavior Nationalized* (University of Chicago Press 2018).

The decline in split-ticket voting also coincides with a decline in split *outcomes* (*i.e.*, congressional districts carried by a presidential candidate from one party, but won by a House candidate of the opposite party), culminating in 2016 with only 8% of districts electing a House member from a different party than their preferred presidential candidate, and zero splits in outcome between the Senate and presidential races. *See* David Hawkings, *The Incredible Shrinking Split Tickets*, Roll Call, Feb. 1, 2017, http://bit.ly/2IBrtHS.[15] In fact, 2016 marked the first election since 1914—when the country began electing Senators by popular

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[15] Due to the sharp decline of split-ticket voting, knowledge of top-ticket voting is becoming an increasingly useful proxy when assessing how people will vote in a legislative race, further enhancing the reliability of predictive voting models, discussed *infra* at Section II.B.

vote—in which no State had divided outcomes between Senate and presidential votes. Harry Enten, *There Were No Purple* States On Tuesday*, FiveThirtyEight, Nov. 10, 2016, https://53eig.ht/2XoDDHk.

The concurrent phenomena of stable partisan identity as an indicator of voting preferences, intensifying partisanship, and the decline of ticket-splitting allow mapmakers to rely on the predictability of voter behavior as never before when working to maximize the partisan bias and durability of gerrymanders.

B. Publicly-Available Voter Data Enables Partisans to Predict Voting Behavior at a Granular Level

Today's mapmakers have access to more voter data about partisan affiliation than they did just a few years ago. Data gathering has become so precise that voters can be individually targeted with customized messages. *See* Dan Patterson, *How campaigns use big data tools to micro-target voters*, CBS News, Nov. 6, 2018, https://cbsn.ws/2BTWKjp. Data brokers like Civis Analytics advertise their ability to create a "scientific understanding of the voter" to calculate the "likelihood for a certain behavior of a voter based on multiple characteristics like income, age, and geography." Civis Analytics, *Political Campaign Tools—Running a Digital Campaign* 14 (2018), http://bit.ly/2SoTWjX.

Data brokers are experienced in creating "augmented voter files," or extensive public and commercial

datasets of voter data. *See* Eitan D. Hersh, *Hacking the Electorate: How Campaigns Perceive Voters* 67, 69-72 (2015). These voter files combine traditional voter registration records with substantial additional information, such as "data from frequent-buyer cards at supermarkets and pharmacies, hunting- and fishing-license registries, catalog- and magazine-subscription lists, membership rolls from unions, professional associations, and advocacy groups." Chris Evans, *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 Minn. J.L. Sci. & Tech. 867, 883-84 (2012).

The 2018 elections demonstrate the power of using voter records, data, social media and even credit reports to micro-target and track voters. Patterson, *supra*. The 2018 election was marked by unprecedented use of social media information to predict and influence voter behavior. Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. Times, Dec. 17, 2018, https://nyti.ms/2SsqlpR. During the 2018 Georgia governor's race, for example, candidate Stacey Abrams eschewed traditional, broad targeting tactics, choosing instead to target an "untapped market" of 90,000 voters that her campaign identified as "persuadable" based on collected data. From the outset, she "targeted her message, the mechanics of her campaign and much of her nearly $17 million fundraising haul" on these "irregular voters." Bill Barrow, *Inside Stacey Abrams' strategy to mobilize Georgia voters*, AP News, Oct. 12, 2018, http://bit.ly/2NqsIbN.

The quantity and granularity of publicly-available voter data, and improvements in data analytics, will allow mapmakers to assess and predict partisan affiliation at both the individual and aggregate levels more accurately than ever. Data broker Civis Analytics correctly forecasted the winner in 383 out of 394 *contested* races (97%) in 2018 and its estimate of the national popular vote was accurate to within tenths of a percent. Civis Analytics, *Data science and the midterm elections: breaking down the results*, Nov. 28, 2018, http://bit.ly/2XpRLjB. By inputting proprietary voter data and existing Census and consumer data into advanced statistical models and predictive analytics, political campaigns can determine partisan affiliation at a level of precision that did not exist in even the recent past.

C. Advanced Analytics and New Statistical Techniques Enable Partisans to Draw Districts for Maximum Partisan Advantage

Advanced analytics and new statistical techniques have allowed mapmakers to optimize voter data to create durable gerrymanders capable of stopping and even reversing the effects of "wave" election years. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, McKinsey Global Institute (May 2011), https://mck.co/2VhvlPC. Legislators are "now more knowledgeable about the need to avoid drawing a *dummymander* . . . than they were in past decades," and mapmakers have "gained

more technical sophistication in mapping historical election data into proposed districts, and then checking to make sure that they do not make a *dummymandering* kind of mistake." Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from* League of Women Voters v. Commonwealth of Pennsylvania *(2018)*, 17 Election L.J. 278 (2018), http://bit.ly/2BTrnpj; *cf.* Editorial, *Gerrymandering failed for GOP in state Senate loss*, Buff. News, Nov. 12, 2018, http://bit.ly/2U97NfZ.

During the 2010 redistricting cycle, mapmakers had access not only to expansive data sets that allowed them to predict voter behavior accurately, but to new and/or improved redistricting software, such as AutoBound, developed by Citigate GIS; Maptitude, developed by Caliper Corporation; and ArcGIS, developed by ESRI. This type of software, combined with modern statistical techniques, allowed mapmakers to draw durably biased maps. Users could quickly and easily develop redistricting plans based on customizable data sets, including data that predict the projected partisan affiliation of voters. *See, e.g.*, AutoBound, http://bit.ly/2TnXxU0.

Mapmakers aligned with both Republicans and Democrats used these techniques and technologies to design maps in the most recent redistricting cycle. For example, in North Carolina's redistricting process, Maptitude was used to collect past election data and to "'pursue partisan advantage without sacrificing compliance with traditional districting criteria.'" *See Common Cause* v. *Rucho*, 318 F. Supp. 3d 777, 883

(M.D.N.C. 2018) (quoting *Whitford* v. *Gill*, 218 F. Supp. 3d 837, 889 (W.D. Wis. 2016)). The maps that emerged from North Carolina's multiple rounds of redistricting this cycle, including court-ordered redistricting, have substantial and durable partisan bias and preserved the Republican Party's 10-3 partisan advantage in North Carolina's congressional delegation, despite a ratio of registered Republicans to Democrats of 0.7 to 1 in 2012 in the electorate. *See id.* at 869; Royden, Li & Rudensky, *supra*, at 1, 6, 25 (2018); Voter Registration Statistics, N.C. St. Board Elections & Ethics Enforcement, http://bit.ly/2TkJ0rZ.

Similarly, in Maryland, the Democratic Party leadership retained a consultant who used Maptitude to create different hypothetical districts and gauge potential election results for each configuration based on precinct-level voter registration, voter turnout, and election results. *Benisek* v. *Lamone*, 348 F. Supp. 3d 493, 517-18 (D. Md. 2018). Under the maps that emerged from this process, Democrats won seven out of eight of Maryland's congressional districts, capturing a historically safe Republican seat in the Sixth Congressional District by 21 points. *Id.* at 501-02.

While historical mapmakers may have experimented by drafting three or four maps, now they can use software to generate tens of thousands of possibilities, all precisely engineered based on hyperlocal voting data, allowing partisan actors to select the single map that exhibits the greatest partisan advantage. These tools enable mapmakers to reduce the risk that they have drawn anything less than a

maximally-partisan map, which in turn enable them to create more durable and aggressive partisan gerrymanders.

III. IN THE ABSENCE OF JUDICIAL INTERVENTION, PARTISAN GERRYMANDERS WILL ONLY BECOME MORE DURABLE AND MORE RESISTANT TO WAVE ELECTIONS

As powerful as current methods are, predictive modeling and other large-scale analytical tools will become more potent in the near future. New technologies and data sources, such as augmented voter files and modern machine-learning algorithms, will make it easier for mapmakers to predict the decision-making habits of Americans in a more nuanced and accurate way than ever before. When applied to the process of redistricting, new data analysis techniques will enable partisan mapmakers to create gerrymanders that are even more biased, more durable, and more capable of withstanding the effects of "wave" election years.

A. Partisans Will Deploy Even More Advanced Data Analytics to Dilute the Votes of Opposition Party Voters

Data analytics have grown more potent in recent times due to two important developments: (1) greater commercial availability of compiled data about Americans, and (2) more powerful and precise data analysis

techniques. Like their corporate counterparts, political parties are leveraging these advancements.

First, political data brokers and vendors are growing increasingly sophisticated in their ability to collect public voter information and create augmented voter files. *See supra* Section II.B.; David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. Econ. Persp. 51 (2014). These augmented files have emerged only recently in part because large-scale, public voter information was not available until the mid-2000s. *See* Hersh, *supra*, at 67. Candidates in 2022 will be able to target their campaign efforts and micro-targeted campaign appeals to the same voters and using the same data and the same prediction of their behavior as their party did in drawing the new district lines for that election.

In future redistricting cycles, augmented voter files will become powerful mapmaking tools because they will allow mapmakers to predict voting patterns at an individualized level. For example, private vendors can predict a voter's race with reasonable accuracy by using the voter's name and the general racial composition of his or her neighborhood. *Id.* at 127. Such accurate, individualized data at the fingertips of mapmakers will only serve to enhance mapmakers' current abilities to create district maps with extreme partisan bias.

Second, in addition to having access to a greater breadth of information, political vendors are able to

deploy data analysis techniques involving machine-learning, which will allow them to recognize previously undiscovered individual voting patterns. *See supra* Section II.A. "Machine learning" refers to the ability of a computer to learn from a data set without relying only on a set of pre-existing rules. *See* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147, 1156-57 (2017). Modern machine-learning algorithms outperform traditional methods in predictive accuracy because the algorithms are able to apply numerous variables to large volumes of data in order to make inferences about the behavior of individuals. *See id.* at 1157. In addition, the algorithm can determine by itself which variables are relevant for predictive purposes, whereas traditional statistical techniques only allowed scientific researchers to make predictions by designing models based on rigid, predefined assumptions. *See id.*

In past campaigns and redistricting efforts, a political party may not have used anything more than basic regression techniques to predict voter behavior. *See* Nickerson & Rogers, *supra*, at 59. However, basic regression techniques are of limited utility when confronted with complicated relationships involving a large number of variables. *See id.* at 59-60. Additionally, in the context of voter behavior, relationships between variables are often nonlinear and context-dependent. *Id.* at 59-61. For example, older voters tend to turn out at a higher rate than younger ones, but this relationship peaks between ages 60 and 70, and for voters older than 70, the turnout gap between them

and younger voters begins to narrow. *Id.* at 61. Because of such nuances, past campaigns had difficulty predicting individual voter behavior with accuracy. *See id.* at 59-61.

Modern machine-learning algorithms, however, do not suffer from these drawbacks. Machine-learning algorithms will be better able to process nonlinear nuances within a voting model, such as the above-mentioned relationship between voting and age, and are able to do so with less reliance on the skill of any particular analyst. *See id.*; Olivia Guest, Frank J. Kanayet, and Bradley C. Love, *Cognitive Capacity Limits and Electoral Districting* (Dec. 12, 2018), http://bit.ly/2TlmXBm.

B. "Matched-Slice" Gerrymandering Schemes Designed to Maximize Partisan Bias Will Become Possible in the Next Round of Redistricting

The availability of augmented voter files and analytical tools will soon enable mapmakers to prepare maps that are far more biased and durable than historical gerrymanders—including even those drawn during the 2010 redistricting cycle.

A theoretical technique called "matched-slice" gerrymandering can draw election maps in order to maximize partisan bias based on accurate, individualized knowledge of voter behavior. *See* Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on*

Partisan Gerrymanders, 59 William & Mary L. Rev. 1601, 1650-51 (2018) (citing John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 Am. Econ. Rev. 113, 126, 134-35 (2008)). In a matched-slice gerrymander, a district is divided optimally from the mapmakers' perspective if each geographic subdivision within the district contains matched-slice representations—*i.e.*, highly partisan Republican voters are paired with highly partisan Democrat voters, center-right Republicans are paired with center-left Democrats, and so on.

Matched-slicing strategies are optimal because they neutralize a party's most reliable voters. For example, if a group of reliable Republican voters resides in one particular area, a gerrymander could dilute their power by drawing a map such that the strong Republican base is split up, with each "slice" of strong Republicans being matched with a slightly larger and equally fervent group of reliable Democratic voters. Over time, this "matched-slice" strategy will produce optimal partisan results because it most efficiently distributes a party's base of reliable voters. *See* Friedman & Holden, *Optimal Gerrymandering*, 98 Am. Econ. Rev. at 126; *see also* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. Chi. L. Rev. 553, 567 (2011).

Historically, partisan redistricting efforts lacked sufficient individualized voter data and the ability to process that data for use in matched-slice strategies. *See* Elmendorf, *supra*, at 1650-51. Instead, mapmakers relied on broader, geographic-based proxies, such as

ward-level data of voter preferences. *See id.*[16] With the proliferation of individualized voter data, however, future mapmakers using new techniques such as the matched-slice strategy will be increasingly capable of forming districts designed to entrench and expand partisan bias to a degree sufficient to withstand "wave" election years with even higher vote differentials than 2018.

IV. SOCIAL SCIENCE PROVIDES OBJECTIVE MEASURES AND RELIABLE TOOLS THAT COURTS COULD USE TO EVALUATE PARTISAN BIAS IN MAPS

Even as data and technology have been used to create maps with extreme and durable partisan bias, these same tools have been and can continue to be a part of the solution to extreme partisan gerrymandering. With the aid of expert witnesses, courts can use

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[16] For example, a district may contain a simple 52% majority of voters siding with the party in control of the mapmaking process, but that majority may be composed of a mix of strong partisan voters and more moderate voters. This distribution is far less reliable than an "ideal" district containing a 52% majority of only strong partisan voters because the former, "mixed" district is subject to swing voters. *See* Cox & Holden, *supra*, at 567. Historically, it was not possible to ensure this distribution reliably because of difficulty in obtaining sufficiently robust and precise data on individual voters. *See* Nickerson & Rogers, *supra*, at 55-56. Instead, to combat this distribution, historical mapmakers would have to either accept the risk of swing voters or inefficiently move more partisan voters into districts to ensure that the district votes for the mapmaker's party. *See* Cox & Holden, *supra*, at 565-67.

advanced computer modeling techniques to identify partisan gerrymanders.

For example, modern software and computers can randomly generate a large number of alternative redistricting plans that adhere to traditional redistricting criteria and then compare the computer-generated alternatives to existing plan. If the existing plan is more biased than all or almost all of the plans the computer has drawn, lower courts can conclude that the traditional criteria do not explain the plan. *See* Daniel B. Magleby & Daniel Mosesson, *A New Approach for Developing Neutral Redistricting Plans*, 26 Pol. Analysis 147-67 (2018); Jowei Chen & David Cottrell, *Evaluating partisan gains from Congressional gerrymandering: using computer simulations to estimate the effect of gerrymandering in the U.S. House*, 44 Electoral Stud. 329 (2016); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 Election L.J. 351 (2016). In recent years, courts have utilized such innovative, large-scale analytical tools to assess partisan bias in maps. *See, e.g.*, *League of Women Voters of Mich.* v. *Johnson*, No. 2:17-cv-14148, 2018 WL 6257476, at *7-9 (E.D. Mich. Nov. 30, 2018); *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *City of Greensboro* v. *Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 949 (M.D.N.C. 2017).

A variant of these modeling techniques is the Markov Chain technique, which involves making billions of small and randomized adjustments to an existing map.

Maria Chikina, Alan Frieze & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. Nat'l Acad. Sci. 2860 (2017); Benjamin Fifield, Michael Higgins, Kosuke Imai & Alexander Tarr, *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (May 24, 2018) (unpublished manuscript), http://bit.ly/2VqCDRx. If the vast majority of those random adjustments result in maps that exhibit a reduction in partisan bias when compared to the existing map, they can support a conclusion that the original map is a partisan gerrymander.

Courts and litigants can use computer modeling techniques and social science tools to identify gerrymanders and to evaluate proposed remedial election plans. These tools have been vetted by scholars and political scientists and are generally regarded as objective, verifiable, and reliable mechanisms to assess partisan bias. This Court should set a standard allowing lower courts to use the many tools now available to identify constitutional violations.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court rule in favor of Appellees and affirm the judgment in Case Nos. 18-422 and 18-726.

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No. 18-422, No. 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR GOVERNORS ARNOLD SCHWARZENEGGER AND LAWRENCE JOSEPH HOGAN JR. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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ERR Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961).....11

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31,
138 S. Ct. 2448 (2018).....*passim*

McCutcheon v. Fed. Election Comm'n,
572 U.S. 185 (2014).....3

Printz v. United States,
521 U.S. 898 (1997).....3

Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary,
134 S. Ct. 1623 (2014).....7

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624 (1943).....14

Constitutional Provisions

U.S. Const. amend. I.....12

Page(s)

Other Authorities

Arnold Schwarzenegger & Ro Khanna, *Don't listen to the establishment critics. California's open primary works,* Washington Post (June 18, 2018) 9

Christian R. Grose, *Political Reforms in California are Associated with Less Ideologically Extreme State Legislators,* Schwarzenegger Institute Report, March 2016 10

Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines In California,* 53 J.L. & Econ. 545 (2010) 6, 7

David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?* 54 Vill. L. Rev. 57 (2009) 4

Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts,* Washington Post (Nov. 16, 2018) 8, 10

Federalist No. 52 (James Madison) 4

Federalist No. 57 (James Madison) 4

Page(s)

G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877 (2006) 5

J. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, The Journal of Politics, Vol. 68, No. 4 (Nov. 2006) 6

Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12(1) State Politics and Policy Quarterly 23 (2012) 9

John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. Miami L. Rev. 489 (2002) 8

Laura Royden, et al., *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice (2018) 5, 10

Maryland Redistricting Reform Commission, 2015 Report, 19 (Nov. 3, 2015) 7

Page(s)

Matthew G. Jarvis, *Redistricting Reform Could Save California from Itself*, California Journal of Politics and Policy Vol. 1 (2009) 5

Nate Silver, *A Statistical Appreciation of the Washington General's And Harlem Globetrotters*, Five Thirty Eight (July 21, 2014) 2

Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839 (2012).....6

Rachel Chason, *Inside Larry Hogan's victory: The numbers behind a GOP win in a blue wave*, Washington Post (Nov. 9, 2019) 8

Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004).....7

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the former California Governor Arnold A. Schwarzenegger and current Maryland Governor Lawrence Joseph Hogan Jr., have governed states that have suffered the consequences of partisan gerrymandering. They have both witnessed how this process leads to hyper-partisanship. While politicians and parties benefit, the public and more centrist voters lose. *Amici* believe that extreme partisan gerrymandering warrants constitutional scrutiny.

Arnold A. Schwarzenegger served as the Governor of California from 2003 to 2011. During his tenure, he successfully advocated for ballot measures that dramatically reformed the election process in California. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California, which is committed to advancing post-partisanship where leaders put people over political parties and work together to find the best ideas and solutions to benefit all.

Larry Joseph Hogan Jr. is the Governor of Maryland currently serving in his second term. As Governor, he continues to advocate for redistricting reform, including the creation of a statutory, nonpartisan redistricting commission. He has also successfully enacted numerous ethical reforms designed to hold government officials to higher standards and keep them more accountable to the public.

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[1] Rule 37 statement: All parties have consented to the filing of this brief. No party's counsel authored this brief in any part and no person or entity other than *amici* and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

Where extreme partisan gerrymandering exists, district lines are drawn in a manner that ensures that all seats remain safe. In such districts, elections are as predictable as a Harlem Globetrotters game. It may be theoretically possible for a party to lose a gerrymandered district, but it is highly unlikely.[2] Politicians whose only competitive election is their party primary are more responsive to that electorate than the electorate as a whole. As a result, legislators often hold far more extreme views than the citizens they ostensibly represent.

This deprives many citizens of any mechanism by which they can influence the policy making process and disenfranchises moderate voters in particular. Despite this, Appellants and others argue that challenges to partisan gerrymanders should be non-justiciable. The Court should reject this argument, as it would effectively give legislators free rein to systematically entrench party extremes and artificially dilute the strength of moderate voters.

Last term in *Janus*, this Court held that public employees could not be compelled to subsidize a union they do not necessarily support. To be sure, as a doctrinal matter, the legal issues presented in *Janus* are different from the ones here. The core constitutional concerns, however, are similar. In *Janus*, the Court

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[2] The Harlem Globetrotters have beaten the Washington Generals 99.96% of the time. Nate Silver, *A Statistical Appreciation of the Washington Generals And Harlem Globetrotters*, Five Thirty Eight (July 21, 2014), https://53eig.ht/2TiQkVR.

reasoned that a compelled agency fee scheme conflicted with citizens' fundamental right to advocate in favor of laws and policies of their own choosing. If public sector unions want employees' support, they must earn it. The same should be true of politicians. Districts designed to protect one party, however, mean that elections are not competitive, and moderate voices are made all but irrelevant.

For these reasons and the reasons explained below, *amici* respectfully urge this court to hold that the present disputes are justiciable and affirm the judgments below.

ARGUMENT

I. GERRYMANDERING AMPLIFIES THE VOICES OF PARTISANS AND DROWNS OUT THE VOICES OF MODERATES

A. Gerrymandering Results in Legislative Bodies That Are More Extreme Than The Electorate As a Whole

Our constitutional republic was founded on one overarching principle: "government will represent and remain accountable to its own citizens." *See Printz v. United States*, 521 U.S. 898, 920 (1997); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (It is "a central feature of democracy [] that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.") As the framers recognized, "it is particularly essential that the [legislative branch] have immediate dependence on, and an intimate sympathy with, the

people[,]" and "frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." The Federalist No. 52 (James Madison).

But elections can only instill in representatives the "habitual recollection of their dependence on the people," Federalist No. 57 (James Madison), if representatives who fail to cultivate this habit risk defeat. *Amici*, who were both elected to office in statewide elections, know well the importance of being responsive to the demands of voters. As a current and a former Republican governor of majority Democratic states, they each had to appeal to broad swaths of electorate to win elections. This meant building coalitions that included moderate voters in the middle of the political spectrum; voters who are open to considering alternative points of view.

Many legislators, however, at both the state and federal level, rarely face similar pressures to win over voters in general elections as the framers intended. Instead, members of both parties depending on the state have drawn district lines that all but guarantee the election of the candidate of one party in a given district; the primary is the election that matters as the outcome of the general election is preordained. As former speaker of the house Newt Gingrich once remarked, "'[Democrats] get to rip off the public in the states where they control and protect their incumbents, and [Republicans] get to rip off the public in the states [Republicans] control and protect our incumbents, so the public gets ripped off in both circumstances . . . .'" David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 63 (2009).

Partisan gerrymandering, by design, decreases electoral competition in general elections and democratic accountability along with it. For example, prior to the adoption of California's redistricting and primary reforms in 2010, "California's election system produc[ed] winners and losers with relative certainty . . . before 2008, no seat in the California legislature had changed party hands since the last redistricting, and [by 2009], only 3 of 400 elections to the California legislature since 2001 have resulted in a party change." Matthew G. Jarvis, *Redistricting Reform Could Save California from Itself*, California Journal of Politics and Policy Vol. 1, 5 (2009). Congressional races with gerrymandered districts exhibit similar partisan stability. In Maryland, although Republicans have won between 31 percent and 42 percent of the votes in recent congressional elections, the Democratic controlled legislature has drawn maps that "all but guarantee[] Democrats seven out of eight [congressional] districts . . . even during strong Republican years like the wave election of 2014." Laura Royden, et al., *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice 16 (2018).

In gerrymandered districts, representatives stand little risk of losing a general election. Their central objective is to win primaries by catering to their party base. *See, e.g.*, G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("[L]egislators and legislative candidates are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries, the only important races in a gerrymandered system."); Jarvis, *supra*, at 6

("The safe members are relatively free to be as partisan and extremist as they please . . . ."). The result is legislators who are ideologically more extreme than the citizens they are supposed to represent. Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines In California*, 53 J.L. & Econ. 545, 564 (2010) (noting studies demonstrating that "state-level legislators[] tend to take more extreme positions on issues than does the general population").

The empirical evidence bears this out: gerrymandering results in less competitive districts, which in turn leads to less responsive government and polarization. *See, e.g.*, J. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, The Journal of Politics, Vol. 68, No. 4 (Nov. 2006) ("[C]onsiderable evidence support[s] the claim that competitive districts induce greater responsiveness among elected officials."); Grainger, *supra*, at 548 (finding "evidence that legislative behavior changes after each redistricting, and these changes are consistent with the polarization argument. Specifically, drawing districts legislatively . . . is associated with increased polarization in the state legislature."); Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839, 862 (2012) (The empirical evidence "strongly suggest[s] that district maps created by nonpartisan officials will lead to greater responsiveness to voter preferences.").

Amici have witnessed this breakdown in the political process first hand. By experience, *amici* know that gerrymandered legislative bodies look nothing like the deliberative bodies imagined by the founders.

See Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623, 1637 (2014) (partisan gerrymandering reduces the kind of "rational, civic discourse" that is essential "to form a consensus to shape the destiny of the Nation and its people."). Instead of working towards legislative compromise, representatives cater to their base. Indeed, often the only issue on which legislators are willing to cooperate is the gerrymandering process itself (at least where one party has not been able to shut the other out of a meaningful role in the legislative process entirely). Legislators sometimes work together to enact redistricting plans that protect the seats of *both* parties, not just their own. Maryland Redistricting Reform Commission, 2015 Report, 19 (Nov. 3, 2015) ("[L]egislatures that are split by party can still usually agree on one principle: protecting incumbents."); Grainger, *supra*, at 548-49 & n.7 ("[I]n 2001 the district lines [in California] were drawn in a high-profile *bipartisan* gerrymander.") (emphasis added).

B. Partisan Gerrymandering Dilutes the Voting Strength of Moderate Voters

A "perverse consequence" of partisan gerrymandering is that it drives "the center out of [legislatures]." Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004). From the perspective of a partisan mapmaker, predictability of outcomes is the goal. Thus, the mapmaker minimizes the role of moderate or swing voters in election outcomes, voters who are more open to consider alternative viewpoints.

There is no doubt that a law that decreased the weight of the votes of moderate voters from 1 to 0.5 while giving a full vote to those on the left and the right would be unconstitutional. Yet sophisticated gerrymandering technology can effectively accomplish this result. John Hart Ely once warned, "given the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in a those pre-computer days) its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance." John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders*? 56 U. Miami L. Rev. 489, 505 (2002).

The result is either one party dominance, or, in the case of bipartisan gerrymanders, highly polarized legislatures and endless gridlock. The experience of *amici* as governors are illustrative.

In Maryland, for example, partisan gerrymandering has led to one party dominance such that the Democrats now enjoy legislative supermajorities. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS. In essence, Democrats have been able to gerrymander around Governor Hogan's veto power even though Governor Hogan was recently reelected by double-digit margins. Rachel Chason, *Inside Larry Hogan's victory: The numbers behind a GOP win in a blue wave*, Washington Post (Nov. 9, 2019), https://tinyurl.com/y5mybk6g. The people of

Maryland clearly want the Governor to have a say in the legislative process and act as a check on the legislature even if the partisan Democrats in the legislature do not.

During Governor Schwarzenegger's term, California faced the different but related problem of persistent partisan gridlock. The state "was reeling from the effects of destructive partisanship — stuck with structural deficits" and a perpetual inability to pass timely budgets. Arnold Schwarzenegger & Ro Khanna, *Don't listen to the establishment critics. California's open primary works,* Washington Post (June 18, 2018), https://wapo.st/2NzCBDX. Historically, "California [was] notorious for its budget gridlock" due in large part to extreme partisanship. *See* Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12(1) State Politics and Policy Quarterly 23, 23 (2012) (noting that "[f]rom 1950 to 2008, the budget was adopted late 44% of the time"); *see also id.* at 37 ("[T]he lack of accountability could also signify a larger problem concerning partisan gerrymandering where safe districts serve to insulate legislators from the consequences of gridlock."). The result was not only that the legislature failed to track the views of the public; it was also that nothing could get done, making governing difficult.

In sum, partisan gerrymandering grossly distorts the normal legislative process. This is also why we cannot rely on the normal political process to fix it absent court intervention. As *amici* can attest, state legislatures jealously guard their redistricting powers and can be expected to resist any real reform efforts. For example, even though 73% of Maryland citizens

would prefer maps drawn by an independent commission, the legislature has ignored Governor Hogan's efforts to implement this type of reform. Erin Cox, *Hogan creates emergency commission to deal with 'embarrassment' of gerrymandered congressional districts*, Washington Post (Nov. 16, 2018), shorturl.at/hqtDS.

In California, Governor Schwarzenegger and other reformers were only able to enact election reform by circumventing the legislature entirely and appealing directly to the people themselves through the referendum process. These reforms included the creation of an independent redistricting commission and top-two primaries. Unfortunately, California is an exception, and in most states the politicians and the political parties have the ability to ignore the majority of the voters who detest gerrymandering.

California, however, demonstrates that the harms of gerrymandering are real. Following California's reforms, legislative partisanship in California measurably decreased. Christian R. Grose, *Political Reforms in California are Associated with Less Ideologically Extreme State Legislators*, Schwarzenegger Institute Report, March 2016, at 7 ("Legislative voting in California is, on average, less extreme in 2013 and 2014 following the enactment of the top-two primary and redistricting reforms."). "Comparing the extremity measure in 2011 to the extremity measures in 2014, [there was] a 34 percent reduction in ideological extremity in the Assembly pre- and post- reform." *Id.* at 9. In addition, "from early 2011 to late 2014, the average California senator had a decrease in ideological extremity of 31%." *Id.* at 3, *see also* Royden, *supra*, at 4. (finding that "California's commission

drawn congressional map . . . [is] among the most responsive in the country.").

If this Court were to hold that challenges to partisan gerrymanders are non-justiciable, most of this nation's citizens will, like those in Maryland, have no remedy against the constitutional harms outlined above and scourge of unrepresentative legislatures due to gerrymandering. This is not the system our founders envisioned, nor is it one this Court should embrace and endorse.

Extreme gerrymandering prevents government from functioning properly and can deprive citizens of their constitutional right to "influenc[e] the passage . . . of laws." *See ERR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Partisan gerrymandering thus disenfranchises voters twice: first, by facilitating the election of representatives whose views are more extreme and partisan than the population as a whole and second, by potentially creating one-party rule or, alternatively, legislative gridlock.

II. *JANUS* ADDRESSED COMPARABLE ISSUES

This Court has, on occasion, compared public unions to political parties, despite their obvious differences. Such comparisons are relevant here. In *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31,* this Court held that government employees could not be "forced to subsidize" public sector unions that they "choose not to join." 138 S. Ct. 2448, 2459-60 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)). The concerns that motivated this Court in *Janus* suggest that constitutional challenges

to partisan gerrymanders warrant serious consideration.

The petitioner in *Janus* was Mark Janus, a state employee who did not want to pay an agency fee to the union that a majority of his fellow employees had chosen as their exclusive bargaining agent. This Court held that the First Amendment prohibited the agency fee requirement. In reaching that result, the Court posited a hypothetical about political parties: "Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for . . . the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 138 S. Ct. at 2475.

This extreme hypothetical presents an obviously unconstitutional state rule requiring residents to align themselves with a particular political party. Extreme partisan gerrymandering, where a computer systematically discounts the votes of voters who do not adhere to views of the dominant party in their gerrymandered district, is government action that forces moderate voters to be represented in all districts by candidates aligned with the platform of a political party. In effect, extreme partisan gerrymandering is comparable to the very hypothetical that this Court observed in *Janus* is clearly unconstitutional. If Mr. Janus were a Democratic voter in North Carolina, or a Republican voter in Maryland, or moderate voter in either state, he would be harmed by extreme partisan gerrymandering in a comparable way.

To be sure, *Janus* is a very different case involving different legal issues. But it would be a strange

result indeed if public sector unions, who are now required to convince public employees to support them based on the merits, are constitutionally required to be more responsive than elected representatives. *See Abood*, 431 U.S. at 256 ("The ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the views and perceived interests of its membership.") (Powell, J., concurring). In *Janus*, this Court "end[ed] the oddity of allowing public employers to compel union support . . . but not to compel party support. . . ." *Janus*, 138 S. Ct. at 2484. But it would be no less of an oddity if this Court were to hold that compelled agency fees, which affect only a subset of the population and implicate only a narrow set of political issues, warrant constitutional scrutiny, but partisan gerrymandering, which undermines the electoral process on which representative government depends, does not.

The *Rucho* Appellants assert that the Court should hold that the present dispute is non-justiciable and not enter the political fray by intervening in the redistricting process: "[t]he framers delegated this delicate and politically fraught task to Congress for good and sufficient reasons, and this Court should decline the invitation to reassign the authority to itself." *Rucho*, Op. Br. at 36. In *Janus*, this Court rejected a similar argument:

> We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," [cite]—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American

> doctrine of judicial review requires us to enforce the Constitution. . . . ." [t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

Janus, 138 S. Ct. at 2486, n.28. The Court should similarly ignore Appellants' plea not to intervene here.

CONCLUSION

For the reasons set forth above, partisan gerrymandering creates real constitutional harms that require a judicial remedy, and the decisions below should be affirmed.

Respectfully submitted,

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Dated: March 8, 2019

No. 18-726

IN THE

Supreme Court of the United States

LINDA H. LAMONE AND DAVID J. MCMANUS, JR.,

APPELLANTS,

v.

O. JOHN BENISEK, ET AL.,

APPELLEES.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF AMICUS CURIAE STEPHEN M. SHAPIRO IN SUPPORT OF APPELLEES

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March 6, 2019

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INTEREST OF THE AMICUS[1]

Amicus Stephen M. Shapiro resides in the southern, predominantly Democratic, lobe of Maryland's Eighth Congressional District. He is a registered Democrat, but occasionally splits his votes. Amicus filed the original and first amended complaints, pro se with two Republican co-plaintiffs in 2013, and was the petitioner when this case was before this Court in 2015. After the case was remanded in 2016, the plaintiffs focused their challenge more narrowly on the harms to Republican voters who lived in the former Sixth District, and amicus withdrew from the case in November 2016 to avoid potential issues as to his standing. He filed an amicus brief in support of plaintiffs-appellants, now appellees, when this case was before this Court last term, and he is also filing a brief in *Rucho v. Common Cause*, No. 18-422, that offers argument applicable here as well.

Amicus agrees with appellees and the court below that partisan gerrymandering violates the First Amendment. He is filing this brief to make the argument, not made by the district court or by appellees in their motion to affirm, that this Court's racial gerrymandering cases provide a proven and manageable template that courts can readily apply to this First Amendment claim and thereby eliminate the political question and related merits objections raised by appellants.

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[1] This brief is filed pursuant to blanket consents filed by the parties. No person other than amicus and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

In most cases, courts decide whether the case presents a political question before addressing the merits. But to date, in political gerrymandering cases, this Court has found that the political question doctrine precludes the courts from reaching the merits because of a lack of a "manageable standard" for determining whether a gerrymander goes too far and or is acceptable because it is no more than ordinary politics at work. This brief argues that the racial gerrymandering cases, in which the political question doctrine has never been a barrier, provide the standard – did race "predominate" in the line drawing decisions - that fills the gap in this First Amendment case. Because that standard also provides an appropriate and manageable test on the merits, it thereby overcomes the political question objection.

Appellants continue to argue that the political question doctrine precludes the Court from remedying this First Amendment violation. In many previous redistricting cases, the challengers attacked the plan on a statewide basis. Last term in *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018), this Court held that such challenges must be brought on a district-by-district basis, by voters in an adversely affected district, which is precisely what has been done here. The concurring opinion of Justice Kagan in *Gill*, *id.* at 1934-40, as well as the Court's first opinion in this case, *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), explained

why the First Amendment is a proper basis on which to challenge partisan redistricting, and appellees' brief in this case solidifies the ruling below that agreed with that conclusion.

This Court's recent decisions rejecting districts that were racially gerrymandered also directly support appellees' position. In prior cases such as *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004), this Court refused to overturn gerrymandering schemes that were assumed to be unconstitutional because the Court was concerned that there was no "discernible and manageable" remedy that it could impose. But the political question doctrine has not caused this Court to shy away from striking down similar racial gerrymanderings when the challenge was made on a district-by-district basis. It has done so by forbidding states from drawing district lines where the racial motive "predominates." That same approach should be applied under the First Amendment when a state does what Maryland did here: move hundreds of thousands of voters to cure a 10,000-person over-population, and where the political party of those who were moved was found by the district court to be the "predominate" reason for choosing them.

Another aspect of the racial gerrymandering cases supports the conclusion that a First Amendment based challenge to political gerrymandering provides a legally supportable and reasonably manageable standard for a court to utilize. Under the race cases, the violation of the Fourteenth Amendment occurs when the decision is made to move voters because of their race. A state can offer limited justifications in order to

satisfy strict scrutiny, but nothing further need be proven by the challengers. That same analysis works equally well for First Amendment challenges such as this because actions based on the political view of those affected are inherently suspect. Thus, when a plaintiff establishes massive, unnecessary shifting of voters among districts based on their actual or perceived political party affiliation, that is all that is needed to establish a prima facie First Amendment violation.

This conclusion has additional consequences which also make the First Amendment claim more manageable. Once the lines are drawn for an unconstitutional reason – whether race or political affiliation – the violation has occurred. As a result, there will be no need to await the outcome of future elections to see whether the predictions of the line drawers were accurate, because it is the unconstitutional attempt, not the outcome, that matters. For that reason, these cases should be able to be decided very quickly, possibly in time for the first election after the census, instead of the last, as is the case here. Under this approach, the only relevant inquiries will be the numbers of people moved from each party and whether there is any legitimate justification for the choice of who was moved of the kind that is available in a racial gerrymandering case.

There is also a further benefit to the racial gerrymandering cases once the Court rules that a state violates the First Amendment by making unconstitutional use of a person's political party as the dominant reason for moving that person between districts. Until now, the standard defense

in the racial gerrymandering cases is that the movement of voters was done "as part of a 'strictly' political gerrymander, without regard to race." *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017). But if line drawings based on the political party of the voters being moved violates the First Amendment, that will no longer be a defense to a claim of race-based line drawings. Thus, upholding appellees' claim in this case will put an end to the hypocrisy of states defending against claims of racial discrimination by arguing that "it's all political" when the two are inextricably intertwined and equally repugnant to the Constitution because, for all practical purposes, the two are "virtually indistinguishable." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).

The district court found that, when appellants re-drew the lines for Maryland's Sixth Congressional District in 2011 to adjust for an over-population variance of about 10,000 people, appellants moved 360,000 residents in largely rural Republican precincts out, and 350,000 residents in largely suburban Democratic precincts in, for a net gain of 90,000 Democrats. J.S. App. 5a-11a. Their goal in doing so was, as the district court found, to "flip' the District from one that was reliably Republican to one that appellants expected to be reliably Democratic. *Id.* at 49a. As Justice Kagan remarked at oral argument when the case was previously before this Court, "however much you think is too much, this case is too much.... I mean, how much more evidence of partisan intent

could we need?" Oral Agt transcript, No. 17- 333, at 40-41.

As the district court concluded on remand, "the plaintiffs have amply established the intent element of their claim." J.S. App. 51a. The result was a clear violation of the fundamental First Amendment rights of those affected because the choice of whom to move was predominantly based on their political party affiliation, and the state failed to offer any legitimate justification.

ARGUMENT

APPELLANTS' PARTISAN GERRYMANDERING VIOLATED THE FIRST AMENDMENT, AND IT CAN BE REMEDIED BY THE SAME APPROACH USED IN RACIAL GERRYMANDERING CASES.

A. The District Court Properly Found a First Amendment Violation Here.

Article I, § 2 provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), this Court applied that provision to require that congressional districts within a State have equal populations so that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Then in *Karcher v. Daggett*, 462 U.S. 725 (1983), it struck down a deviation of less than one percent between

the largest and smallest districts. As the Court explained in *Wesberry*, the rationale for strict adherence to the principle of one-person one-vote is the prevent "debasing the weight of appellants' votes," 376 U.S. at 4, which is precisely what the district court found happened here. Because the Constitution forbids a state to do indirectly that which it is forbidden from doing directly, *US Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995), the political gerrymander engineered by appellants cannot stand.

In prior cases, the Court has declined to set aside partisan gerrymanders because it could not find a method to correct them that was the product of a reasoned legal determination and produced a remedy with judicially manageable standards. The overtly partisan manner in which the district lines are being drawn in many states is recognized by Democrats and Republicans alike as being fundamentally at odds with basic principles of democracy. And, although this Court agreed in *Vieth* that the resulting districts were unconstitutional, 541 U.S. at 292–93 (plurality op.), it nonetheless concluded that such "*statewide* claims are nonjusticiable," *id.* at 292 (emphasis added). For that reason, the Court declined to intervene because no proper remedy had been identified. *Id.* at 316 (Kennedy, J., concurring in plurality's view that partisan gerrymandering is impermissible and agreeing that no solution had yet been found).

Before assessing whether this claim presents a political question, it is first essential to

understand precisely what the First Amendment violation is under this Court's decisions such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In both cases, the state made employment decisions that adversely affected the plaintiffs based solely on their failure to support the political party of those who made such decisions. The employees in *Elrod* were discharged (or threatened with discharge), while all but one of those in *Rutan* retained their jobs, but were denied promotions or other enhancements in their workplace situation. In finding a First Amendment violation in *Rutan*, this Court ruled that "deprivations less harsh than dismissal" still violated the First Amendment. *Id.* at 75. Indeed, one of the *Rutan* plaintiffs had only been turned down for a job, not fired, because he was of the "wrong" political party, and the Court nonetheless held that his complaint stated a valid claim for relief. *Id.* at 79.

This understanding of the violation as the act of making a decision based on a prohibited First Amendment ground is vital to refuting appellants' main defense on the merits: that appellees cannot show that the First Amendment-based line drawing actually affected the outcome of the congressional races in the Sixth District. Br. 6-8, 14, 16-18, 20-22, 35-37, & 53-56. Such a showing is irrelevant to showing a constitutional injury. The job applicant in *Rutan* did not have to prove that she *would* have gotten the job in order to state a claim, any more than the white firefighters plaintiffs in *Ricci v. de Stefano*, 557 U.S. 557, 562

(2009), had to show that they actually would have been promoted based on their test performance.

The gravamen of the harm in this case is the abridgment of appellees' rights of representation, speech, and association incident to the dilution and debasement of their votes when appellants moved hundreds of thousands of voters from one district to another based on their status as either registered Democrats or registered Republicans. More specifically, the violation here was of the First Amendment rights of the four Republican plaintiffs who were moved out of the Sixth District and into the largely Democratic Eighth District for partisan reasons, and the three Republican plaintiffs who remained, but whose votes and continued opportunity to associate with others with a common political view were similarly diminished. In all relevant respects, the conduct was just as much a violation of the First Amendment as the conduct at issue in the *Elrod* line of cases.

Appellants have countered by arguing that drawing lines predominately on the basis of political parties does not inevitably produce the election outcomes intended by the line-drawers. But even if true, it is legally irrelevant because it is the purposeful movement for partisan reasons that is the constitutional violation. The movement of voters for their partisan views is just as suspect under the First Amendment as the movement of voters for their race is under the Fourteenth. Thus, the fact that the results in successive Congressional elections in the Sixth District all

flipped from Republican to Democratic is of no legal significance because appellees' constitutional rights were violated when the lines were drawn predominantly to dilute the impact of Republican voters. Thus, that violation would not evaporate even if a Republican had nonetheless managed to have been re-elected. In addition, making the outcome of post-redistricting elections immaterial will enable the courts in future cases to determine the legality of a redistricting based on whether the numbers and the shapes of the redrawn districts were done for predominantly partisan reasons, with no need to wait until the next election to determine whether the line drawers actually succeeded.

Another important feature of a First Amendment approach is that the courts will focus on what happened in the most recent redistricting, with no need to go back to prior line-drawings, as the decision in *Elrod, supra*, shows. The dissent there argued that, because most of the plaintiffs had obtained their jobs through the same political patronage system to which they now objected, they had no right to complain. *Id.* at 380. The majority refused to consider the earlier patronage actions as a basis to immunize the current violation, holding that, even though long-standing, "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments. *Id.* at 373. As applied to this case, it is therefore no defense for appellants (Democrats) to claim that their 2011 gerrymander only evened-up what Republicans had done in prior packing of the Sixth District. And that same logic also should preclude challengers in

these cases from going back to prior redistrictings, even if a statute of limitations or laches did not bar the re-opening. This ban on looking back, plus the irrelevance of showing that the violation actually affected elections, in contrast to affecting voters, will make First Amendment challenges much more manageable and further overcome any political question objection.

Finally, appellants repeatedly assert that applying a First Amendment approach to gerrymandering under *Elrod* forbids any partisan considerations (Br. 27, 33, 34, 45). They even go so far as to claim that "[t]he only political considerations [that could be] reliably excluded would be *failed* attempts to take politics into account." (Br. 36, emphasis in original). Appellants are wrong. First, the Court in *Elrod* specifically left open the possibility of allowing support by a political party to be relevant, but only where it advanced "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." 427 U.S. at 363. *See also, Branti v. Finkel*, 445 U.S. 507, 517 (1990): "Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment."

Second, and perhaps most significantly, the proper First Amendment standard for overturning a redistricting does not remotely resemble the test parodied by appellants. Rather, as we have noted, a challenger must show that improper partisan

considerations "predominated" in the decisional process, a test that appellants never mention in their brief. Moreover, under a proper First Amendment analysis, the state is permitted to offer narrowly tailored justifications, just as this Court has permitted when there are claims alleging racial discrimination, as we now show.

B. The Racial Gerrymandering Cases Provide the Proper Standard for This and Other First Amendment Gerrymandering Cases.

As explained above, the quest for a workable standard and a tailored remedy for political gerrymandering has been answered by appellees' First Amendment claims in this case. When, as here, the dominant reason for massive movements of people among congressional districts is to disfavor certain voters for their affiliation with one political party, an actionable violation of the First Amendment has been established. Applied on a district by district basis, a requisite showing of predominant intent provides a relevant and manageable standard for rectifying the worst partisan gerrymanders. Most significantly, that approach is no less manageable in this context than it is when the Court has used it to decide whether to uphold or reject a claim of racial gerrymandering.

The method of analysis used in racial gerrymandering cases establishes the proper resolution of this and other political

gerrymandering cases. In both kinds of cases, the response of the state is that all redistricting is political, and it can never be otherwise because those who draw the lines will know, or have strong inclinations, as to how every proposal will affect the political alignment of the body for which the election will be held. That is true whether the lines were drawn to disadvantage Republicans, as here, or (largely Democratic) African-Americans in the race cases, because in both situations legislatures make their best guesses, supported by advanced statistics and technology, as to how the new lines will affect the outcome of future elections. [2]

In *Shaw v. Reno*, 509 U.S. 630 (1993), this Court first faced the issue of the circumstances in which the use of race in congressional redistricting was unconstitutional. After noting that statutes establishing legislative districts do not, on their face, make racial classifications, the Court observed, in language equally applicable to partisan gerrymandering, that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race

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[2] There may have been a time in some parts of the country where denying African-Americans the vote was a goal, regardless of their political party. Today everyone recognizes that racial gerrymandering is the equivalent of political gerrymandering. *See Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (only question in case was factual: whether race or politics predominated in drawing district lines).

consciousness does not lead inevitably to impermissible race discrimination." *Id.* at 646 (emphasis in original).

On the other hand if "a district obviously is created solely to effectuate the perceived common interests of one racial group," that would be "altogether antithetical to our system of representative democracy." *Id.* at 648. As the Court amplified, a plaintiff states a valid claim "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 649.

In subsequent cases, the Court clarified the standard by which the constitutionality of alleged racial gerrymanderings should be determined. This standard has been shown to be manageable, and it can be readily applied to the partisan gerrymandering that was done here. As enunciated in the follow-on case involving the same district as in *Shaw v. Reno*, this Court held that a violation had occurred when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," with the "highly irregular and geographically non-compact" shape of the District as evidentiary support for such a finding. *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996); *see also Miller v. Johnson*, 515 U.S. 900, 914-15 (1995). Moreover,

the existence of alternative maps by which the legitimate goals of redistricting can be met, without massive movements of disfavored voters, supports both the claim that race (or political party) improperly predominated and increases the likelihood that there is an appropriate and manageable remedy. *Cooper v. Harris*, 137 S. Ct 1455, 1479-80 (2017).

The same massive movement of voters to cure the need for small population shifts here was also present in two recent racial gerrymandering cases in which there was no political question objection. In *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015), only 1000 individuals needed to be moved to achieve population equality, yet "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics." A similar choice to move large numbers of black and white voters, when only a change of 3,000 out of 730,000 was necessary to retain population equality in North Carolina's District 12, was significant in *Cooper*, 137 S. Ct at 1466. Like those racial gerrymandering cases, this political gerrymandering case clearly involves "excessive" partisan movement of voters, and all three cases demonstrate that appellants are mistaken in their belief (Br. 32, 34) that it is not possible to decide the predominant motive of the line drawers.

This Court has recently recognized the "special challenges" that trial courts have in determining whether the predominant motive for the lines drawn was race, particularly "when the State asserts partisanship as a defense." *Cooper*, 137 S. Ct. at 1473; *id.* at 1488 (Alito, J. concurring in judgment, internal quotations & citations omitted) (race being "highly correlated with political affiliation in many jurisdictions ... makes it difficult to distinguish between political and race-based decisionmaking"). But this Court did not throw up its hands, nor, most importantly for this case, did the difficulty in deciding whether there had been a racial gerrymander cause it to conclude that the case presented a political question.

To be sure, this Court in *Shaw v. Reno* observed that "racial and political gerrymanders are [not] subject to precisely the same constitutional scrutiny." 509 U.S. at 650. However, that observation was based on the inequity principle embodied in the Equal Protection Clause, not the First Amendment as relied on here. More significantly, the challenge here is remarkably similar to the challenge in *Shaw* in other respects. Both cases focus on challenges to lines drawn for a specific district, and are not statewide challenges to the manner in which the state drew all of its district lines as in *Vieth*. Therefore, the narrowing of the remedy needed to repair a single district gerrymandering presents a much more manageable problem

because it does not require the court to re-do the entire state, although the state may choose to do that to comply with other requirements of law.

Second, the focus in both kinds of gerrymandering cases is on the movement between districts of favored and disfavored voters—particularly when they are disproportionate to the need to assure compliance with one person, one vote. The focus may be the absolute numbers – how many people were moved to respond to the known population variance from equality – and relative numbers – how many of each favored and disfavored group (racial or political) were moved in and out. *See Alabama Legislative Caucus*, 135 S. Ct at 1266 (claim supported where appellants "presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts").

Moreover, this Court has never required challengers to prove that the outcome of any election in racial gerrymandering cases would have been different: it was the fact that the legislative lines were drawn with race as the "predominant" factor that was the constitutional violation. Just as states are not permitted to use "*post-hoc* justifications" to support what appear to be impermissible race-based districts, *Bethune-Hill v. Virginia State Bd of Elections*, 137 S. Ct. 788, 799 (2017), so too should both the state and the challengers in political gerrymandering cases be precluded from offering evidence as to what

happened in subsequent elections as proof of proper or improper line drawing.[3]

On the other hand, the two kinds of cases differ in some respects. Even though racial considerations are presumptively improper when they predominate, the state may still prevail if it can establish that the racial lines were drawn to "reflect wholly legitimate purposes," such as "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw v. Reno*, 509 U.S. at 646; *see also Alabama Legislative Caucus*, 135 S. Ct at 1263 (permissible reasons include "traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents"). Accordingly, and contrary to appellants' contention (Br. 29, 37-38), the decision below would not overrule *Gaffney v. Cummings*, 412 U.S. 735 (1973), which allowed a bipartisan board that sought to create a politically balanced set of districts. Like all other legitimate purposes, achieving political balance across the state can be as a legitimate justification to counter a claim of partisan gerrymandering. *See Gaffney* at 754 (suggesting the Court may have reached a different conclusion "if racial or political groups

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[3] Appellants spend much of their brief making the irrelevant argument that subsequent events show that the lines drawn in 2011 did not produce the anticipated benefits to Democrats or harms to Republicans, and hence there was no First Amendment violation. Br. 6-8, 14, 16-18, 20-22, 35-37, & 53-56.

ha[d] been fenced out of the political process and their voting strength invidiously minimized").

In addition, in partisan gerrymandering cases, unlike race-based cases, compliance with the Voting Rights Act is not a defense. *See Cooper*, 137 S. Ct. at 1469. Moreover, the "odious" nature of racial classifications, together with their threat "to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *Shaw v. Reno*, 509 U.S. at 643, may warrant a closer examination of the justifications offered by the state than when the violation is based on the political party of the plaintiff. But that is not an excuse for no scrutiny when First Amendment rights are at stake.

The Court has left open the possibility that considerations of race may be lawful to cure prior improper racial line drawings, but only if the state can identify specific discrimination that it is seeking to cure and, even then, it "must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Shaw v. Hunt*, 517 U.S. at 909, 910 *(quoting Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986). Whether even that very difficult to meet standard would be open if a challenger sought to re-open prior redistrictings is an open question, but if that were allowed, that same high bar would surely apply, whether the improper reasons were based on the race or political party of the individuals affected.

In short, while these differences on the merits of a racial gerrymandering claim may make the standards for determining a violation of a political gerrymandering different, none of the differences suggest that the remedy available in district by district racial gerrymandering cases would not be suitable for remedying the partisan gerrymandering at issue here. Accordingly, any such differences do not require the Court to find that political gerrymander cases present a political question because of the absence of "discernible and manageable standards" by which to create a remedy, as the *Vieth* plurality concluded in the context of its equality analysis of the state-wide redistricting challenge there. 541 U.S. at 286.

Unstated in the racial redistricting cases is the fact that the remedy focuses only on fixing the last lines drawn and does not also require the state to remedy past violations, which appellants suggest is another defect in the ruling below (Br. 39-41). Thus, if race had also been used in an unconstitutional manner to draw district lines in the past, the remedies for a current violation do not require re-opening the lines drawn years before, although the state would be free to seek to eliminate the effect of prior racial discriminations as part of its remedy.

While in one sense this limitation can be seen as a weakness, it can also be seen as a means of limiting what one court can be expected to do in any given litigation. In this respect, it is rather like

the situation confronted by the Court in *Elrod v. Burns, supra*, in which the political patronage system being challenged had been in place for many years, yet all the Court did (or could realistically do) was to provide relief to plaintiffs claiming current injuries. Thus, in contrast to cases in which the Court is being asked to re-shape an entire state's districting plan, the remedy sought in racial gerrymandering cases and here is much narrower because it focuses only on fixing the harms done in the most recent redistricting. Narrowing the scope of the relief sought significantly lessens the problem of designing an appropriate and manageable remedy, although, over time prior unlawful gerrymanderings may disappear or least be of lesser significance, especially as populations and voter preferences shift.

There is one other important benefit from upholding the political gerrymandering claim here. In this Court's most recent racial gerrymandering cases, states defended their laws on the ground that politics, not race, was the predominant motivating factor and hence the laws were constitutional. This Court in *Cooper v. Harris*, noted the "special challenges for a trial court" in sorting out the predominant factor where both race and politics point in the same direction. 137 S. Ct. at 1473. To the extent that courts rely on irregular shapes to discern racial motivations, "such evidence loses much of its value when the State asserts partisanship as a defense, because a

bizarre shape—as of the new District 12—can arise from a 'political motivation' as well as a racial one." *Id.*

The proper response is to attack the premise frontally. It is little short of hypocritical in situations where race and political party are "virtually indistinguishable," *Abbott v. Perez*, *supra*, for a state to argue "that politics alone drove decisionmaking." *Cooper* at 1476. Allowing legislatures to draw district boundaries based on the political party of the voters being moved from one district to another is just as offensive to the First Amendment as racial gerrymandering that this Court has struck down in *Shaw* and its progeny is to the Equal Protection Clause. And once this Court establishes that both reasons for line drawings are unconstitutional, trial courts will no longer be faced with the task of sorting out a predominant motive when both reasons are unlawful. Moreover, treating the two kinds of gerrymandering as functionally the same will end the necessity of bringing several rounds of cases to attack the same gerrymandering, which is what happened to the same North Carolina Districts at issue in the *Shaw* and *Cooper* cases.

Finally, nothing in *Vieth* precludes the relief that was ordered below. First, *Vieth* was a statewide challenge analyzed as an Equal Protection claim. As such, it presented the more difficult question of deciding when inequality in drawing district lines across an entire state went

too far. Because this case is a challenge to a single district, the Court only need assure itself that the voters moved in and out of the Sixth District were chosen primarily for partisan reasons, and that a remedy can be devised to cure that wrongdoing, without having to take on the redistricting of the entire state.

To be sure, *Vieth* declined to apply the lessons from racial gerrymandering to political gerrymandering, in part because the plurality there saw race as more immutable than political affiliation. Accepting that conclusion does not support appellants because both kinds of gerrymandering assume that the targeted class is not subject to persuasion or change in its voting patterns. But perfection in prediction is not necessary to establish a constitutional violation where there is an improper reason for movement of voters – either race or political party. Immutability is especially irrelevant today when experts have a very high rate of success in predicting how likely voters are to perform as expected, when the basis for the movement of voters is race or political party.

Appellants' defense also overlooks the fact that even within areas where blacks (or Republicans) are in a significant majority, they never represent 100% of those whom the legislature has moved. And to the extent that those affected by a political or racial gerrymander do not vote the way that is anticipated—and that is certainly their right—that mainly means that the

gerrymandering is less successful than desired, but the improper classification remains. *Cf. Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (*incorrect* belief that government employee had supported candidate for mayor did not insulate defendant from *Elrod* claim for unlawful First Amendment retaliation). Moreover, no matter the outcome in a given election under partisan gerrymandering, the state, not the people, would have had a major hand in picking the winner, contrary to the Constitution.

***

Appellees have established that their First Amendment rights have been violated by appellants' partisan gerrymandering of Maryland's Sixth Congressional District, which moved massive numbers of Republican and Democratic voters, when only modest changes were needed. Moreover, it did so with the avowed goal of adding one Democratic member to the State's delegation to the House of Representatives. Political gerrymanderings of this kind undermine our democracy and, as shown by the racial gerrymandering cases, nothing precludes the courts from ordering district-by-district relief to remedy the constitutional violation in this and similar cases

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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March 6, 2019

No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,
Appellants,

v.

O. JOHN BENISEK, *et al.*,
Appellees.

On Appeal from the
United States District Court
for the District of Maryland

BRIEF OF ROBERT LEE STONE, JR., AND JOHN HARVARD LOMAX, JR., AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) 12, 25

Benisek v. Lamone, Case No. 13-cv-3233 (D.Md., 7 Nov. 2018), appeal docketed in this Court as *Lamone v. Benisek*, Case No. 18-726 . . . . . 4, 5, 12, 17, 20

Colgrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) 25

Common Cause v. Rucho, Case No. 16-cv-1026 (M.D. N.C., 27 Aug 2018), appeal docketed in this Court as *Rucho v. Common Cause*, Case No. 18-422 . . . . . 4, 6, 20

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Dred Scott v. Sandford, 60 U.S. 393 (1857) 25

Gill v. Whitford, 585 U.S. ___, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018) 8-11, 19, 23

Hamilton v. Pallozzi, 848 F.3d 614 (4th Cir. 2017) 14

League of United Latin American Citizens v. Perry, 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) 23

Luther v. Borden, 48 U.S. (7 How.) 11 (1849) 25-26

Radogno v. Ill. State Bd. of Elections, No. 11-4884, 2011 WL 5868225 (N.D. Ill., 22 Nov 2011) 15

Republican Party of N.C. v. Martin, 980 F.2d 943 (4th Cir. 1992) 14

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 12, 25

Shapiro v. McManus, 203 F.Supp.3d 579 (D.Md. 2016) 16

Vieth v. Jubelirer, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) 3, 8, 14-19, 23

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Constitution of 1787 . . . . . passim

Reference Works and Treatises

Black's Law Dictionary (10th ed.) 5, 26

Madison, James, *Federalist* 43 20

Story, Joseph, *Commentaries on the Constitution* 3:§1808 (1833) 21

USLegal, *Sham Election Law and Legal Definitions* (https://definitions.uslegal.com/s/sham-election, retrieved March 2, 2019) . .. 7

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*, Robert Lee Stone, Jr., and John Harvard Lomax, Jr., are citizens and lifelong, permanent residents of the United States. Both *amici* have had legal training, and both have taught constitutional law and political science at public and private universities in the United States—as is the case with the authors of "Brief of David Orentlicher as *Amicus Curiae* Supporting Neither Party" and "Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* in Support of Neither Party," both filed in the case at bar. In addition, in this case, both *amici* received their doctorates at the University of Chicago.

As American citizens and U.S. political scientists, the *amici curiae* are significantly affected and harmed by the well-known national consequences of gerrymandering. It has already been proven beyond doubt that the resulting corruption, polarization, lack of legislative compromise, partial paralysis, and demagoguery are by no means merely local phenomena, but are national, and all Americans pay a price for them every day. The findings of the professional literature on the subject, i.e. of books and articles in political science, law, and sociology, is voluminous, unambiguous, and definitive.

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[1]The parties have filed blanket consents to the filing of *amici* briefs. No counsel for a party, these or any other *amici*, authored this brief in whole or in part. No party, counsel for a party, or any person other these *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

Federal and state legislators and parties to previous and current gerrymander cases all reach the same conclusions about these negative, national consequences. As pointed out on page 9 of this *amici curiae* brief, "All parties and *amici curiae*" in the Gerrymander Cases "agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved." This point "is obvious to courts and scholars alike." See pp. 7-12 below. Members of the United States Congress, in their brief cited below, refer to "a cascade of nega-tive results" from partisan gerrymandering that include "indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise, and the impossibility of reaching pragmatic, bipartisan solu-tions to the nation's problems" (pp. 13-14 below). As state legislators have further pointed out, "partisan gerrymandering has 'sounded the death knell of bipartisanship' creating a legislative environment that is 'toxic' and 'tribal.'" (p. 14 below)

In brief, the gerrymander is a special case that touches the heart of American government and has widespread, profound consequences across the nation. That is just an empirical fact: every Ameri-can citizen's life today is discernibly worsened by the manifestly unhealthy political atmosphere fostered by gerrymandering. Even if that harm does not suffice to confer standing as litigants, it does entitle informed U. S. citizens, with the help of appropriate legal counsel, to serve as friends to the Court.

CONSTITUTIONAL PROVISION INVOLVED

Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

SUMMARY OF ARGUMENT

Partisan gerrymandering, which is a kind of election-rigging, is widespread in this country and is widely understood to be growing like a noxious cancer that is destroying republican government. This Court has been reluctant to intervene to stop it because the only two grounds for doing so that have been suggested so far (First Amendment and Equal Protection Clause) are inapplicable. Election-rigging does not abridge speech and does not discriminate against protected groups. It harms everyone equally.

The District Court's opinion in the case at bar attempts to make a First Amendment argument that satisfies *Vieth* and its progeny, but that is not possible. Fortunately, the Republican Form of Government Clause in Article IV, Section 4, does provide the correct legal ground.

ARGUMENT

1. Procedural Posture.

On August 27, 2018, a three-judge panel of the United States District Court for the Middle District of North Carolina, in the case of *Common Cause v. Rucho* (16-cv-1026), the companion case to the case at bar, found that, as a matter of fact, the Congressional district boundaries in that State are examples of egregious partisan gerrymandering. That court found that the boundaries that one party is attempting to impose on the State of North Carolina are intended to thwart competitive, democratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in that case that that partisan gerrymandering is unconstitutional. The gerrymandering politicians then appealed to this Court, and the appeal was docketed by this Court on October 3, 2018. The gerrymandering politicians argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Then, on November 7, 2018, a three-judge panel of the United States District Court for the District of Maryland, in the case of *Benisek v. Lamone* (13-cv-13233), found that, as a matter of fact, the boundaries of the Sixth Congressional district in that State are examples of egregious partisan gerryman-dering. That court found that the boundaries that the other party is attempting to impose on the State of Maryland are intended to thwart competitive, demo-

cratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in this case, too, the partisan gerrymandering is unconstitutional. This appeal was docketed by this Court on December 6, 2018, as *Lamone v. Benisek* (Case 18-726), the case at bar. The gerrymandering politicians again argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Since all partisan gerrymandering pursues the same purpose, in principle the two Gerrymander Cases, as they stand at present, altogether condemn partisan gerrymandering by both major parties nationwide.

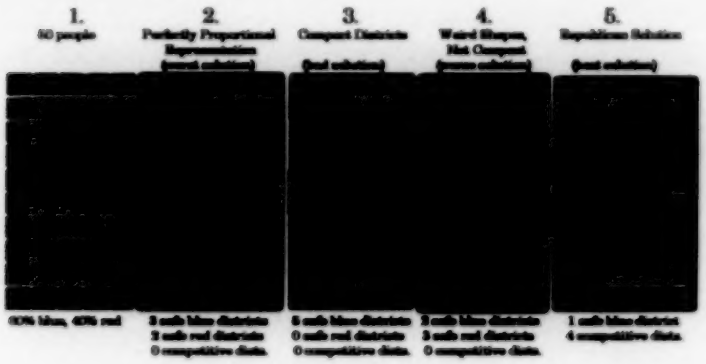
2. What is Partisan Gerrymandering?

All parties and *amici curiae* in the Gerrymander Cases agree on what partisan gerrymandering is. The definition is obvious to courts and scholars alike.

> **Gerrymander**. /jéhriymænder/ géhri. A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party . . . .
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Gerrymander"

Curious as it may seem, in America politicians are allowed to draw their own election districts. Thus many elected officials can hardly be voted out of office, regardless of what the voters think of them. State legislatures may redraw the districts every ten years, when a new census becomes available. Whichever party controls a State legislature in that year will largely be able to control the electoral results in both Congressional and State elections in that State for at least the next ten years, simply by gaming the system in this way. The incentives are enormous, so both parties do it.

This series of sample districts suggests the wide range of possibilities open to gerrymandering politicians:



In both *Rucho* and *Benisek*, as in most States, the majority party has drawn the lines as shown above in Illustration No. 3 ("bad solution"). Then, in both *Rucho* and *Benisek*, the minority party sues the majority party and asks the courts to impose Illustration No. 2 (proportional representation, the "worst solution"). Neither side wants to

be competitive. In both of the Gerrymander Cases, all parties want the Court to intervene, or to refrain from intervening, in such a way as to insure that elections have predictable outcomes and that those outcomes are favorable to the party in question and insure proportional representation. However, elections with foregone conclusions are called "show" or "sham" elections and are typical of third-world dictatorships. USLegal, ***Sham Election Law and Legal Definition*** (https://definitions.uslegal.com/s/ sham-election, retrieved March 2, 2019). The very defini-tion of democracy is free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) **Competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.,"** *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting) (emphasis added).

3. How Harmful is Partisan Gerrymandering Really?

All parties and *amici curiae* in the Gerrymander Cases agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved. This too is obvious to courts and scholars alike. Even the gerrymandering politicians in Maryland, through their Attorney General's excellent "Brief of Appellants," in the case at bar admit that partisan gerrymandering threatens democracy itself (and that it is unconstitutional):

> Maryland recognizes that the problem of partisan gerrymandering poses a threat to democracy in the United States and that our courts have an important role, in both

> remedying existing unconstitutional gerrymander and preventing future violations . . . .
>
> --*Brief of Appellants*, at 26-27

Among the opinions and briefs available to the Court in the case at bar, the most insightful, careful, and also eloquent is that of Chief District Judge Bredar (concurring). It bears quotation at length. First and foremost, it is necessary to understand that gerrymandering is a "noxious" "cancer":

> Partisan gerrymandering is noxious, a cancer on our democracy. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plur-ality opinion) (concluding that severe partisan gerrymanders are incompatible with democratic principles); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2677 (2015) (stating that **to curb partisan gerrymandering is to restore "the core principle of republican government" that "voters should choose their representatives, not the other way around")** . . . ; *Gill v. Whitford*, 138 S. Ct. 1916, 1940-41 (2018)
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 60 (concurring) (emphasis added)

Cancer, if left untreated, kills. Then Judge Bredar points out that partisan gerrymandering is nothing less than "election-rigging":

> [It] amounts to "rigging elections." The present danger of partisan gerrymandering is obvious to courts and scholars alike . . . .
>
> --*Id.*

But it is worse than that, because the problem is growing worse with each passing year:

> The problem of gerrymandering has never been worse in modern American history.
>
> --*Id.*

As this Court has discussed, the problem is driven by technology:

> [T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like) . . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan

> gerrymanders on record . . . . The technology will only get better, so the 2020 cycle will only get worse.
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

What is the big deal? Why does it matter whether one group of politicians or the other is in power at the moment? For the benefit of all parties, this Court has already explained the systemic threat to the entire country of the cancer of election rigging. First, it is in principle outrageous and destroys confidence in the entire political process:

> Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth*, 541 U. S. at 316 (opinion of Kennedy, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.*, at 317 . . . . It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around . . . ."
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

But the practical effects are even worse:

> And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case [*Gill v. Whitford*] are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences.
>
> --*Id.*

The Congressional brief in that case describes a "cascade of negative results" from partisan gerrymandering:

> indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems . . . .
>
> --*Id.*

And the state legislators told a similar story:

> In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal."
>
> --*Id.*

In other words, fair representation of groups, interests, parties, races, classes, and persuasions is minimized or thwarted. The democratic ethos loses vigor.

More and more people figure elections do not count, as least not as much as they used to. A greater sense of political helplessness on the part of ordinary citi-zens can leave a vacuum that more extreme partisans and demagogues of the left and right will gladly fill and exploit. The Gerrymander Cases are conceivably the most important legal cases of the century.

4. Why not Leave the Problem to the Political Branches?

All parties and *amici curiae* in the Gerrymander Cases agree that only the courts can save the nation from the "noxious cancer." This, too, is obvious to courts and scholars alike. Even the Appellants in the case at bar, the gerrymandering politicians in Maryland, do not argue that election rigging is "nonjusticiable" or that *Lamone v. Benisek* is barred by the "political questions doctrine":

> . . . our courts have an important role, in both remedying existing unconstitutional gerrymanders and preventing future violations by providing clear guidance for legislatures and other districting bodies.
>
> --"Brief for Appellants" at 27

Historically, at least since 1962, federal courts have been decisive in rejecting Justice Frankfurter's admonition at all costs to avoid entering into the "political thicket" of redistricting. Instead this Court has decisively struck down gerrymanders that carved out districts with different population sizes. See *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds*

v. Sims, 377 U.S. 533 (1964). These decisions are among the most important, the most beneficial, and the most widely cited that this Court decided in the Twentieth Century. (The partisan gerrymandering of today is even more destructive than were districts of unequal population.)

However, since then the federal courts have been very reluctant to strike down gerrymanders that are purely partisan, just as long as the districts in question contain populations of equal size, as in the case at bar. Judicial discomfort and hesitation result in part from the provision in Article I, Section 4, that gives State legislatures the power to prescribe the time, places, and manner of Congressional elections. Also, Congress does have the right under Article I to alter such stipulations. Furthermore, there is no explicit provision in the Constitution for supervision of State election rules by the federal judiciary.

However, the Constitution is not a mutual-suicide pact. It is obvious that the acceleration of the noxious "cancer" will not be stopped or even moderated by Congress, either this year or in the foreseeable future. The direct beneficiaries of malfeasance will not ordinarily be quick to overrule it at their own expense. The fox never guards the henhouse.

The present situation is like a high-stakes football game between two parties in which knives are used, because there is no referee to forbid it. Both sides get hurt by the carnage, but neither side

dares disarm unilaterally. Only the courts can change the rules.

5. The Courts So Far have Articulated No Coherent Standard.

The unintended result of this Court's understandable ambivalence about how to address gerrymandering is that the courts so far have articulated no coherent standard. Again, the excellent opinion of Judge Bredar in the case at bar is instructive:

> As the Supreme Court made clear in Vieth, a legal standard employed to measure the lawfulness of partisan gerrymanders "must be principled, rational, and based upon reasoned distinctions." Vieth, 541 U.S. at 278. Otherwise, it is not justiciable. Note: see Republican Party of N.C. v. Martin, 980 F.2d 943, 950 (4th Cir. 1992) ("Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.") (alteration in original); Hamilton v. Pallozzi, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal.")
>
> --Opinion of Bredar, C.J.,
> United States District Court
> for the District of Maryland in
> *Benisek v. Lamone* (13-cv-3233)

(November 7, 2018), at 61 (concurring)

Judge Bredar reviews the case law:

> From 1986 until today, the Court has rejected stan dard after standard as not workable and, consequently, non-justiciable. See Davis v. Bandemer, 478 U.S. 109 (1986) (articulating, as a plurality, that a justiciable partisan gerrymandering claim requires a showing of intent to discriminate and a denial of a group's chance to influence the political process); Vieth, 541 U.S. at 306 (holding that the Bandemer plurality standard failed and concluding that partisan gerrymandering claims are effectively nonjusticiable); Vieth, 541 U.S. at 317 (Stevens, J., dissenting) (proposing a standard); Vieth, 541 U.S. at 343 (Souter, J., dissenting) (same); Vieth, 541 U.S. at 355 (Breyer, J., dissenting) (same); see also Ra-dogno v. Ill. State Bd. of Elections, No. 11-4884, 2011 WL 5868225, at *2-3 (N.D. Ill. Nov. 22, 2011) (listing rejected partisan gerrymandering standards).
>
> --*Id.*

6. The Opinion of the District Court does Not Meet the Requirements of *Vieth* and its Progeny.

The excellent "Brief for Appellants," written by the Attorney General of Maryland and filed on behalf of the gerrymandering politicians in the case

at bar, shows exhaustively why the opinion of the district court in the case at bar does not meet the requirements of *Vieth* and its progeny. The argument is persuasive. These *amici* need not repeat it here.

Strikingly, the Chief District Judge below agrees with the Appellants on this important point. To return to the instructive concurring opinion of Judge Bredar:

> [In the opinion of the District Court] Judge Niemeyer, joined by my colleague Judge Russell, puts forth an insightful majority opinion, one with which I agree in many respects. Compelling as the opinion is, though, my reading of *Vieth* and its progeny prevent me from joining it.
>
> > I cannot join because Judge Niemeyer's opinion leans on the results of elections in assessing the lawfulness of the Maryland gerrymander. His opinion for the Court considers evidence of electoral outcomes as proof that the gerrymander succeeded—in short, that the map-drawers flipped the Sixth District from red to blue. In considering this evidence, the opinion performs a causation analysis—under both the representational rights and associational rights theories—that would ask future courts to discern whether a given electoral outcome resulted from a legislative manipulation of voters or from the voters themselves changing their minds. Shapiro v. McManus, 203 F. Supp. 3d 579, 602, 606 (D. Md. 2016) (Bredar, J.,

> dissenting); see also id. at 600 ("[T]he courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus voluntarily changed its tune."). The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging—perhaps impossible—to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did. The Supreme Court's requirements for a standard are exacting in this context, so much so that the Court has cast aside numerous attempted standards. Assessing causation by examining the outcome of any given election will always be problematic. And, such a problematic test probably does not satisfy the requirement of Vieth that the tool used to gauge lawfulness be "principled, rational, and based upon reasoned distinction." Vieth, 541 U.S. at 278. Because this problematic causation analysis permeates Judge Niemeyer's opinion, I write separately.
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 62 (concurring)

Judge Bredar explains:

> I concur on narrower grounds, rejecting the representational rights theory once again . . . . First, the representational rights analysis appears to line up with the many other valiant—though nonetheless rejected—attempts at crafting a standard for partisan gerrymandering claims because it does not articulate a sufficiently concrete and measurable standard. Beyond the causation problems connected to reliance on electoral outcomes for proof, it also leaves unanswered the line-drawing question: how much political consideration is de minimis and how much violates the Constitution? See, e.g., Vieth, 541 U.S. at 291 (rejecting as not judicially manageable a standard that weighs factors "with an eye to ascertaining whether the particular gerrymander has gone too far").
>
> --*Id.*

In the opinion of *amici*, the Appellants and Judge Bredar are correct that the opinion below fails to meet the requirements of *Vieth* and requires the courts to decide whether Congressional election results are legally permissible. Obviously, if the legal reasoning of the opinion of the District Couirt in the case at bar were affirmed and turned into a national legal standard, it would violate the Doctrine of Separation of Powers and quickly become a legal and political quagmire. It would require the federal courts to examine each election result to decide whether or not it is permissible—exactly what this Court has so prudently stated so clearly that it will not condone.

There is a second important reason why the reasoning of the opinion of the District Court in the case at bar should not be adopted by this Court. It is based on a Constitutional provision (the First Amendment) that is simply not applicable to redistricting and gerrymandering cases.

In *Vieth v. Jubelier*, 541 U.S. 267 (2004), this Court rejected a claim based on the Equal Protection Clause of the Fourteenth Amendment, and a plurality of this Court (Scalia, J.) opined that all gerrymander claims based on the Fourteenth Amendment, no matter how well crafted, could never show standing. After all, the harm caused by rigged elections is nation-wide, while the Equal Protection Clause protects individual rights from the States.

Similarly, in *Gill v. Whitford*, 585 U.S. ___ (2018), this Court rejected a claim based on the First Amendment, and the majority opinion (Roberts, C.J.) expressed strong doubts that any gerrymandering claim brought under the First Amendment could show standing. After all, the First Amendment, too, is intended to protect individual rights, and partisan gerrymandering is a cancer that destroys the entire electoral system, not just specific individuals. That is quite different. To make a long story short, rigging elections just does not abridge individuals' freedom of speech (First Amendment) and does not discriminate against a protected group (Fourteenth Amendment).

To adopt the reasoning of the opinion of the District Court in the case at bar would be unwarranted. However, it would also be a grave error not

to heed the findings of fact of the district courts in both *Rucho* and *Benisek*, that the partisan gerrymandering they examined and weighed carefully is obviously intentional, improper, illegal, malicious, undemocratic, and unfair. To fail to heed those courts' findings of fact—to fail to affirm the judgment of the U.S. District Court--would shelter even the most egregious partisan gerrymanders from judicial review.

7. There is an Available Standard.

Fortunately, there is an available Constitutional provision: the long-neglected Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

The Republican Form of Government Clause is included in the Constitution for good reasons, and it has a distinguished provenance and a discernible meaning. James Madison in *Federalist* No. 43 (January 23, 1788), explains that a Republican Form of Government Clause, or something like it, is an essential part of any federal governmental system; otherwise a systemic problem arising in any one State will spread to other States. The whole system is based on "the impartiality of Judges," who can stop contagious political diseases from spreading. Support for the importance of enforcing the

Republican Form of Government Clause is one of the few points on which Thomas Jefferson and Alexander Hamilton, and Federalists and anti-Federalists alike, agreed. That great Federalist justice of this Court, Joseph Story, explains the thinking of the Founders:

> The want of a provision of this nature was felt, as a capital defect in the plan of the [Articles of] confederation, as it might in the consequences endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government.
>
> --J. Story, *Commentaries on the Constitution* 3:§1808 (1833)

For example, if Florida or New York were to become a dictatorship, the people of the United States (and the people of the infected State) would have a Constitutional remedy. Under the Articles of Confederation, they had no remedy. And the Clause is the only Constitutional remedy. The same applies to gerrymandering. It is impossible to employ extreme partisan gerrymandering for very long, thereby violating "the most fundamental of all democratic principles," and to retain for long a republican form of government. As both Jefferson and Lincoln might have observed, this is just the common sense of the matter.

What is the specific justiciable legal standard suggested by the Republican Form of Government Clause? This Court could readily discover a standard if it were to rely on the Republican Form of Government Clause and thereby free itself from irrelevant First Amendment and Equal Protection precedents requiring harm to specific individuals. The obvious legal standard that suggests itself is that the States must maximize the thing that is the very definition of democracy: free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) After all, competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.'" *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting).

So the legal standard suggested by the text and history of the Republican Form of Government Clause and of the Constitution of 1787 as a whole, is:

> The State legislature may exercise its political discretion to draw district lines in its State as it sees fit. It is of no concern to the courts how the voters vote. The only requirement of the Constitution is that lines must be drawn so as to maximize the number of competitive districts in the State (as shown in Illustration No. 5 above). And "competitive district" is defined the way it is defined in all election-law studies: to the extent reasonably possible, no district may

contain more than 55 percent of voters from any one party.

This proposed standard solves the problem completely while avoiding entanglement by the courts in politics in any way. It is concrete and specific and therefore easily justiciable. Thus, abstracting from the irrelevant rules of First Amendment and Equal Protection law, this proposed standard meets all of the criteria suggested by both the majorities and the minorities in all of the recent precedents: *Davis v. Bandemer* (1986), *Vieth v. Jubelirer* (2004), *League of United Latin American Citizens v. Perry* (2006), *Arizona State Legislature Ariz. v. Indep. Redistricting Comm'n* (2015), and *Gill v. Whitford* (2018).

8. Is there an Argument against Invoking the Republican Form of Government Clause?

Is there a compelling legal argument against invoking the Republican Form of Government Clause in the case at bar, for which the Clause obviously was intended? After all, there must be some reason why the Clause has suffered neglect and abandonment. The reason is not at all that "republican form of government" is a vague term with no ascertainable meaning.

The central importance and meaning of "republican form of government" is already indicated in the "Ordinance of 1787: Northwest Territorial Government," passed by the Confederation Congress, which included the framers of the Constitution of 1787, which was drafted by the same people in the

same year. The Ordinance is placed at the front of the United States Code as one of the "Organic Laws" (constitutional documents) of the United States, together with the Declaration of Independence and the Constitution of 1787. See U.S.C. "Front Matter: Organic Laws" (2019).

In the Ordinance of 1787, it is clear that the principle of republican government is a broad guarantee of political and civil liberty. In order to extend to the new States "the fundamental principles of civil and religious liberty, which form the basis whereon these republics [the extant States], their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitution, and governments, which hereafter shall be formed in said territory," the Confederation Congress required, as "articles of compact" to "forever remain unalterable," the celebrated libertarian articles excluding slavery and assuring freedom of worship, habeas corpus, jury trial, due process, inviolability of contracts, public schools, just dealings with Indians, and federal supremacy. To clinch the point, Congress requires that **"the constitution and government, so to be formed, shall be republican**, and in conformity to the principles contained in these articles." See U.S.C. "Front Matter: Organic Laws" (2019) (emphasis added). Thus, the guarantee of republicanism, which applies to the very constitution and form of government, is the supreme and most fundamental protection of the rights of the people.

Why the most important clause in the Constitution, at least before the Fourteenth Amendment, has been neglected is a long story that would

require a separate article. But the principal culprit was a pro-slavery appointee of Andrew Jackson, Chief Justice Roger Taney, who wanted to suppress the Clause to prevent its use to free the slaves.

There have been only two decisions of this Court since 1789 that have explicitly addressed the Republican Form of Government Clause: *Luther v. Borden*, 48 U.S. (7 How.) 11 (1849) (Taney, C.J.); and *Colgrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J.). The later has been clearly overruled by this Court in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964). In *Baker*, Justice Frankfurter correctly characterized that case as "in effect, a Guarantee Clause claim masquerading under a different label."

So *Luther v. Borden* stands alone as an obstacle. Like Roger Taney's "masterpiece," *Dred Scott v. Sandford*, 60 U.S. 393 (1857), no later decision of this Court has ever overruled it. In *Luther v. Borden*, the losing party invoked the Clause, and Roger Taney rejected the claim, opining in dicta that the Clause may be used by the President and by Congress, but not by the Courts of the United States. Therefore, any use of the Republican Form of Government Clause by any court of the land necessarily must overrule the dicta in *Luther v. Borden*.

However, to invoke the Republican Form of Government Clause, this Court need not overrule the holding in *Luther v. Borden*. The meaning and binding character of a precedent is not its dicta but rather its holding. The holding of an opinion is:

> The legal principle to be drawn from the opinion (decision) of the court. Opposite of dictum. It may refer to a trial ruling of the court upon evidence or other questions presented during the trial.
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Holding"

The holding of an opinion is the application of the legal principles to the specific facts in the case. And the holding of *Luther v. Borden* is not nearly as broad as its dicta. (Even if it were, *Luther v. Borden* cannot nullify the Constitution of 1787 as explained by the Ordinance of 1787.)

In *Luther v. Borden*, the government of Rhode Island had not been reformed, and the franchise had not been expanded since the State's Royal Charter of 1663 and was highly undemocratic. So a group of radicals held an unauthorized constitutional convention on their own and declared themselves to be a revolutionary government. They marched on an armory, but their cannon misfired, and they were arrested and incarcerated. From prison they sued the legitimate government, arguing that the soldiers who had arrested them were guilty of trespass. The State court denied their claim, and the U.S. District Court affirmed. The prisoners appealed to the Supreme Court of the United States, arguing that the legitimate government was less democratic than the one they would have liked to impose, and asked the Supreme Court in effect to dissolve the legitimate government. Seven years later, the Supreme Court judiciously declined to rule in their favor and affirmed the dismissal of their case. This narrow decision in a

unique case cannot provide the basis for forbidding all of the courts of the United States ever after from invoking the very important Republican Form of Government Clause.

CONCLUSION

For the foregoing reasons, this Court should declare claims of election-rigging using partisan gerrymandering to be justiciable under the Republican Form of Government Clause, adopt the proposed standard for evaluating the constitutionality of partisan gerrymandering, and affirm the judgment of the United States District Court.

March 8, 2019

Respectfully submitted,

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No. 18-726

IN THE

Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF REPRESENTATIVE DAVID TRONE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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For the People Act of 2019, H.R. 1, 116th Cong. (introduced Jan. 3, 2019) 23

Maryland's 6th congressional district, Wikipedia, available at https://en.wikipedia.org/wiki/Maryland%27s_6th_congressional_district (last accessed Dec. 12, 2018) 7

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Md. State Bd. Elections, Elections by Year, Representative in Congress (election year 2018), available at https://results.elections.maryland.gov/elections/2018/results/general/gen_results_2018_2_008X.html 13

Md. State Bd. Elections, Elections by Year, Representative in Congress (elections of 2002 through 2006), available at https://results.elections.maryland.gov/elections/2002/results/g_representative_in_congress.html; https://results.elections.maryland.gov/elections/2004/general/congress.html; https://results.elections.maryland.gov/elections/2006/results/general/office_Representative_in_Congress.html 12

Md. State Bd. Elections, Eligible Active Voters on Precinct Register (as of Oct. 21, 2012), available at https://results.elections.maryland.gov/press_

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae David Trone represents the people of Maryland's sixth district in the House of Representatives. Mr. Trone first ran for office in the 2016 Democratic primary for Maryland's eighth congressional district, finishing second. On August 2, 2017, he announced his candidacy for an open seat in the adjacent sixth district and thereafter campaigned extensively throughout the district. In June 2018, he won the Democratic Party nomination over four challengers. The Washington Post endorsed Mr. Trone in the general election "by a mile" over a Republican candidate who had "dismissed Montgomery County, where she and a big chunk of the district's constituents live," in favor of the more Republican-leaning sites in the west of the district. Editorial Board, *David Trone for Congress in Maryland*, Washington Post (Oct. 22, 2018). On November 6, 2018, Mr. Trone won the general election with 59 percent of the vote, compared with 38 percent for the Republican candidate and about 3 percent for other candidates.

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[1] On December 19, 2018, during the jurisdictional briefing, Mr. Trone moved for leave to file an amicus brief in support of appellant, and the Court granted that motion on January 4, 2019. This brief is a slightly modified version of Mr. Trone's earlier brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

Mr. Trone is a Maryland native who grew up on a struggling family farm in south central Pennsylvania, near the Maryland border. He completed graduate business school and started a small business in Pennsylvania, and then moved to Montgomery County, Maryland, where he and a brother built and ran one of the country's largest and most successful retailers of wine and other beverages. The company is based in Montgomery County and today employs more than 7000 people nationwide. Mr. Trone and his wife raised four children in Montgomery County, where Mr. Trone once coached 13 different youth sport teams in a single year. He has contributed tens of millions of dollars to local and national charities.

Mr. Trone's unusual background in conservative-leaning endeavors like farming and entrepreneurship, layered against an extensive history of liberal philanthropy, helped him connect with voters throughout the sixth district. The district encompasses an historic corridor of Maryland that runs from the commuting exurbs of Washington D.C. into rural communities rooted in farming, manufacturing, and tourism. At one time the political and commercial interests of the district were roughly linked by the original route of the Baltimore & Ohio Railroad and by the Chesapeake & Ohio Canal, two of the State's greatest public works projects. Today the district is defined more by Interstates 270 and 70, along with the non-navigable, upper reaches of the Potomac River and its tributary, the Monocacy. Mr. Trone believes the people of the district today, while broadly split among the two major political parties, are not deeply conservative or liberal, but instead are united by a pragmatism and industriousness that suits his background and personality. He is honored

to be their representative and hopes they re-elect him in 2020. He desires that the sixth district retain its current form until then.

SUMMARY OF ARGUMENT

This Court has struggled to find a workable test that will define constitutional limits on partisan gerrymandering. The resulting uncertainty is not a jurisprudential flaw; it is a feature of competing constitutional values that cannot be easily reconciled. Ignoring this reality, the three-judge court gave life to the aphorism that for every complex problem there is an answer that is clear, simple, and wrong. The court fashioned and applied a concise three-part test that yielded an absurd result: the invalidation, as an excessively partisan gerrymander, of a redrawn congressional district that is geographically compact and politically competitive; is more compact and competitive than the one it replaced; and is far more competitive than the state as a whole.

Perhaps the quest for a simple test to measure unconstitutionally partisan gerrymandering is worth pursuing. But not in this case, which is easily resolvable by accepting that a redrawn district is constitutional if it satisfies any one of five objective measures of the geographical shape and political composition of the redrawn district, rather than by requiring a review of the conduct and the subjective intent of legislators, map-drawers, voters, and other stake-holders in the redistricting process. In this case, the Court should hold that a redrawn congressional district is not subject to constitutional attack for partisan gerrymandering, regardless of the

multiple reasons it was redrawn, if the resulting district is:

1. Reasonably compact and cohesive;
2. More compact and cohesive than its predecessor;
3. Reasonably competitive as measured by the percentage split in party registrations;
4. More competitive, as measured by the percentage split in party registrations, than its predecessor; or
5. More competitive than the state-wide split in party registrations.

Maryland's re-drawn sixth district meets all five of these criteria, but any one should be enough to pass constitutional muster. The Court has been clear that a partisan motive is not enough to invalidate a redrawn district. *E.g.*, *Gaffney* v. *Cummings*, 412 U.S. 735, 752-53 (1973). A natural corollary is that a re-drawn district that has geographic or political cohesion, or that diminishes objective measures of partisanship when compared with the prior district, cannot be unconstitutional even if partisanship was a significant force in the redistricting process. A redrawn district that meets those criteria is fundamentally within the purview of the state's political actors. Only if a re-drawn district violates these criteria should the judiciary examine the subjective intent of the redistricting authorities or the alleged individual harms to voters.

Adopting one or more of these neutral principles may not resolve every case of partisan gerrymandering, but it will provide clear, achievable, and constitutional targets for redistricting personnel.

And it will supplant the dangerous precedent reached by the three-judge court in this case, in which a finding of sufficiently partisan intent inevitably results in a constitutional injury, and an order to redraw a district that is perfectly satisfactory as a constitutional matter and could very easily become more partisan as a result of the order.

The constitutionally acceptable – and politically preferable – check on excessively partisan gerrymandering is nationwide legislation, as authorized by Article I, § 4. Mr. Trone has co-sponsored a bill in the current Congress that would create independent redistricting commissions and establish standards for the commissioners to apply, including standards that would limit partisan gerrymandering. That bill, if it passes, would have a political legitimacy that cannot and should not come from this Court, which can only mire itself in partisanship by constitutionalizing standards for partisan gerrymandering and then refereeing the innumerable challenges that will ensue.

ARGUMENT

I. HISTORY, GEOGRAPHY, AND POLITICAL DEMOGRAPHY OF MARYLAND'S SIXTH DISTRICT

In assessing the redrawn sixth district, the court below focused mostly on what it saw as partisan intent in repositioning clusters of voters after the 2010 decennial census. Mixed into its assessment of intent, however, was some commentary about the geographic and demographic characteristics of the new district. The tenor of the commentary was that

the new district made less sense than the old because it traded large portions of four northern and eastern counties for a section of western Montgomery County. *See* JS App. 54a.

The court's commentary was misguided. The redrawn sixth district has a firm historical grounding and is more geographically and politically cohesive than the one it replaced. The three-judge court observed that "[s]ince 1966," the sixth district included "all of Maryland's five most northwestern counties – Garrett, Allegany, Washington, Frederick, and Carroll Counties." JS App. 5a. But the 1966 map was not drawn by state politicians; it was drawn by an earlier three-judge court that had concluded the unequal populations in the existing districts violated the Supreme Court's "one person, one vote" rule. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966). By contrast, from 1872 through 1966, all of Montgomery and Frederick counties were included with the three western counties in a single congressional district. *See* JA978-985. Moreover, in 1972 the sixth district included portions of northern Montgomery County, *see* JA989, and after the 1980 census the sixth district was redrawn to include large portions of western and northern Montgomery. JA991. Montgomery became essentially its own district after the 1990 census, JA993, but was then fragmented after the 2000 census, with a small arm in the north of the county assigned to the sixth district. JA995.[2]

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[2] Prior to the 1992 redistricting, voters in the sixth district had a long history of electing members of both parties, many of them moderates. Starting in 1911, the succession ran:

This 2002 map remained in place through the 2010 elections and became the baseline for the three-judge court's assessment of the current sixth district. The 2002 (baseline) and 2011/12 (current) maps are reprinted below as they were introduced in the record, with the sixth district depicted in green. (Large versions are at JA995 and JA997.)

Democratic (1911-17, David J. Lewis); Republican (1917-31, Frederick N. Zihlman); Democratic (1931-39, David J. Lewis); Democratic (1939-41, William D. Byron); Democratic (1941-43, Katharine Byron); Republican (1943-53, James G. Beall); Republican (1953-59, DeWitt S. Hyde); Democratic (1959-61, John R. Foley); Republican (1961-69, Charles M. Mathias Jr.); Republican (1969-71 John G. Beall Jr.); Democratic (1971-78, Goodloe E. Byron); Democratic (1979-93, Beverly Butcher Byron). After the 1992 redistricting, the seat was held for 20 years by Roscoe Bartlett, a conservative Republican. *See* Maryland's 6th congressional district, Wikipedia, available at https://en.wikipedia.org/wiki/Maryland%27s_6th_congressional_district (last accessed Dec. 12, 2018).

The court focused on the net change in Democratic- or Republican-registered voters in the district

without acknowledging that the redrawn district was more compact and cohesive than its predecessor. As shown above, the 2002 map extended from the Susquehanna River in the east all the way to the State's western border, encompassing large pieces of Harford and Baltimore counties that have never been meaningfully connected with western Maryland. Even Carroll County has minimal cultural connection to western Maryland. Harford, Baltimore, and Carroll counties are all part of the Baltimore-Columbia-Towson metropolitan statistical area.

By contrast, the northern and western portions of Montgomery County in the current sixth district are closer to the western counties and have long been politically and culturally associated with them. Historically, the district was connected by the Potomac River, by the Chesapeake and Ohio Canal that runs alongside it, and by the original western line of the Baltimore & Ohio Railroad. The B&O, running west from Baltimore along the Patapsco, turned south just below Frederick and ran roughly along the Frederick corridor of the current district, before turning west along the Potomac toward the coal fields in the western counties (crossing into what is now West Virginia for a stretch). A spur into Frederick opened in 1831, forming the Frederick Branch that still carries commuters today under the banner of the State's MARC service. The development and operation of the C&O Canal and B&O Railroad were major political issues in Maryland in the 19th Century, when regional political blocs often sought state investment and support for railways and canals. The Canal in particular was a longtime financial albatross for the State and was a major funding concern at the State's 1867 Constitutional

Convention before it finally stabilized, at least for a time, in the late 19th Century. *See, e.g.*, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION 788-816 (J. Connolly ed. 2018) (reprinting convention debates). The Canal and the Railroad were western Maryland's principal commercial corridors before the proliferation of the automobile and they created common interests for communities along the line.

Today, the district remains connected by the Potomac and Monocacy rivers. The Canal right-of-way is now a popular linear park that traverses most of the district. And the most heavily populated sections are connected by the I-270/I-70 corridor running north and west out of Washington D.C. This corridor is the State's modern growth engine, forming its own community of technology and other modern businesses and institutions. *See* JA961. (The national headquarters of Mr. Trone's business is situated at the base of the corridor, just outside the district.)

The redrawn sixth district is not perfectly geometric – a near impossibility in Maryland – but it is reasonably compact and cohesive given Maryland's odd shape and the constitutional requirement of proportionate representation. The State introduced ample evidence from highly qualified experts explaining that the redrawn district possessed demographic, economic, and transportation cohesiveness. *E.g.*, JA959-960. What's more, the three-judge court never tried to explain why the new map was less geographically, historically, or culturally cohesive than the prior map, preferring to focus on the relative *changes* in political-party registrations.

This was a flawed methodology because the preexisting sixth district was no paragon of nonpartisanship; it was instead drawn to provide a safe seat for Republicans. If the test for constitutionality turns on party-registration changes from one map to the next, the relevant measure should not be the total swing from one party to the next, but the net change in competitiveness; i.e., whether the district is more or less competitive, regardless of which party has the edge.

This point is readily established through numbers furnished by plaintiffs' expert witness, Michael P. McDonald. In attempting to show the voter "swing" in the redrawn sixth district, a concept credited by the three-judge court, Dr. McDonald reported the following statistics (correcting for trivial errors):

	Bchmrk [2002]		Adopted [2011]		Chng.
	No.	Pct.	No.	Pct.	No.
Dem.	159,661	35.8%	184,120	44.8%	24,459
Rpbl.	207,966	46.7%	141,548	34.4%	-66,418
NoPty	77,892	17.5%	85,535	20.8%	7,643
Total	445,519	100.0%	411,203	100.0%	-34,316

Thus, Dr. McDonald and the court focused on a swing of 90,877 party registrations (24,459 more Democrats plus 66,418 fewer Republicans). As shown in the table below, however, the redrawn sixth district was more competitive than the 2002 version when measured by the relative differences among the two major parties.

	Bchmrk [2002]		Adopted [2011]	
	No.	Pct.	No.	Pct.
Dems – Reps	-48,305	-10.8%	42,572	10.4%
(Reps+NP) - Dems	126,197	28.3%	42,963	10.4%
Reps – Dems	48,305	10.8%	-42,572	-10.4%
(Dems+NP) - Reps	29,587	6.6%	128,107	31.2%

This table shows that the percentage difference between registrations for the two major parties was slightly less in 2011 (10.4 vs. 10.8 percent). Further, Democrats had a smaller registered-voter advantage in 2011 than Republicans had in 2002 (42,572 vs. 48,305). Finally, if the Republican candidate in the redrawn district carried the nonaligned voters, the Republican would have had a substantially greater chance of defeating a Democrat than the other way around under the prior map (Republicans plus No Party outweighed Democrats by 42,963 in 2011, while Democrats plus No Party outweighed Republicans by only 29,587 in 2002). This type of result is not unprecedented in Maryland, which is all the more reason why courts should be cautious to declare constitutional injuries by gerrymandering. Maryland's most conservative district, the first, is generally a Republican stronghold. The Republican candidate prevailed there in every election from 1990 through 2006, winning by 53, 52, and 38 points in the elections of 2002 to 2006. *See* Md. State Bd. Elections, Elections by Year, Representative in Congress (elections of 2002 through 2006).[3] But in 2008, with

[3] Available at https://results.elections.maryland.gov/elections/2002/results/g_re

no change in district boundaries, the Democratic candidate won. *See id.* (election year 2008).[4]

Moreover, the redrawn sixth district was significantly more competitive than the State as a whole. In 2012, Democrats comprised 55.7 percent of all registered voters in the state, versus 26.0 percent for Republicans – a ratio of more than 2.1 to 1, and a percentage-point spread of 29.8. *See* Md. State Bd. Elections, Eligible Active Voters on Precinct Register (as of Oct. 21, 2012).[5] The redrawn sixth district, by contrast, has a Democrat-to-Republican ratio of 1.3 to 1 and a percentage-point spread of only 10.4. By these absolute measures, the redrawn sixth district is substantially more competitive than Maryland as a whole. And the sixth district proved to be the most competitive of Maryland's eight congressional districts in the 2018 general election, *see* Md. State Bd. Elections, Elections by Year, Representative in Congress (election year 2018),[6] suggesting that the

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presentative_in_congress.html;
https://results.elections.maryland.gov/elections/2004/general/congress.html;
https://results.elections.maryland.gov/elections/2006/results/general/office_Representative_in_Congress.html.

[4] Available at
https://results.elections.maryland.gov/elections/2008/results/general/gen_results_2008_4_008X.html.

[5] Available at
https://results.elections.maryland.gov/press_room/documents/PG12/PrecinctRegisterCounts/statewide.pdf.

[6] Available at
https://results.elections.maryland.gov/elections/2018/results/general/gen_results_2018_2_008X.html.

district had returned to its historical competitiveness under the challenged map.

II. THE COURT SHOULD ENDORSE OBJECTIVE CRITERIA THAT ESTABLISH WHEN A REDRAWN DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK

The three-judge court acknowledged that the Constitution gives authority to draw election districts to the political branches of the state and federal governments. JS App. 31a, 33a (citing U.S. Const. art. I, § 2, cl. 1 & art. I, § 4, cl. 1). The court further recognized that this Court has addressed the constitutionality of partisan gerrymandering in a series of cases, most arising under the Equal Protection Clause, and has never invalidated a district on that basis or even settled on a clear standard for doing so. *See* JS App. 38a. In Amicus's view, the facts of this case are well within existing Equal Protection precedents, clearly foreclosing any relief under that clause. *See, e.g., Vieth* v. *Jubelirer*, 541 U.S. 267, 281 (2004) (plurality); *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Gaffney* 412 U.S. at 752-53; *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 423 (2006) (plurality) [hereafter, "*LULAC*"].

Doubtless because of these precedents, plaintiffs in this case sought relief under the First Amendment, and the three-judge court found in that Amendment a test for partisan gerrymandering that is notable for its breadth as much as for its novelty. After 50 years of this Court's rejecting constitutional challenges to partisan gerrymandering, the divided three-judge court found (through different two-judge majorities)

two justiciable violations of the First Amendment. The tests it fashioned for proving these violations, moreover, turned out to be quite easy to satisfy, and if endorsed by this Court they would effectively nullify longtime judicial reticence about intruding on congressional redistricting.

Two of the three judges below (Niemeyer and Russell, JJ) found that plaintiffs could prove a violation of their First Amendment representational rights by establishing (1) that the state actors drew the map with "specific intent" to burden them "because of how they voted or the political party with which they were affiliated"; (2) that the redrawn district diluted their votes "to such a degree that it resulted in a tangible and concrete adverse effect"; and (3) that the intent to burden was a but-for cause of the adverse effect. JS App. 59a. The same two judges found that plaintiffs could prove a violation of their First Amendment associational rights by proving the same elements, except that element (2) required proof of a burden on the "targeted citizens' ability to associate in furtherance of their political beliefs and aims." *Id.* (Chief Judge Bredar concurred in the associational-rights holding, but on somewhat narrower grounds.)

The three-judge court's decision has some grounding in Justice Kagan's concurring opinion in *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018), and in Justice Kennedy's earlier concurring opinion in *Vieth*. *See* 541 U.S. at 314-16. By contrast, the plurality in *Vieth* was skeptical of a First Amendment basis for partisan gerrymandering claims, "for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of

political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." *Id.* at 294.

The three-judge court's decision in this case proves the *Vieth* plurality's point. The court's two tests for First Amendment justiciability turned out to be very easy to satisfy – so easy that the court granted a permanent injunction on plaintiffs' motion for summary judgment, relying extensively on unreliable hearsay. Plaintiffs might answer that the test was satisfied because the facts were egregious, but that is unpersuasive for two reasons. To be sure, the record included ample evidence that some state officials intended the sixth district to lean Democratic. But as Appellants have explained at greater length, the record also included substantial evidence of nonpartisan intent, *see* App'nt Br. 11-14, and nothing in the record suggested a specific intent not to comply with the law as articulated by this Court. That law has been clear for decades that extensive partisan intent in redistricting is permissible, at least if the challenge is brought under the Equal Protection clause. *E.g.*, *Gaffney*, 412 U.S. at 752-53. The three-judge court fundamentally confused partisan intent, which is clearly permissible, with unlawful intent to harm specific voters because of their party affiliation, which was not remotely proven.

More important, the tests fashioned by the three-judge court are satisfied in nearly every case where political actors control redistricting and the prevailing voter registrations in the redrawn district change from one party to the other. The intent element of the three-judge court's test, although

ostensibly requiring a "specific intent" to burden voters based on their prior votes or party affiliation, in fact requires nothing more than proof of an intent that the redrawn district favor one party over the other. It might have been a different case if the three-judge court required, for instance, proof that redistricting officials curved an otherwise straight boundary around the house of a specific political opponent in retaliation for that opponent's political affiliation, or speech. But nothing like that happened in this case, and as a practical matter the court's "specific intent" element is readily provable. After that, the other two elements – causation and damages – are gimmes. A few voters testify about their political ennui after redistricting, and the case is over. Indeed, in this case, the court did not even require first-hand testimony. *See* App'nt Br. 54-55.

Nothing in this Court's precedents, or in the three-judge court's decision, explains why partisan gerrymandering challenges should be easier to win under the First Amendment as compared to the Fourteenth. The questions that have animated jurisprudence in this area for decades are "what is necessary to show standing in a case of this sort, and whether those claims are justiciable." *Gill*, 138 S. Ct. at 1929. These questions are aimed at ensuring that the judiciary respects its limited role. *Id.* In *Gill*, decided just last term, seven justices agreed that "[f]oremost among these requirements is injury in fact — a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affect[s] the plaintiff in a personal and individual way." *Id.* (quotation marks omitted).

The alleged First Amendment injuries in this case were essentially identical to the injuries alleged in the Equal Protection cases: dilution of the plaintiffs' vote, or their enthusiasm to vote, because of a perception that their party's candidate will not win. Despite the three-judge court's attempt to frame the plaintiffs' injury as personal, partisan gerrymandering cases are by nature impersonal. If the intent is to "flip" a district, as the three-judge court believed, the target is the district as a whole, not any individual voter.

This Court may not want to declare a broad rule equating the justiciability standard for partisan gerrymandering challenges under the First and Fourteenth amendments. As noted, for instance, the First Amendment might provide relief if map-makers specifically re-districted a political opponent who criticized the re-districters. But that is not remotely what happened in this case.

Instead, Amicus suggests that the Court proceed cautiously, as it has done for decades in this area, by holding that any number of objective principles preclude relief in this case and others like it, whether the claim is under the First or Fourteenth Amendments. Those principles are set forth in the next section.

III. BY REASONABLE OBJECTIVE MEASURES, MARYLAND'S REDRAWN SIXTH DISTRICT IS NOT SUBJECT TO CONSTITUTIONAL ATTACK FOR PARTISAN GERRYMANDERING

The Court should reverse the judgment below because at least five objective and undisputed facts

should put this case beyond the reach of constitutional challenge. A decision on these grounds would not foreclose all challenges to partisan gerrymandering under the First or Fourteenth Amendments, but it would establish clear safe harbors for map-makers that accommodate competing constitutional principles: namely, that the Constitution commits re-districting authority to political actors and does not prohibit partisanship in the process, yet also affords each citizen a right to cast a vote that counts as much as any other citizen's vote. It will also permit Congress to fashion a national solution to partisan gerrymandering that will possess a political legitimacy that can come only from federal legislation.

First, the Court should hold that a redrawn district that is reasonably compact and cohesive is not subject to a collective gerrymandering challenge even if the redrawn map was intended to, and does, change the district's prevailing party affiliation. Permitting such challenges would unreasonably intrude on state officials' constitutional power to draw congressional election districts, and to consider partisan interests as they do so. *See, e.g.*, *Gaffney*, 412 U.S. at 754 ("neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State"). Whatever limits the Constitution imposes on partisan gerrymandering, they cannot be

crossed if the new district has reasonable geographic and cultural cohesion.

Second, the Court should hold that a redrawn district is not subject to a collective gerrymandering challenge if the map is more compact and cohesive than its predecessor. The *ne plus ultra* of nonpartisan districting is probably a geometric grid transposed over a state map with lines adjusted as little as possible to ensure equal populations per district. Perfect nonpartisanship may be impossible but movement in that direction should not be subject to punishment. Absent evidence that map-makers specifically targeted individual voters in violation of their constitutional rights, a district that becomes more compact and cohesive than its predecessor cannot give rise to a "concrete and individualized" injury, even if the district "flips" as a whole.

Third, the judiciary should not adjudicate partisan gerrymandering claims if the redrawn district is reasonably competitive as measured by the percentage split in party registrations. If a district is politically competitive, there can be no injury of a constitutional dimension regardless of the map-makers' intent.

Fourth, partisan gerrymandering claims should not be justiciable if the redrawn district is more competitive than the prior district, as measured by the percentage split in party registrations. Again, State officials should not be discouraged from making a district less partisan, even if the result is not perfect.

Finally, partisan gerrymandering claims should not be justiciable if the redrawn district is more

competitive than the State as a whole. *See Gaffney*, 412 U.S. at 754 ("judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"); *LULAC*, 548 U.S. at 419 (Kennedy, J.) ("a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority"). In that instance, no individual citizen in the redrawn district can possibly establish the type of concrete and individualized injury required for justiciability. Every citizen in the redrawn district who could claim an injury of any kind is by definition in a more favorable position than he or she has a right to expect.

As set forth above in Part I, the record in this case establishes each of these criteria. The second, fourth, and fifth items are essentially incontrovertible in this case and are easily applied in other cases. The first and third require some judgment in individual cases, including this one, but they are amply supported by the record in this case. In any event, the five criteria considered as a whole should establish beyond question that the three-judge court's sweeping decision in this case should be reversed.

* * * *

The three-judge court's evident exasperation with partisan gerrymandering may have impelled it to find a judicial solution. *See, e.g.*, JS App. 67a (Bredar, C.J., concurring) ("Partisan gerrymandering is noxious, a cancer on our democracy."). Amicus himself is no fan of partisan gerrymandering, but that does not mean it is a terminal disease, much less

one that the judiciary can or should cure. The district-by-district resolutions that would come from judicial review of partisan gerrymandering claims can only mire the courts in partisan politics. Were this Court to invalidate a Democratic district in a strongly Democratic state like Maryland, Democrats nationwide would cry foul, and rightly question why Republican gerrymanders in Republican-controlled states are not subject to the same scrutiny.[7]

The absence of a broad-based judicial solution does not consign the republic to live with partisan gerrymandering. On the contrary, the Constitution gives Congress secondary authority to "make or alter" the States' primary authority to prescribe the "Times, Places and Manner of holding Elections ... for Representatives." U.S. Const. art. I, § 4; *see* The

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[7] Plaintiffs' and the three-judge court's insistence that gerrymandering is anti-democratic is true in theory, but not necessarily in practice. Amicus agrees that the democratic ideal is a complete absence of partisan gerrymandering (and he supports nationwide legislation that accomplishes that goal, *see infra*). But if some partisan gerrymandering is permitted (or occurs even if not permitted), democracy is hindered, not helped, when one party engages in it and the other does not. Congress is a national legislature; a single state's delegation achieves nothing by itself. If, hypothetically, a Republican-gerrymandered delegation from North Carolina is not offset to some degree by a Democratic-gerrymandered delegation from Maryland, representation in Congress will be less reflective of the electorate as a whole. This is why a national legislative solution is so critical. Judicial solutions will always have problems of timing (because gerrymandering challenges will not be decided in all districts at the same time), as well as precision (because courts cannot legislate clear anti-gerrymandering rules, but can only fashion standards based on the facts of individual cases applied against broad Constitutional text).

Federalist No. 59 (A. Hamilton). Congress's power almost certainly includes the ability to curtail or eliminate partisan gerrymandering at the national level, *see Vieth*, 541 U.S. at 276-77; *Davis*, 478 U.S. at 143-44 (Burger, C.J., concurring), and Congress has often considered bills that would fashion a nationwide solution. *E.g.*, Citizen Legislature Anti-Corruption Reform Act, H.R. 145, 115th Cong., § 5 (1st Sess. 2017) ("Each State shall conduct Congressional redistricting (beginning with the redistricting carried out pursuant to the decennial census conducted during 2020) in accordance with a redistricting plan developed by a nonpartisan independent redistricting commission.").

Mr. Trone, in one of his first official acts as a member of Congress, co-sponsored the For the People Act of 2019. *See* H.R. 1, 116th Cong. (Jan. 3, 2019). Subtitle E of that Act is the Redistricting Reform Act of 2019, *see id.* §§ 2400-2422, which would mandate independent redistricting commissions[8] and establish criteria to thwart, if not eliminate, partisan redistricting.[9] If enacted into law, the Act likely

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[8] *See, e.g.*, H.R. 1, at § 2402(a) ("any Congressional redistricting conducted by a State shall be conducted in accordance with ... the redistricting plan developed and enacted into law by the independent redistricting commission established in the State, in accordance with part 2 ...."); *id.* §§ 24 11-12 (selection requirements for independent commissions).

[9] *See, e.g.*, H.R. 1 at § 2413(a)(1)(D) ("Districts shall minimize the division of communities of interest, neighborhoods, and political subdivisions to the extent practicable. A community of interest is defined as an area with recognized similarities of interests, including but not limited to ethnic, economic, social, cultural, geographic or historic identities. The

would obviate or supplant judicial decisions on partisan gerrymandering, as well it should. Federal legislation would apply uniformly and simultaneously across the nation. The proposed legislation seems fair to Mr. Trone and, he believes, it will be acceptable to the electorate as a whole. If that turns out to be incorrect, however, the people's elected representatives in Congress can amend the law accordingly.

A decision by this Court endorsing the three-judge court's judgment and rationale, by contrast, will impose an immutable constitutional standard that is not readily discernible in the Constitution and will not necessarily be accepted by the people. It will also undermine decades of precedent and disrupt settled expectations about what is constitutionally permissible in redistricting. The elimination of partisan gerrymandering is a desirable goal, but only Congress can fashion a remedy that applies uniformly throughout the Nation, and then monitor and adjust the remedy as circumstances warrant and the electorate wishes.

CONCLUSION

For the reasons stated, the Court should reverse the judgment below.

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term communities of interest may, in circumstances, include political subdivisions such as counties, municipalities, or school districts, but shall not include common relationships with political parties, officeholders, or political candidates."); *id.* at § 2413(a)(3) (prohibiting consideration of "[t]he political party affiliation or voting history of the population of a district.").

Respectfully submitted,

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No. 18-726

IN THE
Supreme Court of the United States

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF AMICUS CURIAE SENATOR SHELDON WHITEHOUSE IN SUPPORT OF APPELLEES

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Davis v. Bandemer, 478 U.S. 109 (1986).....26

Gaffney v. Cummings,412 U.S. 735 (1973).....23

Gill v. Whitford, 138 S. Ct. 1916 (2018)..... 1, 18

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 26

League of Women Voters of Pa. v. Commonwealth of Pa., 181 A.3d 1083 (Pa. 2018) 9

Obergefell v. Hodges, 135 S. Ct. 2584 (2015).....27

Powell v. McCormack, 395 U.S. 486 (1969) 18

Reynolds v. Sims, 377 U.S. 533 (1964).....22

Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).....26

Vieth v. Jubelirer, 541 U.S. 267 (2004) ..... *passim*

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) 8

Other Authorities

About, America Votes,
https://americavotes.org/about/ 15

Bill Allison & Sarah Harkins, Sunlight Found., *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions* (Nov. 17, 2014) 17

Americans Across Party Lines Oppose Common Gerrymandering Practices,
The Harris Poll (Nov. 7, 2013) 20

Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. Times Mag. (Aug. 29, 2017) 3, 12, 21

Michael Beckel, *Secret Donors Fuel Democratic Political Powerhouse*, Ctr. for Pub. Integrity (Nov. 18, 2015) 16

Richard Berman, *The Democrats' Dark Money Hypocrisy*, The Hill (May 5, 2016 9:00 AM ET) 15, 16

Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J. L. Ethics & Pub. Pol'y 323, 329 (2014) 9, 12

Laurence Cockroft & Anne-Christine Wegener, *Unmasked* (2017) 17

Betsy Cooper, et al., PRRI, *The Divide Over America's Future: 1950 or 2050? Findings From the 2016 American Values Survey* (Oct. 25, 2016) 19

Fred Dews, *A Primer on Gerrymandering and Political Polarization*, Brookings (July 6, 2017) 19, 21

Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics 564, 575 (Sept. 2014) 20

Matea Gold, *Wealthy Donors on Left Launch New Plan to Wrest Back Control in the States*, Wash. Post (Apr. 12, 2015) 16

J. Gerald Hebert, et al., A.B.A., *The Realist's Guide to Redistricting: Avoiding the Legal Pitfalls* (2d ed. 2010) 4

Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832) 6

Brian Klaas, *The Despot's Accomplice: How the West is Aiding and Abetting the Decline of Democracy* (2017) 19, 21

Chisun Lee, et al., Brennan Ctr. for Justice, *Secret Spending in the States* 3 (June 26, 2016) 16

Niccolo Machiavelli, *The Prince* (1513) 5

Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (2016) 12

Anthony J. McGann, et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* 5 (2016) 7, 8, 9

Stephen Ohlemacher, *GOP Gerrymandering Creates Uphill Fight for Dems in the House*, PBS NewsHour (Mar. 31, 2014) 10

Peter Overby, NPR News Investigations, *From Social Welfare Groups, a River of Political Influence* (Nov. 5, 2013 5:00 AM ET) 14

Olga Pierce, et al., *How Dark Money Helped Republicans Hold the House and Hurt Voters* 13, 15

President Ronald Reagan, *Election Eve Address: A Vision for America* (Nov. 3, 1980) 21

The Redistricting Majority Project, *2012 REDMAP Summary Report* (Jan. 4, 2013) 14

Republican State Leadership Comm., *The Redistricting Majority Project* 13

Karl Rove, *The GOP Targets State Legislatures*, Wall St. J. (Mar. 4, 2010 5:01 AM ET) 14

Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325 (1987) 18

Jeffrey Toobin, *Drawing the Line*, The New Yorker (Mar. 6, 2006) 18

Views on Power and Influence in Washington, Assoc. Press-NORC Ctr. for Pub. Affairs Research (2017) 19, 20

Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy* (2017) 3

Why Democrats are Taking Aim at Gerrymandering, The Economist (July 12, 2017) 10

Governor John Winthrop, A Model of Christian Charity (1630) 21

INTEREST OF *AMICUS CURIAE*

Amicus is U.S. Senator Sheldon Whitehouse of Rhode Island.[1] In *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), *amicus* submitted a brief with the late Senator John McCain of Arizona to provide a bipartisan view of how partisan gerrymandering threatens our democracy. *See* Br. of Senators John McCain and Sheldon Whitehouse, 2017 WL 4311105 (filed Sept. 5, 2017). Because the concerns expressed in that brief are just as relevant today, *amicus* presents the same arguments in this brief.

As a national political leader, *amicus* has a strong interest in the proper functioning of our democracy, and is a witness to the symptoms and ill effects of its distress. As an active, democratically elected legislator, *amicus* is deeply concerned about the damage excessive partisan redistricting inflicts on the American democratic process.

Amicus sees firsthand the concerns of constituents who increasingly view politics as a game run by powerful special interests that have changed the rules to win the game. The age-old problem of an "influencer class" is worsening, and the public sees this class garnering disproportionate rewards at the public's expense. Gerrymandering is a tool of the influencer class in that effort.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk consenting to the filing of all amicus briefs in this case.

Americans do not like gerrymandering. They see its mischief, and absent a legal remedy, their sense of powerlessness and discouragement has increased, deepening the crisis of confidence in our democracy. *Amicus* shares this perspective. From this vantage point, *amicus* sees wasted votes and silenced voices. *Amicus* sees hidden power. And *amicus* sees a correctable problem.

Amicus submits this report from the political front lines in the hope that it will aid the Court by providing pragmatic, real-world input on the ways in which partisan gerrymandering undermines our democracy. These concerns should be central to the Court's review of whether the district courts correctly held that the North Carolina and Maryland redistricting schemes constitute unconstitutional partisan gerrymanders.

On a personal note, *amicus* mourns the loss of his friend and colleague and submits this brief in his honor.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases implicate the effective functioning of American representative democracy. With roots tracing to Patrick Henry and Massachusetts Governor Elbridge Gerry, politically motivated redistricting has long been a part of American politics. But what began as a tactic to protect individual incumbencies and to undercut adversaries has morphed into something much different today. Partisan gerrymandering is now accomplished by using sophisticated technology—including mapping software, census data, and

voting algorithms—to redraw a state's district lines to maximize partisan advantage across an entire state.[2]

This new breed of "bulk" partisan gerrymandering distorts statewide votes, systematically diluting the effect of votes based on political affiliation and leading to the election of congressional and state legislative delegations that do not represent the will of the voters. This practice violates "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted). And importantly—as demonstrated by the redistricting schemes at issue in the cases now before the Court—extreme partisan gerrymandering is a bipartisan problem, undertaken by Republicans and Democrats alike in an effort to entrench political power at the expense of the American voter.

I. A. The rise of extreme partisan gerrymandering over the past decade can be traced directly to this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Although partisan gerrymandering existed before *Vieth*, the threat of judicial review provided a strong deterrent that kept states from adopting extremely gerrymandered districts. *Vieth*'s refusal to treat partisan gerrymandering claims as justiciable effectively removed this threat. State legislatures—and political operatives seeking to gain and entrench

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[2] *See* Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy* 83–86 (2017); Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. Times Mag. (Aug. 29, 2017).

political power—have viewed this decision as an invitation to redraw districts to push the limit of partisan advantage. As the American Bar Association observed, "[t]he Court's recent decisions appear to give legislators leeway to [preserve] partisan advantage as zealously as they like when drawing district lines."[3]

B. The increase in partisan gerrymandering in recent years has been bolstered by the growing presence of "dark money" in the American political system.[4] Special interest groups, fueled by hidden funders with deep pockets and skin in the political game, are now focused on influencing redistricting. The payoff for these groups is obvious: By shaping the decennial redistricting process, special interest groups can affect the outcome of every congressional race in a state for the next decade. The role of dark money in this process is a bipartisan concern, as both Republicans and Democrats now rely on this funding.

C. This Court has already acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles." *Vieth*, 541 U.S. at 292. Severe partisan gerrymandering undermines our democracy, which is based on fair and open elections that accurately reflect the will of the people and count every vote equally. When the voters of a state vote one way, the resulting congressional delegation is more than 2-1 the opposite way, and the advantaged party intentionally produced that undemocratic result, it should

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[3] J. Gerald Hebert, Paul M. Smith, Martina E. Vandenberg, & Michael B. DeSanctis, A.B.A., *The Realist's Guide to Redistricting: Avoiding the Legal Pitfalls* 19 (2d ed. 2010).

[4] The term "dark money" refers to money contributed to nonprofit organizations and used for political purposes without disclosure of the donor's identity.

be obvious that "one person, one vote" has been violated. This partisan gerrymandering leads voters to perceive, rightly, that their votes do not matter. Indeed, we have seen firsthand the growing concerns of constituents who view politics as a game orchestrated by powerful special interests whose victories come at the expense of the American voter.

II. The Court should affirm the district court decisions. The district courts relied on equal protection and First Amendment tests that provide a workable framework for distinguishing between district maps drawn based on legitimate political considerations and those constituting unlawful partisan gerrymandering. The tests are more than sufficient to find an unconstitutional gerrymander on the facts of these cases. Beyond remedying the constitutional violations present in these cases, affirming the district court decisions will send a clear message that partisan gerrymandering will not be tolerated.

ARGUMENT

I. Partisan Gerrymandering Has Become A Tool For Powerful Interests To Distort The Democratic Process.

Democracy is not abstract or academic. It is a battleground on which competing interests exert all the pressure they can muster. This battleground often pits special interest groups against a general population that wants only to be treated fairly.[5]

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[5] This is a long-observed conflict, reflected in the pages of history from Niccolo Machiavelli's writings to President Jackson's bank veto message. *See, e.g.*, Niccolo Machiavelli, *The Prince*, ch. IX

Special interest groups have long influenced the outcome of elections. But this Court's decision in *Vieth* made redistricting a particularly attractive tool for these groups. No longer concerned about the prospect of judicial review, state legislatures now push gerrymandering to its limits, and special interests, supported by dark money, help them do so. The result has greatly undermined the public's faith in our democracy.

A. *Vieth* Opened The Door To Extreme Partisan Gerrymandering.

Justice Kennedy, in his concurring opinion in *Vieth*, predicted that "if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow." 541 U.S. at 312. That prediction has come true. The frequency and egregiousness of partisan gerrymandering has intensified in the decade since *Vieth*, and absent this Court's intervention, the problem is only likely to worsen. Without the threat of judicial review, political parties have every incentive to engage in extreme partisan gerrymandering.

(1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832), *available at* http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves").

Vieth sent a clear signal that the Court was no longer inclined to intervene in partisan gerrymandering cases.[6] *Vieth*'s impact has been felt since 2010—the first round of redistricting after the decision—as state governments sought to redraw electoral maps for partisan advantage more aggressively than ever before.[7] Observers have recognized that "[t]he world changed with the 2010 redistricting. States were no longer constrained by the threat of judicial challenge of partisan gerrymanders, and where one party completely controlled the redistricting process, it often took full advantage."[8]

The North Carolina map currently before the Court illustrates how partisan gerrymandering evolved after *Vieth*. In 2010, Republicans gained control of North Carolina's General Assembly and, with it, exclusive control over the redistricting process. *See Rucho* J.S. App. at 10. The next year, they adopted a new map that allowed Republicans to win a supermajority of the state's congressional seats (9 of 13) in the 2012 election despite receiving a minority of the statewide vote (49%). *Id.* at 13. In 2014, Republicans gained an additional seat, meaning they won 10 of 13 seats with only 54% of the statewide vote. *Id.* at 13-14.

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[6] Anthony J. McGann, et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* 5 (2016) ("[A]fter *Vieth v. Jubelirer* (2004), state legislatures were willing to district for partisan advantage far more than they had previously.").

[7] *Id.* at 3.

[8] *Id.* at 17.

North Carolina was forced to adopt a new map for the 2016 elections after courts invalidated the previous map as a racial gerrymander. *Id.* at 14, 24. The General Assembly created the new map using "Partisan Advantage" as a criterion. *Id.* at 20. One of the Republican leaders explained that "the goal" of this criterion was "to elect 10 Republicans and 3 Democrats." *Id.* at 23. Republicans succeeded. In the 2016 elections, they won 10 of 13 congressional seats (77%) despite receiving only 53% of the statewide vote. *Id.* at 26.

North Carolina was not alone in seizing the opportunity presented in *Vieth* for partisan gerrymandering without judicial oversight. Wisconsin also implemented a gerrymandered map for General Assembly elections designed to ensure that "Republicans would maintain a majority *under any likely voting scenario*; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority." *Whitford v. Gill*, 218 F. Supp. 3d 837, 852 (W.D. Wis. 2016) (emphasis added), *vacated and remanded*, 138 S. Ct. 1916 (2018). The Wisconsin plan produced precisely this lopsided result in the 2012 election that followed, in which Republicans won 60 of 99 General Assembly seats despite receiving only 48.6% of the statewide vote. *Id.* at 853.

Pennsylvania provides another example of extreme gerrymandering in the wake of *Vieth*. Following the 1990 Census, Pennsylvania's congressional districts were relatively compact with few oddly shaped districts, and had little or no partisan bias.[9]

[9] McGann, *supra* note 6, at 9.

After the 2000 Census, the redistricting plan had a few more oddly shaped districts and indications of partisan bias, but the plan was approved by the district court and affirmed by the Court in *Vieth*.[10]

After the 2010 Census, Pennsylvania's districting plan changed dramatically, pushing partisan gerrymandering to its limits. The previously compact districts were largely replaced by districts that are "either elongated or have tendrils that cut into the surrounding districts."[11] From the Republicans' perspective, these changes worked: In the 2012 House elections, Democrats received more votes than Republicans, but the state sent thirteen Republicans and only five Democrats to Congress.[12] This scheme ultimately drew the attention of the Pennsylvania Supreme Court, which in 2018 redrew Pennsylvania's districts after finding that the Republican redistricting plan violated the state's constitution.[13]

Scholars have concluded that this Court's decision in *Vieth* was the primary reason for Pennsylvania's efforts to further gerrymander its congressional districts.[14] When the post-2000 districts were drawn,

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[10] *Id.* at 11.

[11] *Id.* at 13.

[12] Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J. L. Ethics & Pub. Pol'y 323, 329 (2014).

[13] *League of Women Voters of Pa. v. Commonwealth of Pa.*, 181 A.3d 1083 (Pa. 2018).

[14] McGann, *supra* note 6, at 3. The increase in partisan gerrymandering from the 2000 Census to the 2010 Census is clear even if one controls for a variety of other factors, including urban concentration, changes in technology, and the requirements of the Voting Rights Act. *See id.* at 4–5, 12.

gerrymandering for political gain could still be meaningfully challenged in the courts, which explains "why the level of partisan gerrymandering was quite modest in the post-2000 districts compared to the post-2010 ones, even though the Republicans controlled the governorship and state legislature in both cases."[15] The congressional districts adopted after *Vieth*, in contrast, "show the full potential of partisan gerrymandering when there is no threat of judicial action."[16]

The combined effect of partisan gerrymanders in 2012 resulted in Republicans gaining a 33-seat advantage in the House, despite receiving more than one million fewer votes than Democrats.[17] Most of this advantage can be attributed to Republicans successfully tilting the electoral maps in key swing states.[18]

Republicans have certainly benefited from post-*Vieth* bulk gerrymandering, but they are hardly alone in skewing district lines for political gain. As one commentator noted, partisan gerrymandering is "a decennial sin of every majority party."[19] Where Democrats

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[15] *Id.* at 12.

[16] *Id.* at 13 ("In the previous round, the Pennsylvania state government had to consider the possibility that the courts would strike down a blatantly gerrymandered districting plan. After *Vieth v. Jubelirer* (2004), this was no longer the case.").

[17] Stephen Ohlemacher, *GOP Gerrymandering Creates Uphill Fight for Dems in the House*, PBS NewsHour (Mar. 31, 2014), http://www.pbs.org/newshour/rundown/gop-gerrymandering-creates-uphill-fight-dems-house/.

[18] *Id.*

[19] *Why Democrats are Taking Aim at Gerrymandering*, The Economist (July 12, 2017), https://www.economist.com/blogs/economist-explains/2017/07/economist-explains-6.

have been in control, they have drawn gerrymandered maps just like their Republican counterparts.

The Maryland plan before the Court illustrates as much. Following the 2010 Census, Democrats sought to redraw district lines to improve upon the 6-2 advantage they already enjoyed in the state's congressional delegation. *See Lamone* J.S. App. 14a. Democrats took aim at Maryland's Sixth District, which had elected a Republican representative for the previous two decades. *Id.* at 3a, 7a. Working with hired data analysts using sophisticated mapping software, Democrats successfully implemented the Governor's goal of creating a 7-1 map. *See id.* at 12a, 16a, 18a, 22a. The plan "effect[ed] a swing of about 90,000 voters," which "br[ought] about the single greatest alteration of voter makeup in any district in the Nation following the 2010 census." *Id.* at 2a. After the reshuffling, a Democratic challenger unseated the district's ten-term Republican incumbent, confirming that "[t]he result of the wholesale recomposition of the Sixth District was precisely as intended and predicted." *Id.* at 24a; *see also id.* at 11a.

Democrats also led successful partisan redistricting efforts in Illinois. In 2010, Republicans held 11 of Illinois' 19 House seats. After Democrats redrew the district lines in 2011, they took 12 of Illinois' 18 seats in the 2012 election. Although challenged by Republicans, a federal district court, relying heavily on *Vieth*, upheld the gerrymander despite finding that it was "a blatant political move to increase the number of Democratic congressional seats." *Comm. for a Fair*

and Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 567 (N.D. Ill. 2011).[20]

In short, partisan gerrymandering has worsened significantly since *Vieth* removed the threat of judicial review, and bulk gerrymandering has been the vehicle. With the 2020 Census quickly approaching, the Court should curb this pernicious practice.

B. Dark Money Fuels Partisan Gerrymandering On Both Sides Of The Aisle.

As state governments become more willing to engage in partisan gerrymandering post-*Vieth*, a predictable result has occurred: Special interest groups, funded by dark money, are playing an increasingly active role in redistricting.

Drawing district lines that maximize partisan advantage is a complicated task. Legislators therefore turn to outside consultants and organizations, which offer detailed guidance on how to redraw district maps. These groups rely on sophisticated mapmaking software, census data, and partisan voting algorithms to determine how best to maximize partisan gain.[21] This expertise is expensive, but special interest groups are willing to foot the bill because they recognize the potential return on their investment. Spending money to help a House candidate in an election

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[20] *See also* Catanese, *supra* note 12, at 331 (discussing Illinois as an example of a Democratic-controlled gerrymander).

[21] *See, e.g.*, *Lamone* J.S. App. at 17a–18a; Bazelon, *supra* note 2; Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 411 (2016) ("The advent of computers had turned redistricting into an expensive, cynical, and highly precise science.").

can change the occupant of that seat for the next two years. But spending to support redistricting can change every House race in the state for the next decade.

Financial support from groups accepting dark money has been crucial to recent gerrymandering efforts, and redistricting groups in most states can take unlimited amounts of money without disclosing the source. In early 2010, the Republican State Leadership Committee created the Redistricting Majority Project ("REDMAP") with the goal of redrawing electoral maps to benefit Republican candidates.[22] In 2010, REDMAP raised more than $30 million—much of it dark money—to elect majorities in state legislatures in battleground states including Ohio, Michigan, North Carolina, Pennsylvania, and Wisconsin.[23] After gaining control of state legislatures, REDMAP then expanded its efforts to influence the redistricting of those states' congressional seats.[24]

The Republicans' redistricting efforts were largely supported by "opaque nonprofits funded by dark money, supposedly nonpartisan campaign outfits, and millions in corporate donations to achieve Republican-

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[22] *See* Republican State Leadership Comm., *The Redistricting Majority Project*, http://www.redistrictingmajorityproject.com/ (last visited Mar. 6, 2019) ("Republicans have an opportunity to create 20–25 new Republican Congressional Districts through the redistricting process over the next five election cycles, solidifying a Republican House Majority."); Olga Pierce, et al., *How Dark Money Helped Republicans Hold the House and Hurt Voters*, ProPublica (Dec. 21, 2012 3:36 PM ET), https://www.propublica.org/article/how-dark-money-helped-republicans-hold-the-house-and-hurt-voters.

[23] Pierce, et al., *supra* note 22.

[24] *Id.*

friendly maps throughout the country."[25] Among the organizations funding REDMAP were groups with such seemingly neutral names as American Justice Partnership, Fair and Legal Redistricting for North Carolina, and Michigan Redistricting Resource Institute.[26] The neutral names disguise these organizations' underlying agendas.[27]

The strategy behind this effort was clear, and the political intent unmistakable. In 2010, one of REDMAP's early boosters wrote in the Wall Street Journal that Republicans were targeting state legislatures because "[h]e who controls redistricting can control Congress."[28] REDMAP's own 2012 Summary Report highlighted how their "strategy of targeting state legislative races in 2010 led to a Republican U.S. House Majority in 2013."[29] REDMAP explained: "Drawing new district lines in states with the most redistricting

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[25] *Id.* ("Two tobacco giants, Altria and Reynolds, each pitched in more than $1 million to the main Republican redistricting group, as did [Karl] Rove's super PAC, American Crossroads; Walmart and the pharmaceutical industry also contributed. Other donors, who gave to the nonprofits Republicans created, may never have to be disclosed.").

[26] *Id.*

[27] *See, e.g.*, Peter Overby, NPR News Investigations, *From Social Welfare Groups, a River of Political Influence* (Nov. 5, 2013 5:00 AM ET), http://www.npr.org/2013/11/05/242354030/from-social-welfare-groups-a-river-of-political-influence (describing American Justice Partnership as an organization dedicated to legal reform that has "target[ed] liberal judges for defeat").

[28] Karl Rove, *The GOP Targets State Legislatures*, Wall St. J. (Mar. 4, 2010 5:01 AM ET), https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

[29] The Redistricting Majority Project, *2012 REDMAP Summary Report* (Jan. 4, 2013) (capitalization altered), http://www.redistrictingmajorityproject.com/.

activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[30]

The Democratic Party also has supported its redistricting efforts by accepting "secretive redistricting funding."[31] For example, as noted above, Maryland Democrats gerrymandered congressional districts behind closed doors to preserve their incumbencies while taking aim at the state's two remaining Republican seats. As former governor Martin O'Malley explained in a deposition, "part of our intent was to create a map that was more favorable for Democrats over the next ten years."[32] To that end, Democrats hired outside consultants to redraw the district lines. Those consultants later testified that their job "was to see if there was a way to get another Democratic district in the state."[33] They succeeded, and Maryland's two Republican seats shrunk to one.

Democrats too have relied on nonprofit organizations, funded by dark money, for support in redistricting. Like the Republican groups, these groups have nonpartisan-sounding names, such as Democracy Alliance, America Votes, and Patriot Majority USA, that belie their political agendas.[34] Patriot Majority USA,

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[30] *Id.*

[31] Pierce, et al., *supra* note 22.

[32] *Lamone* J.S. App. at 13a.

[33] *Id.* at 16a.

[34] *See, e.g.*, About, America Votes (last accessed Mar. 6, 2019), https://americavotes.org/about/ (describing America Votes as "the coordination hub of the progressive community," with "an eye on redistricting"); Richard Berman, *The Democrats' Dark*

a 501(c)(4) social welfare group not required to publicly disclose its donors, reportedly raised $30 million in 2014 and "was a major player in the Democrats' failed bid to retain control of the U.S. Senate" in 2014.[35] Unions have reportedly donated to Patriot Majority USA,[36] as well as to "an array of 'dark money' liberal advocacy groups including the 501(c)(4) arms of the Center for American Progress, National Employment Law Project, and Partnership for Working Families—which aren't required to report who funds them."[37]

As troubling as these examples are, *amicus* expects that the influence of special interests groups and dark money in redistricting efforts will increase unless this Court steps in. One recent study found that 38 times more dark money was spent during the 2014 elections than in 2006.[38] And political groups are

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Money Hypocrisy, The Hill (May 5, 2016 9:00 AM ET), http://thehill.com/blogs/congress-blog/politics/278881-the-democrats-dark-money-hypocrisy; Matea Gold, ***Wealthy Donors on Left Launch New Plan to Wrest Back Control in the States***, Wash. Post (Apr. 12, 2015), https://www.washingtonpost.com/politics/wealthy-donors-on-left-launch-new-plan-to-wrest-back-control-in-the-states/2015/04/12/ccd2f5ee-dfd3-11e4-a1b8-2ed88bc190d2_story.html?utm_term=.94e5ec28352c (describing Democracy Alliance as "[a] cadre of wealthy liberal donors").

[35] Michael Beckel, *Secret Donors Fuel Democratic Political Powerhouse*, Ctr. for Pub. Integrity (Nov. 18, 2015), https://www.publicintegrity.org/2015/11/18/18875/secret-donors-fuel-democratic-political-powerhouse.

[36] *Id.*

[37] Berman, *supra* note 34.

[38] Chisun Lee, et al., Brennan Ctr. for Justice, *Secret Spending in the States* 3 (June 26, 2016), https://www.brennancenter.org/publication/secret-spending-states.

gearing up for the next round of redistricting. Democrats are already planning for a 2020 redistricting campaign, including through groups funded by "dark money,"[39] and Republicans will surely do the same.

This is just one of many ways in which dark money plagues United States elections, but it is a significant one.

C. Partisan Gerrymandering Produces Uncompetitive And Unrepresentative Districts That Have A Corrosive Effect On Our Democracy.

"Something is rotten in the state of Denmark," wrote Shakespeare to convey the notion of disease in the body politic. Here too, there is a powerful sense among Americans that something has gone awry.[40]

The increase in partisan gerrymandering following *Vieth*, fueled by dark money contributions and advanced technology, distorts our representative democracy and pollutes Americans' faith in their political institutions. This Court has long recognized

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[39] *Id.*

[40] These concerns are well-founded, with recent studies illustrating the high rewards (a return of nearly 1000-1 for lobbying expenditures) and high stakes (over $700 billion per year for one subsidy) for America's influencer class. *See* Bill Allison & Sarah Harkins, Sunlight Found., *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions* (Nov. 17, 2014), https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/; Laurence Cockroft & Anne-Christine Wegener, *Unmasked* 14 (2017) (showing a 750-1 ratio); *see also* http://priceofoil.org/fossil-fuel-subsidies/.

that "[t]he true principle of a republic is[] that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) (quoting Alexander Hamilton in 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). The current practice of partisan gerrymandering undermines that principle, because it "enables politicians to entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring); *see also id.* at 1940. As one commentator recently observed, "[i]t used to be that the idea was, once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents."[41]

As Republicans and Democrats battle each other to control redistricting, the real losers are the American people. Sending delegations to Congress that do not conform to the results of elections leads to disinterested and justifiably disillusioned voters. Ordinary voters may not identify the dark money forces that have separated a state delegation's makeup from that state's election results, but they surely see that some dark force is intermediating to create that anomalous outcome. Realizing that their votes have been gerrymandered into near-meaninglessness, many Americans are checking out of the process entirely, as

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[41] *See* Jeffrey Toobin, *Drawing the Line*, The New Yorker, at 35 (Mar. 6, 2006) (quoting Stanford Law School Professor Pamela Karlan); *see also* Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1329 (1987) (gerrymandering raises "profound issues concerning the legitimacy of our representational structures").

reflected by the lowest voter turnout in 2014 in any election since 1942.[42]

When gerrymandering is used to establish safe districts, the proliferation of those safe seats leads to a more polarized and dysfunctional political climate. In safe districts, an incumbent's biggest threat is often a primary challenge from a more extreme member of his or her own party. This threat makes legislators reluctant to work across the aisle and support bipartisan legislation. Gerrymandering thus worsens "the hyper-partisanship that paralyzes our politics and governance."[43]

Public trust in our democracy is further weakened by the lack of transparency in how redistricting is funded. The influx of dark money compounds this concern, replacing the will of the people with the will of anonymous special interests and wealthy donors. Dark money also increases the risk that politicians become beholden to the special interest groups funding redistricting efforts, rather than to their constituents. Recent surveys have shown that a significant majority of Americans believe "it doesn't matter if they vote," because politics and elections are controlled by wealthy interests.[44] This sentiment is bipartisan:

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[42] Brian Klaas, *The Despot's Accomplice: How the West is Aiding and Abetting the Decline of Democracy* 184 (2017).

[43] Fred Dews, *A Primer on Gerrymandering and Political Polarization*, Brookings (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

[44] *See, e.g.*, Betsy Cooper, et al., PRRI, *The Divide Over America's Future: 1950 or 2050? Findings From the 2016 American Values Survey* (Oct. 25, 2016), https://www.prri.org/research/poll-1950s-2050-divided-nations-direction-post-election/; *Views on Power and Influence in Washington*, Assoc. Press-NORC Ctr. for Pub.

"Democrats and Republicans generally agree that people like them, working people, the poor, and small businesses don't have enough power in Washington, and that political lobbyists, Wall Street, large businesses, and the wealthy have too much influence."[45] And not without reason: studies have found that "the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy."[46]

Americans are particularly troubled by how special interest groups are helping to gerrymander state and federal legislative districts. Across party lines, 64% of Americans believe that redistricting is a tactic to take power away from voters.[47] 71% of Americans believe that "those who stand to benefit from redrawing congressional districts should not have a say in how they are redrawn."[48] One Wisconsin senator who voted for the redistricting plan at issue in *Gill* expressed remorse for his vote, explaining, "[w]hen you talk to people about our government, the thing they

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Affairs Research (2017), http://www.apnorc.org/projects/Pages/Power-and-Influence-in-Washington.aspx [hereinafter AP-NORC Poll].

[45] AP-NORC Poll, *supra* note 45.

[46] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics 564, 575 (Sept. 2014), https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf.

[47] *Americans Across Party Lines Oppose Common Gerrymandering Practices*, The Harris Poll (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html.

[48] *Id.*

tell you is it's rigged."[49] Indeed, the process of redistricting merits little faith because drawing district lines is "among the most easily manipulated and least transparent systems in democratic governance."[50]

Finally, Americans are not the only ones who have observed how partisan gerrymandering has undermined our political system. America's democracy has long stood as a model to the world, a "city [on] a hill."[51] Partisan gerrymandering now threatens that role. A scholar of comparative politics recently remarked that "the American model is not the only viable one out there, and . . . other nations may not be insane to look at it with some sense of distaste."[52] Rooted in part in our use of partisan gerrymandering, this view creates "knock-on effects that damage the core of democracy."[53]

That study of different democratic countries concluded that America's extreme gerrymandering threatens the very fabric of our democracy and "mak[es] a mockery of the one person, one vote principle that is the granite ridge to which democracy should be anchored."[54] Amicus agrees.

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[49] Bazelon, *supra* note 2.

[50] Dews, *supra* note 43.

[51] *See* Governor John Winthrop, A Model of Christian Charity, at 12 (1630); President Ronald Reagan, *Election Eve Address: A Vision for America* (Nov. 3, 1980), https://www.reaganlibrary.gov/11-3-80.

[52] Klaas, *supra* note 42, at 188.

[53] *Id.* at 183.

[54] *Id.* at 185 (internal quotation marks omitted).

II. The Court Should Curb The Rise Of Partisan Gerrymandering By Affirming The District Court Decisions.

When it comes to partisan gerrymandering, this Court can no longer remain on the sidelines. In *Reynolds v. Sims*, the Court explained that "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. 533, 562 (1964). The Court should reaffirm this principle by holding that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland plans violate the Constitution.

The *Rucho* court held that the North Carolina plan violated the Equal Protection Clause by applying a test similar to the test applied in *Gill*. That test—which requires evidence of discriminatory intent, a large and durable discriminatory effect, and a lack of a legitimate justification—provides a clear roadmap for lower courts and is grounded in this Court's precedents. The test addresses this Court's prior concerns by articulating a clear standard that avoids sweeping in legitimate political conduct. The test is manageable, and, importantly, will impose a needed threat of judicial accountability to constrain future partisan gerrymandering efforts.

The first element of the equal protection test—discriminatory intent—provides a workable standard that addresses the concerns expressed in *Vieth*. For this element, the district court analyzed whether the

"predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power'" *Rucho* J.S. App. 145a–146a (quoting *Ariz. State Leg.*, 135 S. Ct. at 2658). Unlike the proposed intent requirements addressed in *Vieth*, this test captures only those political classifications "applied in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J., concurring). The test is also a workable one, allowing courts to consider different forms of intent evidence including admissions, rejection of more neutral plans for no apparent reason, secrecy and lack of transparency surrounding the redistricting process, and unwillingness to include minority party voices. When politicians admit that their efforts to redraw district lines were intended to create undemocratic outcomes, courts should hold them accountable.[55]

The second element of the equal protection test—discriminatory effect—also addresses the concerns articulated in *Vieth*. The district court considered whether "the lines of a particular district have the effect of discriminating against—or subordinating—

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[55] A state ordinarily should find safe harbor against any allegation that it acted with discriminatory intent when it entrusts redistricting to an independent redistricting commission. *See, e.g., Ariz. State Legislature*, 135 S. Ct. at 2652. As this Court recognized implicitly in *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), safe harbors could also include districts designed by "a three-[person] bipartisan Board" rather than a single-party-controlled state legislature, or other processes that incorporate minority voices and promote public scrutiny and transparency through openness and publication of proposed and revised maps. When states take steps like these to protect redistricting from partisan influence, they ought rightly to insulate themselves from cries of foul play.

voters who support candidates of a disfavored party," and "if the district dilutes such voters' votes by virtue of cracking or packing." *Rucho* J.S. App. 151a. Unlike in prior cases, plaintiffs here focus on dilution of their votes due to their political affiliations, rather than on any claim to proportional representation. *Cf. Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (rejecting fairness principle based on a proportionality theory).

The Court has recognized that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Vote dilution is a firmly rooted constitutional injury and provides a sound basis for the discriminatory effect test. And as Appellees demonstrate, experts can now readily measure the dilutive effects of partisan gerrymandering through election results, partisan bias, the "efficiency gap," and sensitivity testing. These are exactly the sort of advancements "that make more evident the precise nature of the burdens gerrymanders impose." *Vieth*, 541 U.S. at 312–13. Wild mismatches between the popular vote and the balance of the delegation are an obvious signal.

The final factor of the equal protection test—lack of a legitimate justification—also speaks to *Vieth*'s concerns. This part of the test ensures that courts can distinguish between district maps drawn to achieve legitimate objectives and those based on impermissible partisan considerations. For example, this element will defeat claims where a non-partisan explanation, such as geographical distribution of voters, accounts for the map's alleged discriminatory effect. *See, e.g., Rucho* J.S. App. 152a–153a

("examin[ing] whether districts' discriminatory partisan effects are justified by a legitimate state districting interest or neutral explanation"). This element appropriately guarantees that legitimate legislative decisions will not be lumped in with naked retaliation based on party affiliation.

The district courts in both cases also held that the districting plans violated the First Amendment. *See Lamone* J.S. App. 4a; *Rucho* J.S. App. 299a–300a. The First Amendment test applied in both cases also provides a workable standard for analyzing partisan gerrymandering claims.

Indeed, the First Amendment test largely mirrors the equal protection analysis by focusing on intent, injury, and causation. For the intent element, the First Amendment test asks whether "those responsible for [a redistricting] map redrew the lines of [plaintiff's] district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." *Lamone* J.S. App. 43a (first alteration in original) (internal quotation marks omitted). For a claim alleging injury based on vote dilution, the First Amendment test requires that "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." *Id.* (internal quotation marks omitted). And for causation, the First Amendment test examines whether "the mapmakers' intent to burden a particular group of voters by reason of their views was a but-for cause of the adverse impact." *Id.* (internal quotation marks omitted); *see also Rucho* J.S. App. 286a. Like the equal protection test, the similar First

Amendment test also addresses the concerns expressed in *Vieth*.

The Court should affirm the equal protection and First Amendment tests applied in these cases. But even if the Court concludes that these tests are inadequate, the Court should, at a minimum, hold that partisan gerrymandering claims are justiciable. As discussed above, the *Vieth* plurality's retreat from *Davis v. Bandemer*, 478 U.S. 109 (1986), has resulted in more frequent and extreme gerrymandering at the expense of our democracy. *See supra* Part I.

Moreover, the plurality's reasons for deeming partisan gerrymandering claims non-justiciable are unpersuasive. For example, the plurality relied in part on Congress's power to make or alter redistricting lines. *See Vieth*, 541 U.S. at 275–77. But the Constitution leaves room for both Congress and the courts to remedy the problem of partisan gerrymandering. Nothing in Article I, Section 4 provides Congress with *exclusive* authority to modify congressional districts. And the question for courts is not what districts should look like, but whether partisan forces have manipulated the process to dilute votes based on political affiliation. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained." (emphasis added)).

Even if the democratic process could prevent excess partisan gerrymandering in some cases, the Court must still step in where, as here, the democratic process has been used to violate citizens' fundamental rights. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 415 (2006) (Kennedy, J.) ("[O]ur precedents recognize an important role for

the courts when a districting plan violates the Constitution."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

The *Vieth* plurality incorrectly suggested that Congress alone can solve the problem of partisan gerrymandering. The facts on the ground since *Vieth* demonstrate that the political process alone cannot provide an adequate solution. Judicial review is a necessary ingredient to restoring our democracy. This Court should hold that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland redistricting plans are unconstitutional.

CONCLUSION

For the foregoing reasons, and those in Appellees' briefs, the Court should affirm the district court decisions.

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March 2019

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No. 18-726

In the
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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STATEMENT OF INTEREST[1]

The Wisconsin Constitution tasks the legislature with drawing state and federal legislative districts after every census. Wis. Const. Art. IV, § 3. Pursuant to that authority, the Wisconsin State Senate and State Assembly enacted Act 43 in 2011. Four years later, a group of Wisconsin Democratic voters sued to invalidate Act 43. The voters alleged that Act 43 unconstitutionally "distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats" for Republicans in the State Assembly. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis 2016). The district court agreed: Act 43 unconstitutionally impeded Democratic voters' "ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." *Id.* at 910.

This Court vacated that decision last term. In *Gill v. Whitford*, the Court ruled that the *Whitford* plaintiffs had no standing to challenge "'their collective representation in the legislature'" or their ability to "influenc[e] the legislature's overall 'composition and policymaking.'" 138 S. Ct. 1916, 1931 (2018). The "fundamental problem with the plaintiffs' case" was that it was one "about group political interests, not individual legal rights." *Id.* at 1933. This Court remanded, giving

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

plaintiffs a second chance to prove that each had been individually harmed. *Id.* at 1934.

Now back before the district court, the *Whitford* plaintiffs have attempted to rehabilitate their case by adding new plaintiffs, new constitutional claims, and a new expert. *See Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis.); *see also Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis.).[2] The Wisconsin State Assembly has since intervened, supported by experts of its own. A second trial of plaintiffs' claims has been postponed until this Court decides *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726. But both fact and expert discovery continue.

The ongoing discovery in *Whitford* has been illuminating. The parties' battle-of-the-experts has confirmed that partisan gerrymandering claims are nonjusticiable. Indeed, the work of the *Whitford* plaintiffs' new expert (also an expert in *Rucho*) has revealed that the alleged harm in these cases cannot be measured. Nor can plaintiffs' alleged harm be judicially remedied, lest states altogether abandon territorial redistricting.

Both in the *Whitford* litigation and as *amici curiae* here, the legislature has an acute interest in ensuring

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[2] After *Gill*, the Wisconsin Assembly Democratic Campaign Committee filed a second lawsuit against the same election officials. The district court consolidated the *Whitford* plaintiffs' suit with the Committee's, which also alleged that Act 43 violated the Committee's First Amendment associational rights. But in January, the Committee voluntarily dismissed its suit. Order Granting Motion to Dismiss, *Whitford v. Gill*, No. 3:18-cv-00763-jdp (W.D. Wis. Jan. 29, 2019), ECF No. 45.

that the task of redistricting remains with the legislature. The legislature is uniquely positioned to explain that allegedly partisan redistricting is not a problem to be solved by hired experts in federal litigation like *Whitford*.

SUMMARY OF ARGUMENT

This Court remarked in *Gill v. Whitford* that there were "few clear landmarks" in the Court's partisan gerrymandering precedents. 138 S. Ct. 1916, 1926 (2018). That may be so, but the only two landmarks necessary to resolve partisan gerrymandering claims are the following: Plaintiffs are not entitled to proportional representation of Democrats and Republicans in the legislature. Nor can plaintiffs backdoor that relief by claiming they are entitled to politically "competitive" districts, whatever that may mean.

Look no further than the shifting theories of the *Whitford* plaintiffs. Plaintiffs have converted their statewide political gerrymandering claim into district-specific claims alleging that districts are not competitive. But that has not unearthed any justiciable, district-level harm. Plaintiffs have been reduced to declaring districts with greater than 50% Democratic voting strength (measured by an arbitrary selection of elections) as "packed" and districts with less than 50% Democratic voting strength as "cracked."[3] *Voilà!* All

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[3] The *Whitford* plaintiffs have alleged that a plaintiff living in a district with an estimated 50.4% Republican vote share is "cracked." *See, e.g.*, Amended Complaint ¶ 82, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Sept. 14, 2018), ECF No. 201; *see also id.* at ¶¶ 49, 79 (alleging plaintiffs are "cracked" in districts with estimated 51% Republican vote shares). The *Whitford* plaintiffs also allege that it would be constitutional for a voter to

plaintiffs are harmed, and their chosen remedy is statewide proportional representation. Worse still, the claims are boundless. Every time the Democratic voting strength goes above 50% (packing!), the Republican voting strength is below that threshold (cracking!). The plaintiffs have done little more than dress up their original theory in the gossamer of district-specific claims.

Plaintiffs' quest for partisan proportionality is inconsistent with our system of territorial redistricting. Partisan political affiliation is not uniformly distributed "save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). Like-minded people live with like-minded people. Communities develop shared interests and political preferences. Voters who tend to vote for Democrats tend to live in urban areas, near others who tend to vote for Democrats. Voters who lean Republican tend to disperse throughout a state.

These naturally occurring demographic phenomena affect redistricting. Because the legislature draws contiguous and compact districts, it will not place Madison Democrats in a district with Republicans in the far reaches of Wisconsin's Northwoods. Nor would

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be in a district with an expected 60% Democratic vote share, but the same voter is unconstitutionally "cracked" if the estimated vote share is 60% Republican. *See id.* at ¶¶ 24-26. And they allege that it would be constitutional for one voter to live in a district with an estimated 63% Democratic vote share but unconstitutional for another voter to be "packed" into a district with an estimated 61% Democratic vote share. *Compare id.* at ¶¶ 21-23, *with id.* at ¶¶ 87-89.

such a pairing respect communities of interest, continuity with previous districts, or any number of other traditional redistricting criteria. The application of these criteria often results in a map that is not politically neutral, even before partisan interests enter the calculus. Each of these traditional non-partisan factors may, at any given moment, favor one party or another.

"The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). When political gerrymandering plaintiffs allege that the political asymmetries in their districts are unconstitutional, what they really mean is that territorial redistricting pursuant to traditional redistricting criteria is unconstitutional. And what they really want is redistricting—even though "root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285 (plurality opinion)—transferred from the political branches to the federal judiciary. Whether there are better means of electing representatives is a debate to be had in the political branches, not the federal courts. The Constitution takes no side in that debate.

When faced with a political gerrymandering claim, a federal court is also without the tools to measure a district's alleged discriminatory effect. Using past election results, hired experts opine on whether there is "too much" partisan advantage. But those expert opinions rest on the flawed assumption that political beliefs are immutable—measurable like race in the racial gerrymandering cases or counted like people in one-person-one-vote cases. Voters' political

beliefs are not so easily coded. For example, in Wisconsin's 2018 general election, a majority of voters in nearly 20% of districts voted both for their Republican State Assembly candidate and the Democratic U.S. Senate candidate.

For all of these reasons, courts cannot measure whether alleged partisan influence has exceeded some hidden constitutional limit. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.). Even if voters could be reliably counted as Democrats or Republicans, territorial redistricting and traditional redistricting criteria will inevitably (and lawfully) have partisan effects. Even the Platonic district map in which partisan interests played no role will itself have districts where Democrats have been "packed" or "cracked" (at least under the *Whitford* plaintiffs' theory). The resulting statewide map will have a partisan tilt, even if generated by a computer programmed to ignore partisan voting patterns. But there is no reliable way for a federal court to determine that preexisting partisan baseline.

Any attempt to divine a baseline would require a federal court to step into the shoes of legislators. Divining that baseline requires policy judgments about what criteria should take priority in redistricting, and in what relative proportions. When hired experts generate simulated maps as comparators in litigation, those simulations are pre-programmed to prioritize certain redistricting criteria (*e.g.* compactness) and ignore others (*e.g.* continuity with prior district boundaries). These are distinctly political judgments, not judgments for a federal court. *See Holder v. Hall*,

512 U.S. 874, 901 (1994) (Thomas, J., concurring in judgment).

Without a baseline, it is impossible to determine whether the legislature's map exceeded any supposed constitutional ceiling for partisan influence. The only possible answer—that partisan interests can have *no* role in redistricting—is no answer at all. To hold that partisan interests can have no role in redistricting would elevate partisanship to a level of prohibition that even race does not today occupy. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015). Finding that in the Fourteenth Amendment might be difficult.

These problems cannot be avoided by recasting a partisan gerrymandering plaintiff's claim as one about her associational rights. In our two-party system, politics is often a zero-sum game. So a court's attempted vindication of one voter's associational rights could very well harm the associational rights of others. For this reason and others, a majority of this Court has not connected partisan gerrymandering claims to this Court's associational rights cases. Those cases involve harms distinct from those alleged here. Many involve a state's meddling with the machinery of a political party or their candidates. Redistricting legislation imposes no analogous restriction, limitation, or condition on voters' First Amendment activities. Those cases, therefore, do not provide a manageable framework to resolve partisan gerrymandering claims. Plaintiffs' claims are nonjusticiable.

ARGUMENT

I. So Long As Territorial Redistricting Is Constitutional, Political Symmetry Cannot Also Be Constitutionally Required.

The Constitution does not compel proportional representation. Nowhere does the Constitution "sa[y] that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers," either in the state legislatures or in Congress. *Vieth*, 541 U.S. at 288 (plurality opinion); *see also id.* at 308 (Kennedy, J., concurring in judgment) (stating there is "no authority" for the notion that a Democratic majority of voters in Pennsylvania should be able to elect a Democratic majority of Pennsylvania's congressional delegation). By the same token, the Constitution does not require political symmetry in individual districts, meant only to maximize a party's chances of achieving proportional representation statewide. Such political symmetry, both at the state- and district-level, is often unattainable given a state's political geography.

Territorial, winner-take-all districts are rarely politically neutral. That is not the result of legislative ill-will. It is basic demographics: like-minded people live near one another. When legislatures follow traditional redistricting criteria, relatively homogenous communities are grouped together into single contiguous and compact districts.[4] Requiring politically competitive

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[4] *See* Expert Report of James Gimpel, Ph.D. at 6, 34-42, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249 (Gimpel Report).

districts would require a radical departure from traditional redistricting criteria. Only then could a legislature combine disparate populations to manufacture political heterogeneity.[5] Such a departure from traditional redistricting criteria is neither constitutionally required, nor wise.

A. Demographic trends should not be mistaken for "cracking" and "packing."

A state legislature does not start with a blank slate when it sets out to reapportion its citizens. Every state must navigate the web of federal constitutional and statutory requirements. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (districts must have near-equal populations); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (districting cannot dilute the voting strength of minority groups); *Ala. Legis. Black Caucus*, 135 S. Ct. at 1272-73 (districting cannot cause retrogression in minority voting strength in certain jurisdictions); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797, 801 (2017) (racial considerations cannot predominate absent a compelling interest). Beyond those federal requirements, several traditional criteria guide redistricting. Legislators consider whether proposed district lines create compact and contiguous districts, whether they preserve communities of interest, whether they pit incumbents against

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[5] Gimpel Report at 7 ("Elevating the priority of competitiveness in redistricting above traditional redistricting criteria will submerge the many benefits of geographic- and population-based representation determined by winner-take-all elections and the expression of established communities of interest. This will be accomplished by combining disparate populations for the sake of creating an uncharacteristic political heterogeneity.").

one another, or how much they deviate from existing district lines. *See* James A. Gardner, *Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L.J. 881, 894-97 (2006); *see, e.g.*, Wis. Const. Art. IV, § 4 (districts "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable"). These criteria are non-exhaustive; myriad local considerations, such as keeping a public works project in a single district, guide redistricting. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 678 & n.95 (2002).

When state legislators apply these traditional criteria, the resulting districts are often not politically competitive. *See Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment). As Justice Breyer noted in his dissenting opinion in *Vieth*, Democrats tend to live closely together in urban areas, while Republicans tend to disperse into suburban and rural areas. 541 U.S. at 359-60; *see* James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 565-66, 569 (2007). Drawing contiguous and compact districts means grouping urban Democrats in one district and dispersing rural Republicans among others. Leaving communities of interest intact might mean an intensely progressive college town determines election outcomes in one district, while a farming community does in another.

Discovery in the *Whitford* litigation shows this trend has intensified in recent years: populations are

even more politically homogenous now than they were a decade ago. One of the Assembly's experts has shown that the concentration of historically Democratic voters is increasing in Wisconsin's urban areas.[6] But the number of historically Republican voters is rising throughout the rest of Wisconsin—meaning districts that were previously competitive or leaned Democrat now lean Republican. *See* App. 1a (comparing Figures 3 and 4 in Gimpel Report).[7] In Wisconsin's smallest 62 counties (of 72 total counties), votes cast for Republicans in statewide elections increased by nearly 5% between 2000 and 2016, while votes cast for Democrats decreased nearly 5%.[8]

Together, these trends confirm that Republicans have a natural advantage in a state with Wisconsin's demographics. Even the *Whitford* plaintiffs' experts have confirmed that fact. In the first *Whitford* trial, one expert concluded that Wisconsin's 2002 district map—a *court-drawn* map—significantly benefited Republicans using plaintiffs' preferred measure of

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[6] For example, as the population of Madison's Dane County has grown, so too has the concentration of historically Democratic voters. In 2000, Dane County delivered 11.5% of the Democratic vote for candidate Al Gore. But by 2016, Dane County delivered 15.8% of the Democratic vote for candidate Hillary Clinton. Gimpel Report at 31. Detailed in Part II.A, the political complexion of a state changes over time because voters change over time, as do the parties.

[7] *See* Gimpel Report at 31-34 & Table 1; *see also* App. D to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-4 (district-by-district table comparing change in vote share over time).

[8] *See* Gimpel Report, Table 1.

fairness (the efficiency gap).[9] *See Whitford v. Gill*, 218 F. Supp. 3d 837, 938-39 (W.D. Wis. 2016) (Griesbach, J., dissenting) (remarking that the pre-Act 43 court-drawn map showed efficiency gap as high as 11.8%). Now on remand, Dr. Chen has produced more than 9,400 simulated maps (constrained by plaintiffs' cherry-picked redistricting criteria).[10] He has chosen one, Simulated Plan 43995, to compare against Act 43. But Simulated Plan 43995 is a complete outlier, even among Dr. Chen's thousands of simulations. Shown below, its near-zero efficiency gap is multiple standard deviations away from Dr. Chen's median map, which has a 5.7% pro-Republican efficiency gap.[11] Even using plaintiffs' flawed metrics, traditional redistricting criteria benefit Republicans.

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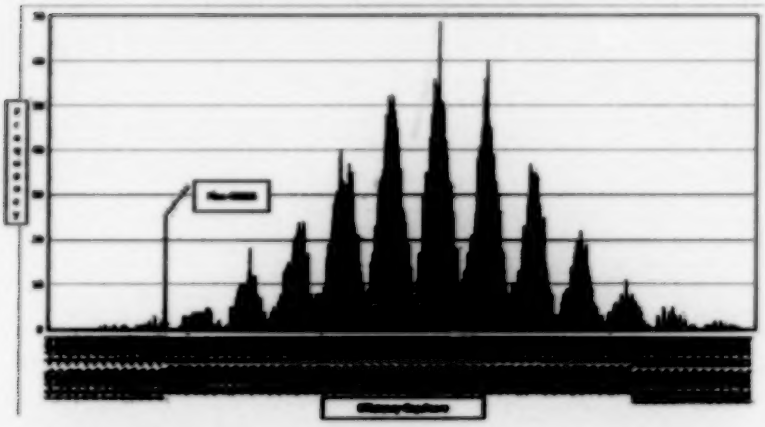
[9] The efficiency gap purports to measure "wasted" votes (meaning votes cast for a losing candidate or excess votes cast for a winning candidate). *See Gill*, 138 S. Ct. at 1933. The efficiency gap equals [(statewide sum of Republican wasted votes)–(statewide sum of Democratic wasted votes)] / (total statewide votes). *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851-52 (2015). In *Gill*, this Court criticized the efficiency gap as failing to "address the effect that a gerrymander has on the votes of particular citizens." 138 S. Ct. at 1933.

[10] *See* Expert Report of Jowei Chen, Ph.D. at 8-9, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Oct. 26, 2018), ECF No. 221 (Chen Report). Detailed in Part II.B, these made-for-litigation computer simulations cannot approximate the human judgment exercised in redistricting.

[11] *See* Gimpel Report at 43-45 & Figure 6.

Gimpel Report, Figure 6



These trends directly affect the composition of legislative districts. They make it more likely for Republican candidates to outperform Democrats in winner-take-all elections, even in states that appear to be closely divided based on statewide election returns. Imagine the following hypothetical, 10-district state where the number of historically Republican and Democratic voters are equally divided.[12] Districts 1, 2, and 3 are urban, comprising 7,000 Democrats and 3,000 Republicans. Suburban District 4 is equally matched. And Districts 5 through 10 are rural, comprising 6,000 Republicans and 4,000 Democrats each:

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[12] For simplicity's sake, this hypothetical creates districts of equal size based on *voting-age* population. In practice, states ordinarily comply with the one-person-one-vote rule by creating districts of equal size based on a state's *total* population. *See Evenwel*, 136 S. Ct. at 1124.

DISTRICT	(D) VOTERS	(R) VOTERS
1	7,000	3,000
2	7,000	3,000
3	7,000	3,000
4	5,000	5,000
5	4,000	6,000
6	4,000	6,000
7	4,000	6,000
8	4,000	6,000
9	4,000	6,000
10	4,000	6,000
Statewide Total:	50,000	50,000

Assuming that historically Democratic and Republican voters cast votes for Democratic and Republican candidates respectively, *but see* Part II.A, *infra*, Democrats and Republicans receive the same number of votes statewide. Even so, Republicans will secure at least six seats in the legislature, and Democrats at most four.

The legislature cannot be expected or required to even out the distribution of voters in our hypothetical state so that a political party's representation in the legislature reflects its share of the popular vote. A legislature, for example, will not send a portion of District 1's urban Democrats to District 5, and send District 5's rural Republicans to District 1. If the counties or municipalities in Districts 1 and 5 do not border each other, then moving voters from one district to another would result in "islands" of voters in each

district. Even if the districts' counties and municipalities bordered each other, no constitutional principle requires splitting those communities of interest or making the districts less compact for the sake of political heterogeneity.

Similarly, imagine that more than half of District 3 is a college town that overwhelmingly votes for Democratic candidates. If District 3's college town neighbors District 6, the legislature could move the college town into District 6. But doing so requires the legislature to move other (likely Republican) voters into District 3. District 6 might now lean Democrat and District 3, Republican. But the overall makeup of the legislature is the same. The only way to make both Districts 3 and 6 politically competitive is to sacrifice traditional redistricting criteria—slicing the college town into two, even though it is a community of interest—for the sake of political heterogeneity.

As these examples show, the application of traditional redistricting criteria often results in politically lopsided districts. That should not be mistaken as "cracking" or "packing" like-minded voters. There is a "'natural' packing effect" in states where political groups tend to cluster and where the legislature's objectives are "compactness and respect for the lines of political subdivisions." *Vieth*, 541 U.S. at 289-90 (plurality opinion). Neither the Equal Protection Clause nor the First Amendment requires legislatures to abandon or reprioritize these traditional redistricting criteria to avoid district-level political asymmetries.

Indeed, the homogeneity of territorial districts has democratic benefits. In *Vieth*, Justice Breyer acknowledged that territorial redistricting enables

more citizens to elect legislators with their same views and maintains stability in the legislature. *Id.* at 360 (Breyer, J., dissenting). It also better ensures that both political and ethnic minorities are represented in their state and federal legislatures (as compared to at-large elections or multimember districts). *See Gingles*, 478 U.S. at 47 (recognizing "that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population" (cleaned up)); *see also Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 563 (2013) (Ginsburg, J., dissenting) (similar). These benefits are consistent with the long-held notion that legislators represent the distinct interests of a particular place, not merely statewide or nationwide party platforms. *See* Gardner, *What is "Fair,"* 90 Marq. L. Rev. at 575, 577-79.

Compare these democratic benefits to plaintiffs' preferred alternative: politically symmetrical districts. Those districts might maximize competition in district-level elections and increase the odds of statewide proportionality. But maximizing competition "promises to make the greatest number of voters *unhappy* with the outcome of the election....In a highly competitive district, nearly half the voters will have voted for the loser." Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. at 668-669 (emphasis added). At the very least, whether the quixotic search for political competitiveness ought to replace traditional redistricting criteria (and the resulting benefits) is a political choice, not a judicial one.

B. Partisan gerrymandering plaintiffs' quest for politically competitive districts is a quest to ban territorial redistricting.

The logical endpoint of plaintiffs' arguments in these political gerrymandering cases is that territorial redistricting is unconstitutional. Plaintiffs bemoan the political asymmetry in their districts. But for the reasons explained above, winner-take-all, territorial districts are often unavoidably politically lopsided. Milwaukee Democrats cannot be included in the same district as Republicans in the Northwoods of Wisconsin. Plaintiffs cannot rid their states of these naturally occurring political asymmetries without also ridding their states of territorial redistricting.

Perhaps at-large or multimember district elections would generate greater competition between the parties for legislative seats in a state like Wisconsin where regions are politically homogenous. *See Baumgart v. Wendelberger*, Nos. 01-c-0121, 02-c-0366, 2002 WL 34127471, at *6 (E.D. Wis. May 30, 2002) (per curiam) ("Wisconsin Democrats tend to be found in high concentrations in certain areas..., and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly.").[13] That would be a policy choice for a state and its citizens to

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[13] Depending on voting rules and demographics, at-large or multimember district elections could have the opposite effect—further entrenching a majority party. *See Gingles*, 478 U.S. at 87 (O'Connor, J., concurring in judgment) (using illustration to show that "the at-large or multimember district has an inherent tendency to submerge the votes of the minority").

consider, not something compelled by the Constitution. *See Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment) (distinguishing "questions of political philosophy" from "questions of law").

Indeed, it would be puzzling for the First or Fourteenth Amendment to prohibit territorial redistricting for state assembly seats when the Constitution's election-specific provisions are silent about the form elections must take. Article IV requires only that states maintain a "Republican Form of Government." U.S. Const. Art. IV, § 4. And the Elections Clause vests state legislatures with the power to dictate the "Times, Places and Manner" of electing U.S. Senators and Representatives but permits Congress to "make or alter" such regulations. U.S. Const. Art. I, § 4. The Framers left unanswered the question whether states should employ single-member districts, multimember districts, or at-large elections. *See Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment).

It would also be puzzling for the Constitution to prohibit territorial redistricting for state legislatures when federal law *requires* single-member district elections for the U.S. House of Representatives. Beginning in 1842 and pursuant to its power under the Elections Clause, Congress prohibited multimember congressional districts, with few exceptions. *See* Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491; Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified as amended at 2 U.S.C. § 2c); *cf. Evenwel*, 136 S. Ct. at 1129 ("It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously

prohibits States from apportioning their own legislative districts on the same basis.").

Any judicial fix for plaintiffs' claims calls into question the constitutionality of a state's choice to adopt single-member, territorial districts. Since the founding, states have debated that choice. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 911-15; *Hall*, 512 U.S. at 897-98 (Thomas, J., concurring in judgment). Wisconsin's very first state Constitution, for example, required "single districts." Wis. Const. of 1848, Art. IV, § 4. Many others elected representatives at large until the mid-nineteenth century. *See* Gardner, *Representation Without Party*, 37 Rutgers L.J. at 913. At bottom, these are political questions. A state's resolution of those questions demands deference. It is part and parcel of the state's "primary responsibility" for reapportionment. *Growe v. Emison*, 507 U.S. 25, 34 (1993).

II. Partisan Gerrymandering Claims Are Nonjusticiable Because Plaintiffs' Alleged Harm Cannot Be Measured.

Federal courts are also without the means to test partisan gerrymandering claims. There is no justiciable way to measure an alleged partisan gerrymander. Whether a redistricting map violates Equal Protection cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Such a "sterile" approach will not tell the federal courts "how much partisan dominance is too much." *Id.*; *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see Hall*, 512 U.S. at 902-03 (Thomas, J., concurring in judgment).

To be sure, this Court has articulated rules in other reapportionment cases. In recent one-person-one-vote cases, state reapportionment plans with a maximum population deviation of less than 10% are presumptively constitutional. *See Harris v. Ariz. Indep. Redistricting Comm.*, 136 S. Ct. 1301, 1307 (2016). The Court has opted for more malleable standards to adjudicate racial gerrymandering claims. *See, e.g., Bethune-Hill*, 137 S. Ct. at 799, 801. But even in racial gerrymandering cases, the minority voters whom the Court intends to protect are readily identifiable.

The same clear rules are unavailable to decide political gerrymandering cases. A voter's political preference is not an immutable characteristic. Voters cannot be categorized as "Republicans" and "Democrats" in the same way voters are categorized in racial gerrymandering cases or populations are counted in one-person-one-vote cases. *See Vieth*, 541 U.S. at 287 (plurality opinion). Further complicating partisan gerrymandering cases is that, unlike race, consideration of partisanship is not *verboten*. *Compare Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment"), *with Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." (quotation marks omitted)).

These features, combined with the reality that districts are politically lopsided to some unknown and

unknowable extent, make a judicial assessment of partisan gerrymandering claims impossible. For courts to decide how much partisan influence is "too much," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), courts must divine the starting point—the pre-existing, baseline partisan advantage in a particular state. They will fail.

A. Partisanship is not an immutable characteristic.

Partisan gerrymandering cases rest on the fiction that certain voters vote only for Democrats and others vote only for Republicans in all elections—past, present, and future. Indeed, the methodology of plaintiffs' expert in *Whitford* (who also served as the *Rucho* plaintiffs' expert) depends entirely on the assumption that votes cast between 2004 to 2010 for candidates at the top of the ticket are a reliable measure of the partisan advantage of a particular district.

But measuring partisanship is not so simple. Over time, voters' political preferences change. "[V]oters can—and often do—move from one party to the other...." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment). Their political affiliation "is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality opinion).[14] "These facts make it impossible to

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[14] *See also* Expert Report of Brian Gaines, Ph.D. at 4-5, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 250 (Gaines Report) ("Even if everyone were to lock into a partisan category for a lifetime upon reaching voting age—which is clearly not the case—electorates would still shift in partisanship as their composition changed due to replacement (from

assess the effects of partisan gerrymandering," let alone articulating a standard or crafting a remedy. *Id.*

In *Whitford*, the perceived partisan advantage of Dr. Chen's Simulated Plan changes considerably using more recent election results versus older results. According to Dr. Chen, his Simulated Plan 43995 has a near-zero efficiency gap, plaintiffs' chosen measure of fairness.[15] Election results over time tell a much different story. Using votes cast in 2004 to 2010 statewide elections to measure the efficiency gap, Simulated Plan 43995 shows a pro-Democratic lean (4.81% fewer "wasted" Democratic votes).[16] Gimpel Report, Table 7. Using votes cast in 2012 to 2016

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death, attaining adulthood, and out- and in-migration). Generally, over the lifetime of a redistricting plan, most districts change not only in population levels, but also in their electorates' partisanships.").

[15] *See* Chen Report at 9. In *Whitford*, the "votes" in Dr. Chen's efficiency gap calculation are completely hypothetical. *See id.* at 8. Dr. Chen assumes that if 1,000,000 two-party votes were cast in a particular district with 50.32% Republican advantage (according to his outdated and arbitrary estimation of Republican advantage), then there would be 503,200 Republican "votes" and 496,800 Democratic "votes" in that district's hypothetical election. *See id.* Because Republican votes outnumber Democratic votes, Dr. Chen would classify that district as a Republican victory—meaning there were 3,199 "wasted" Republican votes and 496,800 "wasted" Democratic votes. *See id.* After repeating this methodology for all districts, Dr. Chen summed all wasted votes for each party, then subtracted those sums, and finally divided by the total number of two-party votes cast statewide for his final efficiency gap score. *See id.*

[16] Even though Dr. Chen's efficiency gap scoring also uses 2004-2010 election results, his methodology disguises the 2004-2010 pro-Democratic lean of his Simulated Plan because his measure of partisan advantage (the "Chen Composite Measure") adds a

statewide elections, Simulated Plan 43995's efficiency gap swings the opposite direction: a more significant pro-Republican lean (7.54% fewer "wasted" Republican votes). *Id.* The Plan's Republican advantage is even greater using only votes cast in the most recent presidential election (8.91% fewer "wasted" Republican votes). *Id.* These variations show that political change over time has a dramatic effect, even using plaintiffs' preferred measurement of "fairness."

Recent elections also show that votes cast for particular candidates cannot always predict a voter's party affiliation. Voters do not mindlessly cast votes for all Democrats or all Republicans. Candidates matter.[17] *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 (plurality opinion) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold."). So while a Republican might win a race at the top of the ticket, a Democrat might win the race for State Assembly.[18] *Id.* at 288-89.

1.8% Republican swing to those election results. Only with that swing is Dr. Chen able to say that his Simulated Plan is politically neutral. *See* Chen Report at 3.

[17] *See* Gaines Report at 18-22 (surveying impact of candidate traits including incumbency advantage, race, gender, religion, physical appearance, and leadership quality).

[18] *See* Gaines Report at 18 ("The average Republican (or Democratic) vote for distinct offices need not match, particularly when one compares top-of-the-ballot offices and down-ballot offices. Mixing together multiple contests does not cancel out candidate effects. As a theoretical construct, partisanship is quite distinct from votes cast, and observed vote for a contest or select contests, averaged, is, at best, a noisy measure of the range of partisan

Wisconsin's 2018 elections are telling. Voters in District 92 voted overwhelmingly for U.S. Senate candidate Tammy Baldwin (D) but also overwhelmingly for State Assemblyman Treig Pronschinske (R).[19] The results in District 92 were not a fluke. Also in Wisconsin's Districts 4, 13, 15, 21, 23, 24, 29, 30, 42, 49, 50, 51, 55, 68, 85, 88, and 96, the majority of voters cast ballots for both Democratic Senator Baldwin and their Republican State Assembly candidate.[20] If that is not enough to prove that candidates matter, consider this: In the same election, Senator Baldwin outperformed candidates from her own party like Democratic Wisconsin Governor Tony Evers (by an average of 4.8%).[21] Likewise, 35 Republican Assembly candidates outperformed incumbent Republican Governor Scott Walker (excluding those who ran unopposed).[22]

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attachments—in direction and strength—of those legally entitled to cast those ballots."); *see also id.* at 23 ("Not only are the Chen estimates based on somewhat old results, from 2004-2010, but those election results were surely determined not solely by partisanship of the electorates, but also by candidate traits [such as incumbency advantage], which are ignored in the averaging.").

[19] Senator Baldwin received roughly 53.7% of two-party votes cast; Assemblyman Pronschinske received roughly 55.1% of two-party votes cast. *See* App. G to Expert Report of James Gimpel, Ph.D., *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249-7 (Gimpel Report, App. G).

[20] *See* Gimpel Report, App. G. A majority of two-party voters in Wisconsin's District 1 also voted for both Democratic Senator Baldwin and the Republican incumbent for Assembly, who defeated his Independent challenger. No Democratic candidate ran for State Assembly in District 1. *See id.*

[21] *See* Gimpel Report at 59-60; Gimpel Report, App. G.

[22] *See* Gimpel Report, App. G. Wisconsin's 2018 election results are instructive for another reason. Democrats won every

Blind to these political realities, political gerrymandering plaintiffs hire experts who resort to past statewide election results to attempt to predict future district-level elections. At bottom, plaintiffs seek a "constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). But no amount of vote counting and number crunching by hired experts can overcome the fact that, in the real world, good candidates win and bad candidates lose. Nor can plaintiffs ignore the fact that voters' politics change over time. Political affiliation cannot be labeled or counted in the same way as race in racial gerrymandering cases or people in one-person-one-vote cases. That alone frustrates any attempt by courts to reliably measure partisan unfairness.

B. Courts cannot determine the baseline partisan advantage in a state and therefore cannot decide how much partisan influence is "too much."

All of the above complexities come to a head when a court attempts the impossible: measuring alleged partisan influence to decide whether redistricting crosses the line from permissible partisan advantage

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statewide office. Even if a party is allegedly disadvantaged at the district level, that party is on equal footing at the state level. With sufficient power and coordination, as was the case in Wisconsin in 2018, that party "should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

to impermissible. This Court's precedents instruct that the permissible amount of partisan influence in redistricting is something more than zero. *See Vieth*, 541 U.S. at 285-86 (plurality opinion) (redistricting informed by partisan considerations is a "lawful and common practice"). But how much more? No one can answer that question because the magnitude of an effect cannot be measured without a control, or baseline.

The Constitution does not wholly forbid the consideration of partisanship in redistricting. Exactly the opposite—by giving legislatures primary responsibility for redistricting, the Framers necessarily anticipated that redistricting would be "root-and-branch a matter of politics." *Id.* at 285. The "opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in judgment). For this reason alone, the permissible partisan influence cannot be zero.

Even if the Court provided guidance for how much partisanship were too much, it would be impossible to determine when redistricting crossed that threshold. Redistricting, even without any consideration of politics, often does not result in politically neutral districts. Demographic trends will cause a party to pick up legislative seats in excess of their share of the popular vote. Even the thousands of expert-generated simulations in *Whitford* show that the lion's share of Wisconsin maps will advantage Republicans (even maps using plaintiffs' artificial selection and prioritization of redistricting criteria, not the legislature's). *See* pp. 11-12, *supra*. That lopsidedness is an inherent

feature of territorial redistricting with winner-take-all elections. *See Bandemer*, 478 U.S. at 130 (plurality opinion). And it is a lawful feature of territorial redistricting. *See id.*; *Vieth*, 541 U.S. at 289-90 (plurality opinion). The Constitution does not require legislators "to engage in heroic levels of nonpartisan statesmanship," creating a map less favorable to them than thousands of randomly generated maps. *Whitford*, 218 F. Supp. 3d at 938 (Griesbach, J., dissenting).

A federal court must first account for these neutral manifestations of partisan advantage—*i.e.*, the permissible, preexisting partisan baseline—before it can even begin to answer the metaphysical question of how much is "too much." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.); *see also, e.g.*, *Hall*, 512 U.S. at 887-88 (O'Connor, J., concurring) (concluding there was no "objective alternative benchmark for comparison" in Voting Rights Act case). As discovery in *Whitford* has shown, no amount of expert testimony will help a federal court reliably answer that threshold question.

An expert like Dr. Chen can program a computer to generate thousands of maps, but made-for-litigation maps will not help a court divine the baseline partisan advantage in a state. The algorithms used to generate these maps cannot approximate the boundless redistricting choices available to actual legislators. In *Whitford*, for example, Dr. Chen programmed an algorithm to generate maps with a maximum number of counties or municipalities to split and incumbents to pair, as well as a minimum number of majority-minority districts. Chen Report at 7. Confined by those parameters—and wholly ignoring others including

continuity with prior districts—the maps generated are only the tip of the iceberg. An expert like Dr. Chen cannot possibly account for the near-infinite permutations that are possible when human legislators draw district lines. In real-life redistricting, humans (not computers) must resolve the often-conflicting goals of traditional redistricting criteria and make policy judgments, tradeoffs, and adjustments informed by local knowledge of particular areas. Accepting a baseline based on a sampling of simulated plans takes these policy judgments out of the hands of legislators and puts them into the hands of hired experts. *See Gaffney*, 412 U.S. at 749 (cautioning that federal courts "themselves must make the political decisions necessary to formulate a plan" when they take on reapportionment).

This impossibility cannot be sidestepped by arbitrary benchmarks dreamt up by social scientists or law professors. *See* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 566 (describing attempts to construct a "definition of partisan fairness that takes into account both the commitment to partisan proportionality ... and the commitment to territorial election districts" as "generally unsatisfying"); *Hall*, 512 U.S. at 899 n.6 (Thomas, J., concurring in judgment) (criticizing "desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues"). A measure like the efficiency gap is nothing but an *ex post* measure of election outcomes, not an *ex ante* measure of competitiveness. *See*

Gill, 138 S. Ct. at 1933.[23] And it is not a very good measure at that—the efficiency gap is highly variable, punishing states like Wisconsin where elections are won by narrow margins.[24]

Ultimately there is no way for courts to answer how much partisan influence is "too much" unless this Court decrees that *any* partisan consideration in redistricting is "too much." That, of course, is no solution at all. Forbidding partisan considerations in redistricting leads to the ridiculous conclusion that the Constitution offers greater protections to Democrats

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[23] Creators of the efficiency gap have argued that congressional redistricting plans exceeding a 2% efficiency gap and state redistricting plans exceeding an 8% efficiency gap (where sensitivity testing shows the efficiency gap is unlikely to hit 0% over the plan's lifetime) are presumptively invalid. Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. at 886-890. One-size-fits-all benchmarks might work in one-person-one-vote cases. But what might be "fair" in a Democratic stronghold like Vermont might not be in a swing state like Ohio. Likewise what is "fair" in Wisconsin in 2019 might not be "fair" in Wisconsin in 2009. *Compare id.* at 888-89 (proposing static benchmark based on pre-2010 data), *with* pp. 10-11, *supra* (showing regional political homogeneity has increased since 2010).

[24] Take, for example, a four-district state in which each election is won by five votes. If Democrats win two districts and Republicans win two districts, the efficiency gap is 0. But if Democrats win three districts and Republicans win only one district, the efficiency gap is roughly 25%. *See also* Gardner, *What Is "Fair,"* 90 Marq. L. Rev. at 572 ("If every district is split evenly among Republicans and Democrats, then even a slight general shift in voter preferences toward one party can permit that party to win every seat, even if it is supported by only fractionally more than half the electorate. This is not, however, an objection based on a lack of equal opportunity to compete but one based on a lack of equality of outcome.").

or Republicans than racial minorities. Even in racial gerrymandering cases, this Court has acknowledged that race sometimes predominates the redistricting process if there are "good reasons" for doing so. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (quotation marks omitted).

There is no judicially manageable standard for how to measure partisan influence on redistricting. Voters are not easily categorized. People are not born Republicans and Democrats. Over time voting preferences change, the parties change, and the candidates change. Even if Republicans and Democrats were easily categorized, figuring out the baseline map, which will inevitably have some partisan tilt, is impossible. Without a way to identify either voters or the baseline, a court cannot even begin to assess whether partisan gerrymandering has gone too far.

III. Reframing Partisan Gerrymandering Claims As First Amendment Associational Claims Does Not Make Them Justiciable.

There is also no judicially manageable way to balance the First Amendment associational rights affected by any redistricting plan. Every voter in a state has a constitutional right to associate, not just plaintiffs who claim partisan gerrymandering. The moment this Court begins entertaining claims that redistricting burdens one party's right to associate, so too begins the game of judicial whack-a-mole. A judicial remedy for one group of voters could very well frustrate the associational rights of another.

To adjudicate these competing associational claims, courts "will find their decisions turning on imponderables such as whether the legislators of one

party have fairly represented the voters of the other." *Bandemer*, 478 U.S. at 157 (O'Connor, J., concurring in judgment). What causes voters to politically engage? To politically disengage? Why might a voter have a yard sign for one candidate but not another? Donate to one candidate but not another? Attend a town hall meeting one week but not the next? How is a court to know whether changes in a voter's behavior (much less the behavior of many voters) are because of redistricting or because of myriad other factors?

Those "imponderables" are far from the more concrete questions presented in this Court's associational rights cases involving political parties or their candidates. In *California Democratic Party v. Jones*, the state meddled with a party's "internal processes" by requiring the party to open its primary voting to non-party members. 530 U.S. 567, 573, 577 (2000). This Court ruled that California's scheme impermissibly "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577. Likewise, in *Buckley v. Valeo*, federal law required political committees to divulge their donors before they could accept political contributions. 424 U.S. 1, 64-74 (1976); *see id.* at 84 (holding disclosure requirements constitutional). Similarly, in *Anderson v. Celebrezze*, the state required Independents to file earlier than Democrats or Republicans. 460 U.S. 780, 790-94 (1983). Each of these cases involved a state-imposed requirement or condition affecting the internal operations of political parties or their candidates.

Nothing resembling those state-imposed requirements is present in partisan gerrymandering cases. Redistricting legislation in no way restricts, limits, or conditions a voter's political activity. Plaintiffs instead claim that the majority's redistricting causes a political malaise for the minority, making it more difficult to elect their preferred candidates. That is simply not enough. Even if redistricting makes it more difficult for plaintiffs to elect their preferred candidates, "the power to influence the political process is not limited to winning elections." *Bandemer*, 478 U.S. at 131-32 (plurality opinion). The First Amendment protects the rights of political minorities; it does not shield them from becoming political minorities.

After reapportionment, minority party members might find it more difficult to generate enthusiasm for certain assembly candidates in certain districts; indeed, reapportionment might lead a Democrat to make the "hard choice" of associating with a Republican to find some common ground. *See Cal. Democratic Party*, 530 U.S. at 584. It might cause voters to support candidates likely to lose, or to redivert their energies to other state or national elections. But not every hard choice in politics is tantamount to a "state-imposed restriction" upon voters' freedom to associate. *Id.*

* * *

Nearly fifty years ago, this Court raised concerns that redistricting "is recurringly removed from legislative hands and performed by federal courts." *Gaffney*, 412 U.S. at 749. That concern has only intensified in recent years. And it will reach a fever-pitch if this Court begins policing partisan gerrymandering. Whether a district unfairly disadvantages a political

party is "beyond the ordinary sphere of federal judges." *Hall*, 512 U.S. at 901 (Thomas, J., concurring in judgment). The claim is nonjusticiable.

CONCLUSION

For the foregoing reasons, this Court should rule political gerrymandering claims are nonjusticiable.

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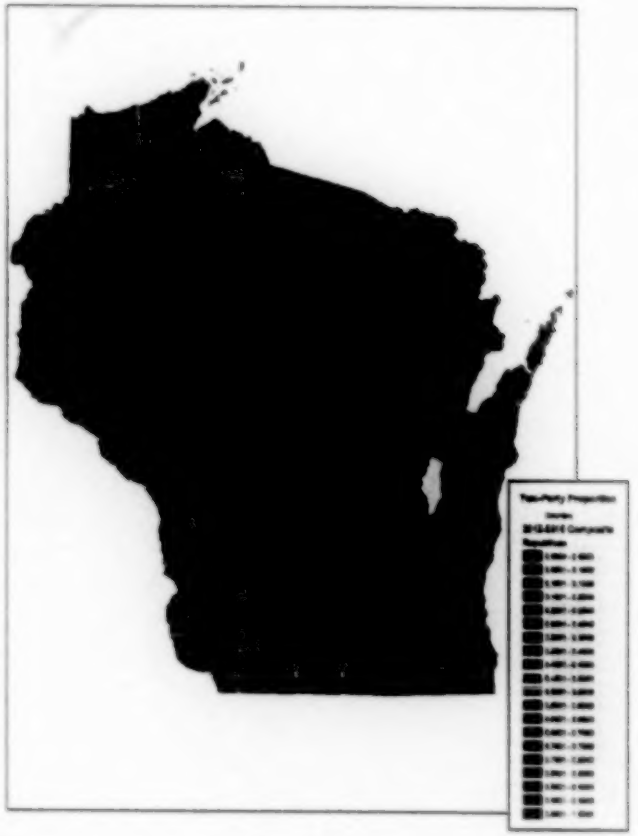
February 12, 2019

APPENDIX

Gimpel Figure 3
2004-2010 Statewide Elections Two-Party Proportion

Gimpel Figure 4
2012-2016 Statewide Elections Two-Party Proportion



Source: Expert Report of James Gimpel, Ph.D. at 32-33, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249.